Law Council
OF AUSTRALIA

Automated Decision Making Transparency Obligation (APP 1)—Issues Paper

Office of the Australian Information Commissioner

3 July 2026

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Acknowledgements

The Law Council of Australia thanks:

- the Law Society of the Australian Capital Territory;
- the Law Society of New South Wales;
- the Law Society of South Australia;
- the Law Institute of Victoria;
- the Administrative Law Committee of its Federal Dispute Resolution Section, and
- the National Elder Law and Succession Law Committee

for their contribution to the preparation of this submission.

Introduction

1. The Law Council of Australia thanks the Office of the Australian Information Commissioner (**OAIC**) for the opportunity to comment on the development of guidance on the automated decision making (**ADM**) transparency obligation.

2. Apart from input from the expert bodies acknowledged above, this submission draws on previous relevant Law Council submissions, including particularly our 2025 submission to the Attorney-General's Department's *Use of ADM by Government: Consultation Paper,*[1] our submission to the Senate inquiry into the Privacy and Other Legislation Amendment Bill 2024,[2] and our 2022 submission to the Digital Technology Taskforce's *Positioning Australia as a Leader in Digital Economy Regulation—ADM and AI Regulation* Issues Paper.[3]

3. The Law Council's advocacy has consistently identified core priorities and principles when it comes to ADM by public sector agencies in particular. The findings and recommendations of the Royal Commission into the Robodebt Scheme also highlighted the deeply concerning consequences of what happens when key protections are otherwise absent from ADM. Those recommendations are highly relevant to inquiries such as the present one. Our 2025 submission to the Attorney-General's Department recommended that:

   (a) the Australian Government commission an audit of all current or proposed use of artificial intelligence (**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; and

   (c) all legislation that authorises the use of ADM and AI to exercise, or assist in the exercise of, statutory powers should:

   - be consistent with regard to the types of powers that may be exercised by ADM or AI, and employ standard statutory language for expressing the power to use ADM or AI;
   - 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;
   - 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;
   - require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it, including sufficient information to

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1 Law Council of Australia, *Use of ADM by Government: Consultation Paper* (Submission, 24 January 2025).

2 Law Council, *Privacy and Other Legislation Amendment Bill 2024* (Submission to Senate Legal and Constitutional Affairs Legislation Committee, 22 October 2024).

3 Law Council, *Positioning Australia as a Leader in Digital Economy Regulation – ADM and AI Regulation* (Submission, 6 June 2022).

enable a broad understanding of how AI or ADM operates to produce lawful administrative decisions; require that any affected individual must be notified where there is significant use of automation, including AI, in making an administrative decision;

- 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
- 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.

4. As stated in the Issues Paper, under the *Privacy Act 1988* (Cth), from 10 December 2026, the types of ADM that require disclosure in Australian Privacy Principles (**APP**) entities' privacy policies will be those that meet the following criteria:

   (a) the entity has arranged for a computer program to make, or do a thing that is **substantially and directly related to making a decision**; and

   (b) the decision could reasonably be expected to significantly affect the rights or interests of an individual; and

   (c) **personal information about the individual is used** in the operation of the computer program to make the decision or do the thing that is substantially and directly related to making the decision.

5. This reflects new APP 1.7. The Law Council generally supported the introduction of this new APP in our submission on the Privacy and Other Legislation Amendment Bill 2024. We have consistently emphasised the need for public and private entities to build public trust and confidence in automated decision-making processes, by ensuring that these processes are transparent, and that clear criteria exist about the factors considered, especially where the personal information of individuals is used.[4]

6. The Issues Paper explains the meaning of "computer program" and "substantially and directly related", and discusses what "significantly affect the rights or interests" of an individual means in the context of this new transparency obligation. This will be important in determining the scope of the transparency obligation, and the Law Council provides its views on these terms below.

7. As there is considerable latitude in potential interpretation of these aspects of APP 1.7, the guidance produced by the OAIC will be crucial in determining its effectiveness to protect individuals' rights and interests in practice. Ultimately however, the privacy regime is limited in how it can regulate ADM. A binding framework based on these principles outlined in our 2025 submission to the Attorney-General's Department is required.

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[4] Law Council, *Privacy and Other Legislation Amendment Bill 2024* (Submission to Senate Legal and Constitutional Affairs Legislation Committee, 22 October 2024), [81]-[82].

Preliminary comments on the Issues Paper

Limitations of the privacy regime

8. At the outset, the Law Council notes that the new transparency obligation is a disclosure obligation rather than a substantive rights obligation. It is likely to require APP entities to revise their privacy policies to include information about any ADM usage, but will not directly require them to use ADM in any particular manner, nor will it necessarily involve obtaining informed consent for the use of ADM.

9. While the Issues Paper suggests that these reforms bring Australia in line with comparable international jurisdictions,[5] it is important to clarify that the protections in Australia are nevertheless not as comprehensive as the European General Data Protection Regulation[6] or even the Canadian *Directive on ADM*.[7] For example, the Australian regime does not provide for a comparable right for individuals not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or similarly significantly affects them.[8]

10. The European Union has, since 2018, prohibited purely automated decisions producing legal or similarly significant effects, subject to narrow exceptions, and conferred explicit rights to human review and to contest such decisions.[9] In February 2025, the Court of Justice of the European Union held that individuals have the right to a genuine, comprehensible explanation of the logic behind automated decisions, and that simply disclosing the algorithm, without making it intelligible, does not satisfy that right.[10] Similarly, the UK, Canada, US and New Zealand all have regulation of ADM that goes beyond transparency.[11]

11. In our view, it is important that the OAIC, in preparing its guidance on ADM, does not focus exclusively on the contents of the disclosure, but also on the effectiveness of the notice provided to individuals who may be affected by the entities' use of ADM. It is well-recognised that most people do not read all privacy policies that affect them. These policies have become increasingly lengthy and detailed, and it is often the case that an individual has no choice but to accept them in order to progress in their

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5 Issues Paper, 3.

6 *Regulation (EU) 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* (General Data Protection Regulation or **GDPR**), available at EUR-Lex.

7 Government of Canada, *Directive on ADM* (last modified June 2025).

8 Compare, for example to GDPR art 22(1).

9 The GDPR prohibits solely automated decisions producing legal or similarly significant effects, subject to exceptions for contractual necessity, law, or explicit consent, and confers rights to human review and to contest the decision: art 22(1)-(3).

10 *CK v Dun & Bradstreet Austria GmbH EU*, Case C-203/22, judgment of 27 February 2025. The Court held that a data subject is entitled to an explanation enabling them to understand and challenge an automated decision, and that mere disclosure of the algorithm is insufficient.

11 See *Data (Use and Access) Act 2025* (UK), s 80; Government of Canada, *Directive on ADM;* Colorado Senate Bill 26-189, signed by Governor Polis 14 May 2026, substantially revising the Colorado Artificial Intelligence Act (SB 205, 2024) and retitled as a regulation of "automated decision-making technology" (ADMT), effective 1 January 2027; *Privacy Amendment Act 2025* (NZ), inserting Information Privacy Principle 3A into the *Privacy Act 2020* (NZ), in force as of 1 May 2026.

engagement with the entity. This situation is exacerbated for certain cohorts: for example people with low literacy levels or limited English language skills.

12. A privacy policy disclosure can, and should, usefully enable an informed person to understand when automated decision making is occurring. It does not, however, give an affected individual the right to know how the algorithm assessed them personally; it does not give them a right to request human review; and it does not establish a mechanism to contest the algorithmic outcome. For any person with reduced capacity, cognitive impairment or limited English literacy, a privacy policy disclosure may offer no practical protection at all. Accordingly, the guidance developed by the OAIC should set a high standard for what constitutes "meaningful and accessible" disclosure and should actively encourage APP entities to do more than the legislative minimum to respect rights and maintain public trust.

13. The Law Council suggests that the OAIC give serious consideration to:

    (a) interpreting the disclosure obligation generously;

    (b) directing APP entities to avoid nominal (formulaic and/or superficial) disclosure, and

    (c) acknowledging in the guidance the broader legal landscape within which the obligation operates, including substantive requirements under administrative law, freedom of information (**FOI**), anti-discrimination law and the common law duty of procedural fairness.

Public sector use of ADM

14. The Law Council observes that ADM is often used to make assessments about eligibility, funding and access to care and supports for some of the most vulnerable people in our society, including those supported by aged care funding and the National Disability Insurance Scheme, and individuals on temporary visas without work rights. It often affects people who face cognitive barriers to understanding their rights, obligations and complex review mechanisms. It may also affect people whose affairs are managed by carers who are overstretched by daily care requirements and lack the time and resources to challenge automated eligibility or funding decisions.

15. It is appropriate that Government, as duty-bearer under human rights and administrative law (both international and domestic), be held to a high standard when it comes to the use of ADM, and adopt international best practice in this area. Public agencies must also be sensitive to the dangers of unchecked/inappropriate ADM usage, as highlighted by the Royal Commission into the Robodebt Scheme.[12]

16. The new guidance should expressly address the particular considerations that apply to government use of ADM, including:

[12] See further Law Council, *Use of ADM by Government: Consultation Paper* (Submission, 24 January 2025), [1]-[13].

(a) the administrative law requirement that statutory powers authorising action that is detrimental to individuals be expressly authorised by law;[13]

(b) the obligation to afford procedural fairness, including notice and an opportunity to respond and seek review;

(c) obligations to provide statements of reasons under the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**);

(d) FOI obligations, including the proactive publication of ADM information under the Information Publication Scheme (**IPS**); and

(e) the role of the Commonwealth Ombudsman in overseeing government use of ADM.

17. The OAIC's October 2025 desktop review found that 74% of agencies with ADM authorisation had not disclosed their use of ADM in IPS information.[14] This finding underscores the systemic nature of the transparency deficit and the need for robust and enforceable guidance.

Private APP entities

18. In terms of the private entities to whom the amended APP will apply, comparable standards should be set as appropriate, taking into account any potential burden on business operations. As the Issues Paper notes, this new transparency obligation is aimed at maintaining public trust and confidence at a time of widespread technological change.[15] This goal is vitally important to both private and public institutions. The efficiency and productivity gains to be achieved by ADM may be undermined if this confidence is eroded by insufficient guardrails for individuals' privacy and related rights.

19. With these considerations in mind, the Law Council looks forward to the commencement of the new ADM transparency obligation in December 2026. The following section provides specific answers to the OAIC's consultation questions.

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[13] See Administrative Review Council, Decision Making: Lawfulness (Best practice guide 1, August 2007), 2-3.

[14] OAIC, *ADM and public reporting under the FOI Act* (Desktop review, January 2026).

[15] Issues Paper, 3.

Comments on specific consultation questions

20. Please note that these responses are based on the questions posed in the secondary "Submission Questions" document, which differ slightly from those in the Issues Paper itself.[16]

"Substantially and directly related" to making a decision

Question 1

In your view, what are the relevant factors to enable an entity to assess whether a computer program substantially facilitates and is directly connected to a human decision-maker's decision? For example:

- **Degree of reliance on the ADM system output**
- **Ability and likelihood of human override over an ADM decision**
- **Nature of the output (advisory vs determinative)**
- **Transparency and explainability of outputs**
- **Integration of ADM into decision-making workflow**
- **Other**

General observations on "substantially and directly related" requirement

21. In the Law Council's submission on the Privacy and Other Legislation Amendment Bill 2024, we recommended that the wording of the new obligation be aligned with that of Article 22 General Data Protection Regulation (**GDPR**).[17] We also recommended that the wording of the new APPs 1.7 to 1.9 be amended to include a list of factors that must be considered by APP entities, prior to determining whether an automated decision may reasonably be expected to affect the rights or interests of an individual.[18]

22. We characterised "substantially and directly related to making a decision" as a "high and narrow" test, which would likely be difficult to apply—particularly where the definition of an automated decision is also ambiguous.[19]

23. We noted further:

> *We recognise that Part 15 of Schedule 1 is not proposed to come into force until two years after the Bill passes the Parliament and receives Royal Assent. Nonetheless, it is likely that any organisation that regards itself as being captured by the requirement in new APP 1.7 will provide generic disclosure in its privacy policy (e.g., 'any information you provide in the application process may be used by a computer program to assist with processing your application'). Such a statement will simultaneously fulfil the new obligation, but will provide no*

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16 OAIC, *ADM Issues paper submission questions* (PDF, 2026).
17 Law Council, *Privacy and Other Legislation Amendment Bill 2024* (Submission to Senate Legal and Constitutional Affairs Legislation Committee, 22 October 2024), Recommendation 11.
18 Ibid, Recommendation 13.
19 Ibid, [99]-[100].

substantive information to meet the commendable objective of providing meaningful information to individuals.[20]

24. Given the relevant wording did not change between first reading and passage of the Bill,[21] and as noted in the Introduction, the guidance that is the subject of the present consultation will be instrumental in determining the effectiveness of the transparency obligation.

25. The proposed factors are broadly appropriate, but risk allowing entities to escape transparency obligations by inserting nominal human oversight over systems that are, in practice, determinative. The guidance should adopt a "substance-over-form" approach. That is, formal human involvement is relevant but not determinative. What matters is whether the ADM system is a real and operative factor in the decision, not whether a human nominally signs off.

Ranking of listed factors

26. The Law Council considers that all of the factors listed in Question 1 are vital to consider in the context of evaluating ADM use in decision making. We therefore make no specific comment in terms of weighting. Indeed, including such weighting in the guidance could mislead APP entities into devaluing certain factors.

27. For example, we would suggest that "Nature of the output (advisory vs determinative)" could lead those using the guidance to overclassify output as "advisory", thus dismissing the need for adequate safeguards—even where the AI output dominates the workflow, curates the evidence, or pre-determines evaluative criteria to such a degree that the human end-user is left with no practical, informed, or independent capacity to deviate from the system's output.

28. The guidance should make clear that a system can be substantially and directly related to a decision where it provides a score, ranking, summary, recommendation, eligibility assessment, fraud flag, triage category, risk rating or similar output that materially influences the decision. This would be consistent with the explanation in the Issues Paper that a program may be captured where it recommends or guides a human decision maker, and that "substantially" refers to being a key factor, while "directly" requires a direct connection with making the decision.[22] Our preference, in keeping with the beneficial legislative underpinnings of the Privacy Act and APPs, would be for the OAIC guidance to encourage entities to favour disclosure in their policies where ADM in relation to a decision making may arise.

29. One suggested addition to the list is whether human oversight is actually exercised over the relevant ADM processes. This is closely related to, but distinct from, the first two points about degree of reliance and ability/likelihood of override.

30. In terms of transparency and explicability of outputs, we would additionally suggest adding *inputs,* since the quality of training datasets can heavily influence the relevant ADM outputs. Individuals affected need to know—at least to some extent—whether

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[20] Ibid, [94].

[21] *Privacy Act 1988* (Cth), Sch 1, Part 1, Items 1.7-1.8 (as inserted, effective 10 December 2026, by the *Privacy and Other Legislation Amendment Act 2024* (Cth)). First Reading version of Bill available here.

[22] Issues Paper, 12.

the system making decisions about their rights/interests have been trained on data that adequately reflects their personal attributes and circumstances. In addition, entities should be required to record all relevant outputs for review/auditing purposes.

Question 2

The National Aged-Care Insurance Agency (NACIA) makes decisions about eligibility for elderly people trying to access life-changing aged care support. To make eligibility assessments quicker, NACIA staff use a generative AI chatbot, GPTea, to summarise candidate profiles and receive recommendations about eligibility. NACIA's human staff always have oversight and make the final decision about eligibility based on the recommendation provided by the chatbot.

Would you consider NACIA's described uses of GPTea to be substantially and directly related to making decisions?

Short answer

31. In this example, the final decision is made by NACIA staff "based on the recommendation provided by the chatbot." This would appear to fulfil the requirement that the automated processes are "substantially and directly related to making a decision" in APP 1.7(i). The degree of reliance appears critical in determining the significance of the LLM's role in the process.

Satisfaction of criteria

32. In practice, decision makers—particularly those with large caseloads—frequently rely on briefs or recommendations prepared by others (formerly only humans). GPTea's outputs may be less substantially related to decisions where it is required to identify key documents that the human decision maker should read before making its decision, and/or identify any issues that GPTea considers requires more investigation before coming to a conclusion. Provided that the decision-maker genuinely engages with the substance of the material before making a decision, the origin of that material, whether authored by a human or AI-generated, may be less significant.

33. The criterion in APP 1.7(ii)—that "the decision could reasonably be expected to significantly affect the rights or interests of an individual"—is likely to be met, since a negative decision would result in the denial to the individual of "life-changing aged care support". In this context, it will be important for the human decision maker to be made aware of any potential biases inherent in GPTea's operation or training, as well as its record of compliance with any applicable laws and regulations, and the need for independent consideration—a "sanity check"—of any recommendations it provides.

34. It is also clear that personal information is used, fulfilling the criterion in APP 1.7(iii).

Context

35. Practitioners who represent older clients subject to the Aged Care Integrated Assessment Tool (**IAT**) note that this fictional example actually hews quite close to the reality for many Australians applying for aged care supports.[23] An algorithm determines funding bands for applicants, and practitioners report that caseworkers have little authority to depart from those determinations, regardless of the legislative framework nominating them as the relevant decision maker. In addition, the IAT process has generated a large waiting list and significant backlog of reviews.[24] This is a clear and present issue affecting the rights and interests of vulnerable Australians (as discussed further below). The OAIC guidance should consequently specifically state whether the IAT falls within APP 1.7.

Meaning of "significantly affect rights or interests"

Question 3

What factors do you consider increase the likelihood that a decision could affect an individual's rights or interests? For example:

- **Sensitive information**
- **Vulnerable persons**
- **Intrusive practices**
- **Financial outcomes**
- **Other**

36. All of the above factors increase the likelihood that a decision could affect an individual's rights or interests. They may be more or less important depending on the relevant decision-making context (or the individual's relevant attributes such as age, economic position or location), so they are not readily susceptible to ranking or scoring.

37. Immediate impact on livelihood and the ability to meet one's needs—for example, if a decision is made to deny or withdraw an ongoing support payment, access to health treatment/medicine or even housing—should be treated with particular care, but could be affected by any of the listed factors.

38. It would be helpful to add "level of discretion" to the list. The Canadian *Directive on ADM* categorises decisions suitable for automation according to the level of discretion involved.[25] Under that framework, those making highly discretionary

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[23] Department of Health, Disability and Ageing, *My Aged Care – IAT User Guide* (November 2025) ; see further AHRC, *Commissioners welcome Ombudsman probe of automated aged care assessments* (Detailed media release, 22 April 2026).

[24] See CareAbout, *The Case Against the IAT Algorithm: Australians Deserve Better* (7 April 2026). Between 1 November 2025 and 23 January 2026, the Department of Health and Aged Care received 414 formal review requests in respect of IAT outcomes. The waiting list for funded aged care services stood at over 130,000 persons by December 2025, up 25,000 in two months. See further Hello Leaders, *Algorithms Overriding Clinicians: Why Aged Care's New IAT System is Eroding Trust* (28 November 2025).

[25] Government of Canada, *Directive on ADM* (last modified June 2025).

decisions, with tests as to what is in the "national or public interest", are prohibited from using ADM.

39. The APPs provide examples of the kinds of decisions that may affect the rights or interests of an individual, namely:

    (a) A decision made under a provision of an Act or a legislative instrument to grant, or to refuse to grant, a benefit to the individual.

    (b) A decision that affects the individual's rights under a contract, agreement or arrangement.

    (c) A decision that affects the individual's access to a significant service or support.[26]

40. However, the guidance should make it clear that "rights or interests" is not to be confined to formal legal rights. It should include practical interests that affect a person's circumstances, choices, opportunities, reputation, livelihood, access to services or ability to participate in society. This is discussed further in the response to Question 6 below.

Question 4

What classes of person do you consider to be vulnerable for the purposes of considering a decision's expected effect on a person's rights or interests, and why?

41. We note that a research report commissioned by the OAIC in 2020 identifies vulnerability for privacy purposes as "heightened susceptibility to harm" and notes that it is preferable to treat vulnerability as a state rather than a status.[27] The report also stated relevantly:

> *The Privacy Act currently does not make explicit reference to vulnerable groups and their particular needs for protection. Likewise, the APP Guidelines do not make any special provision for vulnerable groups.*[28]

42. However, APP Guidelines do refer to the collection of personal information from individuals who may be "traumatised, in a state of shock or intoxicated" or "in a way that disrespects cultural differences".[29]

43. Other factors that may contribute to vulnerable status include age, some injuries, infirmities and disabilities, difficulties with understanding (including language difficulties), welfare dependency, experience of crisis or duress, issues with remote geographical locations, and levels of digital literacy. These factors may also

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[26] APP 1.9.

[27] Normann Witzleb and Moira Paterson, *Privacy risks and harms for children and other vulnerable groups in the online environment* (Report, OAIC/Monash/elevenM Consulting, December 2020), 139.

[28] Ibid.

[29] Ibid, 140 (referring to OAIC, *Australian Privacy Principles Guidelines* (July 2019) [B.56] (**APP Guidelines**), [3.63]).

contribute to difficulty in assessing or challenging an automated decision—an issue compounded by persistent legal assistance shortfalls across the country.[30]

Question 5

What do you consider to be a significant service or support, for the purposes of considering whether a decision affects access to a significant service or support? For example:

- **physical assistance/support**
- **financial assistance**
- **access to educational services**
- **'in home services'**
- **access to essential banking and credit services**
- **access to telecommunications**
- **access to essential utilities**
- **other**

44. Based on the experience of practitioners advising clients on related matters, we consider all of the listed services/supports to be equally important.

45. In addition to the services/supports listed, we would recommend the inclusion of:

    - housing and accommodation;
    - food and water accessibility;
    - safety, health and financial matters;
    - trauma, violence or safety concerns, and
    - permanent migration status (including refugee and citizenship status).

46. The guidance should adopt a functional, open-ended test rather than a closed list. The question to ask is whether the service is essential to a person's health, safety, financial security, participation in society, or access to other essential services. Essentiality is also contextual. For example, telecommunications and internet access are more critical in regional and remote areas.

[30] See Tania Wolff, *The lawyer in the room: When Legal Aid fails, the rule of law is in peril* (Opinion piece by LCA President, 22 May 2026); also Law Council, *A Budget for fairness that left justice behind* (Media release, 12 May 2026), *2026-27 Pre-Budget Submission* (6 February 2026) and *Call to Parties 2025* (March 2025), 6-9.

Question 6

Are there any other legal frameworks or policies that the OAIC should have regard to in considering the meaning of 'rights' and 'interest'?

47. At page 15 of the Issues Paper, there is a discussion of what "significantly affect the rights or interests" of an individual means in the context of this new transparency obligation. The Law Council supports reference to administrative law jurisprudence for this purpose, as made on page 15.

48. The OAIC should have regard to legal frameworks and policies that recognise, protect or otherwise affect the rights or interests of individuals. These include administrative law principles, procedural fairness, merits review and judicial review, anti-discrimination laws, human rights instruments, privacy and information access laws, consumer protection laws, financial services, credit and insurance laws, employment and workplace laws, and frameworks relating to social security, health, aged care, disability, housing, education, digital identity and data sharing.

Question 7

E-commerce company, Daintree, allows subscribers to order books to their home. To make an account, Marco was required to disclose his address, being the luxurious Capital Crescent in Sydney CBD. Marco is surprised that his desired book, The Art of Inheritance, was priced at $100 when his book-club buddy, Charles, from a country town, paid only $35.

Marco is shocked to read an article reporting that Daintree uses differential pricing to inflate prices for individuals from wealthy postcodes. Marco is a freelance artist, so he does not have enough disposable income to purchase the book.

In the above Edge Case, would you consider the inflation of prices for a consumer product to have significantly affected the interests of Marco? If so, at what amount would differential pricing be considered to have significantly affected the interests of an individual?

49. The Law Council cannot nominate a particular threshold at which differential pricing might have a "significant" effect on the interests of the individual. The significance of a decision by a business such as this turns more on how it affects the individual in practice, rather than solely on the category or type of decision being made.

50. We would emphasise that businesses should be cautious in the use of such trade practices, and ensure they are compliant with the *Competition and Consumer Act 2010* (Cth). A price increase of 286% appears to go beyond minor variation in consumer pricing and may amount to a form of financial penalty. The magnitude of disparity is a critical consideration, as it can create a structural barrier rather than a mere inconvenience. An individual's interests are materially affected where pricing effectively excludes them from accessing a product or service, thereby pricing them

out of the market (as Daintree's pricing did for Marco in this example). In such cases, the impact is not only financial but also relates to fairness and equitable access.

51. While such practices may engage considerations of fairness, the degree of impact may be limited in contexts where the decision is discretionary and does not result in substantial or lasting consequences. For example, the impact may be less significant where the subject matter is non-essential (such as discretionary purchases), as opposed to contexts involving fundamental social needs like education or access to essential services.

52. As such, it is difficult to nominate an actual percentage at which differential pricing becomes problematic (as per the second sub-question). If the OAIC guidance provides any benchmark, it should be expressed as a set of non-exhaustive indicia, rather than a single numerical threshold. A fixed percentage threshold may create arbitrary outcomes and could encourage entities to structure differential pricing below that threshold, even where the practical impact on an individual remains significant.

53. In addition, targeted differential pricing based on personal profiling raises specific concerns, particularly where decisions are derived from inferred or assumed characteristics. While differential treatment is in some circumstances (such as taxation) an accepted and necessary principle, there is agreement that any such differentiation should be grounded in accurate and objective criteria, rather than broad assumptions (ie based solely on one's postcode).

Meaning of "making a decision"

Technical definitions and reviewability

54. The definition of "making a decision" for the purposes of APPs 1.7–1.9 is discussed at pages 19–20 of the Issues Paper. The summary on those pages of the definition in section 9 of the ART Act captures the essence of the definition for administrative review purposes. However, we note that the definition of "decision" is actually in section 4, rather than section 9 of that Act.

55. For judicial review purposes under the ADJR Act, the Issues Paper's treatment of the definition of "decision" is too brief. It should be noted that judicial review is also possible under section 75 of the Constitution (in the original jurisdiction of the High Court) and under section 39B of the *Judiciary Act 1903* (Cth) (in the original jurisdiction of the Federal Court of Australia and the Federal Circuit and Family Court of Australia). As the Issues Paper notes, an administrative "decision" for any of these types of judicial review does indeed "generally, but not always, [need to be] practically final or operative and determinative of an issue of fact."[31] However, it should be added that certain administrative "conduct" and failures to make a decision are also reviewable under the ADJR Act.[32] Further, reviewable decisions/conduct must also be "of an administrative character" and made "under an enactment".[33]

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[31] Issues Paper, 19.

[32] ADJR Act, sections 6-7. "Conduct" may include, for example, preparing a report to inform a decision – see *Kelson v Forward* [1995] FCA 799.

[33] See *Federal Airports Corporation v Aerolineas Argentinas* (1997) 147 ALR 649; also *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451 and *Griffith University v Tang* (2005) 221 CLR 99.

56. That is not to say a "decision" for the purposes of APP 1.7 must be judicially reviewable. However, susceptibility to judicial review may be an important consideration in determining the extent of an actor's privacy obligations under the APP. We note the Federal Court has taken a specific approach to automated processes in respect of reviewable decisions under the ADJR Act, as discussed below.

57. The explanation of "decision" in APP 1.9 is not exhaustive, and an algorithmically-driven process (per the scenario in Question 8) may well come under the definition of a decision in section 4 of the ART Act, as it includes "doing or refusing to do any other act or thing," and, as the Issues Paper notes, this definition is cast deliberately widely.[34]

Question 8

Engineering firm, Manscon, is hiring for graduate engineers. To try to target the best candidates, Manscon advertises open roles on job site, Opaque Window. Opaque Window algorithmically promotes this job posting to candidates it thinks are best suited. One metric it uses is gender of account holders. Since most engineers at Manscon are male, Opaque Window prioritises promoting the job to male engineering graduates.

Rafqa is a female engineering graduate searching for a job on Opaque Window. She does not receive the Manscon job ad, which limits her employment options.

Should it be considered a 'decision' that Rafqa did not receive the Manscon job ad?

58. The Law Council considers, on balance, that it should be considered a 'decision'.

59. There is a clear impact on Rafqa's rights and/or interests in relation to her job prospects. The *Fair Work Act 2009* (Cth) prohibits "adverse action" against prospective employees, including discrimination.[35] Manscon's use of Opaque Window might also constitute discrimination under other relevant laws.[36]

60. One view is that the relevant decision is the algorithmic decision to show or not show a job advertisement affecting access to an employment opportunity. In preventing Rafqa from learning about the job through an optimisation or filtering process, the system determined her eligibility in the negative before she could even exercise her own agency to apply. By framing the historical gender imbalance as an objective metric for "best suited", the algorithm converted an existing issue of systemic discrimination into a rigid business rule. The APPs should be interpreted to discourage the transposition of such practices into ADM algorithms.

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[34] Issues Paper, 19.

[35] *Fair Work Act 2009* (Cth), s 351. "Adverse action" includes not hiring someone – see Fair Work Ombudsman, *Protections at work* (Web page, undated).

[36] See eg *Sex Discrimination Act 1984* (Cth), s 14.

61. Another view is that the use of Opaque Window appears to constitute use of a computer program to "do a thing that is substantially and directly related to making" an employment decision for the purposes of APP 1.7(a), which has the capacity to affect Rafqa's rights and/or interests. Recital 71 of the GDPR also contemplates such contributions to decision-making processes.[37]

62. Opaque Window's selection of recipients might not satisfy a dictionary definition of "decision"—for example the Cambridge dictionary defines decision as "a choice that you make about something after thinking about several possibilities". The Federal Court majority in *Pintarich v Federal Commissioner of Taxation*[38] considered that a reviewable decision under the ADJR Act must involve a human mental process, and that is a certainly a conclusion that is also open to those interpreting the meaning of 'decision' under APP 1.7, although this decision has been critiqued.[39]

Meaning of "arranged for"

Question 9

Are there any scenarios relevant to the meaning of 'arranged for' that you consider require guidance? If so, why?

63. The guidance should include detailed scenarios on "arranged for", particularly where ADM is provided through third-party platforms, software as a service products, embedded software, or tools used by staff in the ordinary course of their work.

64. The guidance should make clear that an entity cannot avoid transparency obligations by outsourcing the system, using a third party platform, or characterising the system as a tool used by staff. The key question should be whether the entity caused, procured, authorised, directed, permitted or adopted the use of the computer program in a way that makes, or materially assists, a relevant decision.

65. The Issues Paper gives useful examples, including where an entity procures an AI system to screen and rank job applications, permits or directs employees to use an AI tool to draft performance assessments, contracts with a third party software company to approve or decline refunds, or uses a case management system that automatically escalates complaints.[40] These examples are helpful and should be expanded in the final guidance.

66. Further guidance would be useful on less obvious scenarios, including where ADM functionality is embedded in software acquired for another purpose, introduced through a vendor update, used informally by staff, or provided through a platform that the entity does not directly control. In those cases, entities may not appreciate that

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37 *Regulation (EU) 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*, Preambular Recital (71).

38 [2018] FCAFC 79; (2018) 262 FCR 41.

39 See eg Sarah Sacher and Edward Santow, *Use of Automated Decision-Making by Government* (Submission No.1071994347 to the Attorney-General's Department Consultation on Automated Decision Making Reform, Human Technology Institute, 28 January 2025), 15.

40 Issues Paper, 21.

they have "arranged for" the use of ADM, even though the system may materially assist a decision affecting an individual's rights or interests.

67. The Explanatory Memorandum for the Privacy and Other Legislation Amendment Bill 2024 provided relevantly:

> *The use of the words 'the entity has arranged for a computer program' in APP 1.7(a) is intended to clarify that it is the entity responsible for arranging the computer program to make, or do a thing that is substantially and directly related to making, a decision which must meet the requirements in APP 1.7. This recognises that a computer program may be operated by one entity, but another entity is responsible for arranging for the computer program to make, or do a thing that is substantially and directly related to making, a decision.*[41]

68. One scenario in which guidance is required is where one entity arranges for the computer program to be used (eg a parent company or franchisor) with the effect that an APP entity may not have, in effect, arranged for use of the program but is still required to use it. In such a scenario, there seems to be a disconnect between the obligations on the arranging entity and the using entity.

69. The 'arranged for' concept should be interpreted broadly to prevent outsourcing avoidance. Entities cannot be permitted to escape the ADM transparency obligation by outsourcing decision-making functions to third parties. The guidance should confirm that responsibility follows the entity that deploys and benefits from the ADM system, not merely the entity that technically operates it.

Extent of disclosure

Question 10

When making disclosures about ADM, the OAIC's view is that entities must ensure that meaningful and accessible information is provided to consumers. In doing so, the OAIC considers that entities should strike an appropriate balance to ensure that disclosures are:

- **clearly articulated in plain language and easy to understand;**
- **structured to enable consumers to request further information, where required;**
- **appropriately tailored—sufficiently specific to be meaningful, while avoiding overwhelming levels of detail;**
- **organised so that similar information is grouped in a logical manner; and**
- **framed in a way that allows the information and the decision to be challenged or contested.**

Having regard to the above considerations, is there anything additional that entities should disclose to provide effective and meaningful disclosures about ADM?

[41] Privacy and Other Legislation Amendment Bill 2024 (Cth), *Explanatory Memorandum*, [335].

70. The Law Council supports the OAIC's view that disclosures regarding ADM must be meaningful and accessible to consumers, noting the factors identified in this Question, which are important but should be considered non-exhaustive.

71. The form and priority of disclosure should depend on the domain, the impact on the individual, the data used, the urgency of the decision and the audience. On that basis, we suggest that the guidance should endorse a layered approach to disclosure. A short, plain language front layer, with the ability to access further detail, is likely to provide more meaningful transparency than a single dense block of text. This would allow individuals to quickly understand that ADM is being used, the type of decision involved, the kinds of information used, the likely effect on them, and what they can do if they are concerned. More detailed information could then be made available for those who need it.

72. The Issues Paper refers to the UK Information Commissioner's Office important recommendations that entities consider bite sized informative messages or visual aids, check whether people actually understand how their information is processed, and avoid overly complex, technical or legalistic language.[42] Following these recommendations is particularly important where ADM may affect children, people with disability, people from culturally and linguistically diverse backgrounds, elderly people, or other persons experiencing vulnerability.

73. In addition, we consider the timing of disclosure to be important. It is unlikely that most people affected by government decisions will undertake a detailed review of an entity's privacy policy in anticipation of future dealings with that entity. We consider it most appropriate an individual is informed at the point at which the ADM will be used in a decision that could reasonably be expected to significantly affect their rights or interests.

74. Disclosure obligations should be substantive, not merely formal. The OAIC's disclosure framework is broadly sound, but risks being satisfied by minimalist privacy policy boilerplate.

75. The guidance should require meaningful disclosure, including notice that ADM is being used; the categories of personal information used; the factors influencing outcomes; the extent of human involvement; the availability of review mechanisms; and avenues for complaint. The distinctions between transparency, explainability, accountability and reviewability should be made explicit.

76. APP entities should be required to understand fully how their ADM tools operate and produce reportable documentation that explains how the relevant decision was made—including any assumptions involved in the process, such as where a postcode may be used to determine socio-economic status. This is essential to ensure that the relevant decisions are able to be challenged and/or reviewed meaningfully.

[42] Issues Paper, 23 (referring to ICO guidance, *Explaining decisions made with AI*).

77. There should also be an expectation of timely updates to ensure disclosure policies remain aligned with evolving practices. Maintaining accuracy and currency in policy documents is critical to ensuring that they continue to reflect how systems and processes operate in practice.

78. The eventual guidance documentation should include guidance on best practice ADM audit and review processes. ADM disclosures by an APP entity should consider possible participant vulnerabilities (which may be temporary, as discussed above) to ensure the disclosure is accessible and understandable by a broad range of stakeholders. For those with cognitive impairment (age-related or otherwise) or limited English literacy, the guidance should set a higher standard of disclosure and require testing with users from affected populations to determine effectiveness.

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