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Technology Strategy Branch
Department of Industry, Science and Resources

via email: DigitalEconomy@industry.gov.au

NSW Ombudsman submission – “*Safe and Responsible AI in Australia*” discussion paper

The Australian Government is seeking feedback on appropriate regulatory and policy responses to support the safe and responsible use of AI, and the Commonwealth Department of Industry, Science and Resources has issued a discussion paper – ‘Safe and responsible AI in Australia’ to facilitate consultation.

I am writing to draw to the attention of the Department a special report I tabled in the NSW Parliament that addresses a number of the issues raised in your discussion paper.

The role of the NSW Ombudsman

The NSW Ombudsman is an independent integrity body that pursues fairness for the people of NSW. In particular, we strive to ensure that those entrusted with public power and resources fulfil their responsibilities and treat everyone fairly.

A central function of the NSW Ombudsman is to receive complaints about, to monitor, and to investigate, the conduct of NSW public authorities. This includes State Government departments and agencies, NSW statutory bodies, and local councils.

We aim to identify that public authorities are conducting themselves lawfully, making decisions reasonably, and treating all individuals equitably and fairly. When public authorities fail to do this, we may make findings that they have engaged in ‘maladministration’.¹

In relation to the development and use of AI, the NSW Ombudsman’s oversight of NSW public authorities will include their conduct in developing and/or using AI and related technologies in the exercise of their own functions or service-delivery operations including in particular, any use of automated-decision making (ADM).

The NSW Ombudsman does not generally regulate or oversight the private sector,² and so will not have direct jurisdiction to scrutinise the development or use of AI by or in the private sector. However, private sector development and deployment of AI could come to our attention if questions are raised about the

¹ More formally, section 26 conduct (referring to section 26 of the *Ombudsman Act 1974* (NSW)), which sets out the various categories of wrong conduct about which the Ombudsman may make findings.

² The NSW Ombudsman’s jurisdiction is, however, extended by the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) and other legislation to include some private sector entities, including non-government community service providers that are funded by the NSW Government, and private managers of state correctional facilities.

conduct of NSW public authorities, whether that be as direct or indirect users of the technology themselves, or otherwise in their role as regulators of private sector AI.

To date, our focus in this area has primarily been on the use of ADM by public authorities themselves.

The Ombudsman's Machine Technology (ADM) report

Our report, titled '[*The new machinery of government: Using machine technology in administrative decision-making*](#)' was tabled in the NSW Parliament on 29 November 2021 under s 31 of the *Ombudsman Act 1974* (NSW).

A copy of the report is enclosed and as noted, it touches on many of the issues concerning ADM that are raised by your discussion paper. Additionally, it includes a range of studies from real-world applications of ADM in the NSW public sector.

We were prompted to write the above report after becoming aware that a NSW public authority (Revenue NSW) had been using an ADM system for the performance of a statutory function (the garnisheeing of unpaid fine debts from individuals' bank accounts), in a way that was having a significant impact on individuals, many of whom were already in situations of financial vulnerability. A detailed summary of the Revenue NSW matter can be found in Annexure A of the report.³

Our experience with Revenue NSW, together with a lack of visibility of other use of ADM within the NSW public sector, raised our concern that there may be inadequate attention being given to fundamental aspects of public law that are relevant to the adoption of ADM systems in the public sector.

Drawing on key themes and observations made in our report, we provide the following comments relevant to the Department's discussion paper:

- **Existing frameworks.** ADM technologies are not being introduced into a complete legal or regulatory vacuum. The legal environment into which public sector ADM is introduced is the one that is governed by public administrative law. Administrative law is essentially principles-based which means it is, generally speaking, technology agnostic. While the technology used in government decision making may change, the underlying concerns and norms that underpin administrative law will likely remain unchanged. For simplicity, we group the well-recognised requirements for good decision-making in our report as follows: proper authorisation,⁴ appropriate procedures,⁵ appropriate assessment,⁶ and adequate documentation.⁷ It will be useful to consider any deployment of ADM technologies against those requirements.
- **Principles-based approaches.** While a principles-based approach to regulation in this area seems appropriate, given the diversity of potential applications of ADM, the challenge will be to ensure that this approach is sufficiently general to be applicable across those various current and future

³ NSW Ombudsman, *The New Machinery of Government: using machine technology in administrative decision-making*, Annexure A: Revenue NSW Case Study. URL: https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0004/138208/The-new-machinery-of-government-special-report-Annexure-A.pdf

⁴ NSW Ombudsman, *The New Machinery of Government: using machine technology in administrative decision-making*, Section 7, pp. 27-33. URL: https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0003/138207/The-new-machinery-of-government-special-report-Front-section.pdf

⁵ Above n 4, Section 8, pp. 34-41.

⁶ Above n 4, Section 9, pp. 42-47.

⁷ Above n 4, Section 10, p. 48.

applications, while also being fit for purpose and responsive to the particular contexts and risks of particular use cases. In that regard, it will be essential to ensure that any principles are supported by clear and comprehensive implementation guidance and processes. In our view (and as explained further in Section 15 of our report), any principles should provide for consideration to be given to enacting specific legislation to authorise and regulate a specific proposed use case for ADM.

The discussion paper specifically seeks views about whether a risk-based approach is the best approach to regulation. In our report, we suggested a list of ‘properties’ that could be considered when enacting legislation that authorises use of ADM for a statutory function.⁸ The properties target some of the key areas of risk when agencies use ADM, such as (lack of) visibility and (in)accuracy.

- **Transparency.** A key observation in our report was the current lack of visibility of public sector use of ADM. Indicating when and how ADM systems are used is crucial to effective oversight. When a public authority gives reasons to an individual affected by a decision, those reasons must be meaningful. Among other things, a meaningful explanation should include: that automation was involved; the extent to which automation was used; what information is processed by the ADM system; the date and version of any technology; how (in lay terms) the technology works. The statement should also include the usual requirements for decision notices, including details of how the decision may be challenged or reviewed, and by whom.⁹
- **Oversight.** We would support further development in the area of mandatory standards to enhance consistency in the design, development, deployment, monitoring and decommissioning of ADM systems.

Oversight of ADM would also be more straightforward if there are clear requirements and expectations about what a public authority must do when it designs, implements or uses an ADM system – for example, standards (whether legislated or otherwise) that require agencies, prior to deployment and/or at particular times following deployment:

- to commission an independent algorithmic audit by an expert auditor accredited for that purpose, and
- to obtain a comprehensive legal certification that the system is compliant with the laws governing the relevant function.

If such standards exist, then the role of an independent oversight authority (such as ours, in the case of NSW public authorities) would be to consider, at least as a first step, whether those requirements are met. Rather than asking very difficult technical questions like: ‘Is this ADM infected by algorithmic bias?’ we could start – and possibly end – by asking a range of questions in relation to the design, implementation and operation of the system, like: ‘Was the ADM properly tested for algorithmic bias?’. In that case, existing oversight bodies would be able to quickly add value using existing powers of investigation.¹⁰

⁸ Above n 4, Section 15, pp. 77-79.

⁹ Above n 4, Section 13, pp. 58-62.

¹⁰ See further NSW Ombudsman, ‘Avoiding (and investigating) automated maladministration’. URL: https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0009/138789/Paul-Miller-Avoiding_and-investigating_automated-maladministration-speech_4-July-2023.pdf

This observation does not obviate the need (as discussed in our report) to consider whether new or enhanced oversight capabilities, beyond the existing bodies and their existing powers, might be warranted to respond to the burgeoning use of ADM.¹¹

As noted in the discussion paper, internationally, there are a range of AI and ADM governance initiatives that anticipate requirements for the assessment and audit of a systems' conformity with established requirements. These may provide some guidance to the Australian context, particularly around how an audit should be conducted and by whom.

References to 'Responsible AI'

I note that the title of the discussion paper released by the Department refers to 'Responsible AI'.

This terminology appears to be more frequently used in recent times, including by some of the private sector entities at the forefront of AI development and deployment, including Google¹² and Microsoft,¹³ as well as professional services consultancies that advise both the private sector and government.¹⁴

I take the opportunity to make a quick observation about the use of this terminology by government.

The concept of responsibility, in the context of law and morality, refers to the status of deserving praise or blame, reward or punishment, or some other relevant reaction or consequence. It is a concept that requires, at the very least: (a) a person (being a legal or moral agent) who bears responsibility, (b) to another person or other persons, (c) for some thing (which may be actions or inactions, or consequences or outcomes, etc), (d) having regard to relevant legal or moral norms or criteria (for example, rules or standards about what the person should or should not have done, or about what outcomes or harms the person is expected to bear responsibility for).¹⁵

This means that *there is no such thing as 'Responsible AI'*.¹⁶ Instead, we suggest referring to responsible *actors* (such as in the term 'responsible officers', as used in the NSW AI Assurance Framework)¹⁷ or at the very least to responsible *activities* (like 'responsible AI development' or 'responsible use of AI', as used elsewhere in your discussion paper), which will usually implicate a relevant actor/s who is undertaking those actions.¹⁸

Our concern here is more than a matter of semantics. We worry that referring to 'Responsible AI' risks obscuring the real questions about responsibility for AI. Those questions include *who* is responsible, and *what* is their responsibility, in respect of the development of AI, the deployment of AI, any uses or harms

¹¹ Above n 4, Section 16, pp 80-81.

¹² 'Responsible AI', Google (Web Page) <<https://cloud.google.com/responsible-ai>>.

¹³ Microsoft, *Microsoft Responsible AI Standard, v2: General requirements* (Standard, June 2022), <<https://blogs.microsoft.com/wp-content/uploads/prod/sites/5/2022/06/Microsoft-Responsible-AI-Standard-v2-General-Requirements-3.pdf>>.

¹⁴ See as an example Accenture's 'Principles of a Responsible AI Framework' (Web Page) <<https://www.accenture.com/us-en/insights/artificial-intelligence/responsible-ai-principles-practice>>.

¹⁵ See Prof Hans Lenk, 'What is Responsibility?' (2006) 56 *Philosophy Now*, <https://www.philosophynow.org/issues/56/lenk_hans_what_is_responsibility>.

¹⁶ Putting aside the theoretical possibility of a future in which AI has developed to such a point that it becomes recognised as being a legal or moral agent in its own right, there also *cannot* be such a thing as 'Responsible AI'.

¹⁷ The NSW Government's 'AI assurance framework' sets out the role of 'Responsible Officers' as those responsible for the decision-making and outcomes of the AI project (Web Page) <<https://www.digital.nsw.gov.au/sites/default/files/2022-09/nsw-government-assurance-framework.pdf>>.

¹⁸ To take an example from a different context, reference is often made to "responsible lending [by banks]", not to "responsible loans".

caused by AI (whether known or unanticipated), and so on. These are critical questions that will need to be considered in the development of regulatory responses to AI.¹⁹

By referring to 'Responsible AI', as if it were a thing distinct from legal and moral actors and their actions, attention might easily be drawn away from thinking more directly and deeply about those questions - who is (or should be) responsible, to whom, for what, and by reference to what rules or standards?

Additionally, any regulatory framework needs to make clear that responsibility is both more complex and more enduring than might be suggested by a simple consideration of whether the AI (at some particular point in time) has met some checklist of 'Responsible AI'. For example, AI that is lawful and appropriate when designed or at a particular point in time may become problematic when used in ways that were not originally anticipated, or when there are changes in the surrounding environment, whether that be through legislative change, societal change, or a change to the AI learning environment.

We look forward to the outcomes of this consultation process. If you would like any further information about our report or work generally in this area, please contact Chris Clayton, Chief Operating Officer at cclayton@ombo.nsw.gov.au or on (02) 9265 0430.

Yours sincerely

A handwritten signature in black ink, appearing to read "Paul Miller". The signature is fluid and cursive.

Paul Miller
NSW Ombudsman

¹⁹ We note that the discussion paper begins to unpack some of these issues.