



Australian Government

Office of the Australian Information Commissioner

Automated Decision-Making Transparency Obligation (APP 1)

Issues Paper



18 May 2026

OAIC

Contents

Executive summary	3
Acknowledgement of Country	5
About the OAIC	5
Consultation process	6
Request for feedback and comments	6
Your views and submissions	6
Publication of submissions and confidentiality	7
Background	8
What is the ADM obligation?	8
Synergy with other requirements	8
Anti-discrimination law	8
Administrative law	9
FOI Act	9
General Insurance Code of Practice (GICP)	10
ADM work across governments	10
Commonwealth: use of ADM by government – Attorney-General’s Department (AGD) consultation paper	10
Western Australia: Privacy and Responsible Information Sharing Act 2024 (WA) Principle 10:	
ADM	10
Other	10
Matters about which we are seeking your feedback	12
Meaning of computer program	12
Substantially and directly related to making a decision	12
Meaning of ‘substantially and directly related’ across other legal frameworks	13
Fictional Edge Case: Generative AI with human oversight	14
Meaning of significantly affect rights or interests	14
Meaning of ‘significantly affect the rights or interests’ across other legal frameworks	15
Fictional Edge case: Differential pricing	18

Meaning of making a decision	19
Meaning of ‘decision’ across other legal frameworks	19
Fictional Edge case: Discriminatory targeted job ad	20
Meaning of ‘arranged for’	20
Extent of disclosure	21
Considering best practice	21
Attachment A	25

Executive summary

This Issues Paper seeks feedback from relevant stakeholders into the Office of the Australian Information Commissioner's (OAIC) development of guidance on the automated decision-making (ADM) transparency obligation.¹

The *Privacy and Other Legislation Amendment Act 2024* introduced a transparency obligation within Australian Privacy Principle 1 of the Australian Privacy Principles (APPs) to include information about ADM in an APP entities' privacy policy (the ADM obligation). The ADM obligation commences on 10 December 2026. The provisions were informed by significant stakeholder consultation undertaken throughout the Privacy Act Review process, and bring the Australian legislative framework in line with comparable international jurisdictions.

The OAIC recognises the many benefits that derive from the use of technology when it is underpinned by public trust and confidence. The ADM obligation will enhance the right to privacy by introducing requirements that entities must include information in privacy policies about the kinds of personal information used in, and types of decisions made by, computer programs that use personal information to make decisions that could reasonably be expected to significantly affect the rights or interests of an individual.² Providing individuals with greater transparency allows them to understand how an entity handles their personal information and for what purposes, and allows them to take further action if there has been a breach of their personal privacy.³

The OAIC's research has found that 89% of Australians believe they should have the right to know when their personal information is used in ADM if it could affect them and 86% believe government should publicly report on any technology used to inform decision making.

As Australian businesses and government agencies increase their adoption of artificial intelligence (AI), the ADM obligation will provide an important protection for the Australian community, which will be better equipped to know and understand how their lives are impacted by AI and ADM. The ADM obligation will improve integrity, accountability and trust at a moment of widespread technological change in the Australian economy and society. Businesses will be better able to build the trust and confidence of consumers and customers with greater openness and transparency, while in the public sector trust in government service delivery will be enhanced. A community that is better informed can participate more effectively in democratic processes and proactive release of such information enables individuals to understand why and how decisions affecting them are made.

The OAIC has considered feedback provided by stakeholders to the Legal and Constitutional Affairs Legislation Committee's inquiry and report of the *Privacy and Other Legislation Amendment Bill 2024*, and the Privacy Act Review process. In response to that feedback, the OAIC has developed tailored questions in this Issues Paper to assist the OAIC to produce guidance that will address stakeholders' submissions. In particular, the OAIC has considered stakeholder views on the ADM obligations including the extent of scope, how transparency might be best achieved, the form of disclosure and third-party ADM.

¹ Section 28(1)(c)(i) of the *Privacy Act 1988* (Cth).

² Explanatory Memorandum, *Privacy and Other Legislation Amendment Bill 2024* (Cth) 48

³ *Ibid* 50.

The feedback on this consultation will assist the OAIC to understand how guidance can assist entities in complying with the ADM obligation. The OAIC intends to release guidance by September 2026, prior to the commencement date for this new ADM obligation.

Acknowledgement of Country

The Office of the Australian Information Commissioner acknowledges Traditional Custodians of Country across Australia and recognises their continuing connection to lands, waters and communities. We pay our respect to Aboriginal and Torres Strait Islander cultures, and to Elders past and present.

About the OAIC

The OAIC's stated purpose is to promote and uphold privacy and information access rights. We do this by:

- making sure that Australian Government agencies and organisations with an annual turnover of more than \$3 million, and some other organisations, follow the [Privacy Act 1988- external site](#) and other laws when handling personal information
- protecting the public's right of access to documents under the [Freedom of Information Act 1982- external site](#) (FOI Act)
- carrying out strategic information management functions within the Australian Government under the [Australian Information Commissioner Act 2010- external site](#) (AIC Act).

Our functions are prescribed in Part 2 of the *Australian Information Commissioner Act 2010* (AIC Act) and include conducting investigations to monitor compliance, taking enforcement action where required, reviewing decisions, handling complaints, and providing guidance and advice on government information management, freedom of information and privacy matters. In addition to the three principal Acts outlined above, almost 40 pieces of primary and subordinate legislation confer regulatory and other legal responsibilities on the OAIC, or require other bodies to consult us on privacy matters.⁴

⁴ The following Acts or instruments confer regulatory and other functions, powers, responsibilities or obligations on the Information Commissioner or the OAIC in relation to privacy and information access matters: Administrative Review Tribunal Act 2024; Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth); Anti-Money Laundering and Counter-Terrorism Financing Rules (Cth); Child Care Act 1972 (Cth); Competition and Consumer Act 2010 (Cth); Competition and Consumer (Consumer Data Right) Rules 2020 (Cth); Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019 (Cth); Consumer Data Right (Energy Sector) Designation 2020 (Cth); Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth); Crimes Act 1914 (Cth), pt VIIC (spent convictions); Data Availability and Transparency Act 2022 (Cth); Data-matching Program (Assistance and Tax) Act 1990 (Cth); Digital ID Act 2024; Environment Protection and Biodiversity Conservation Act 1999; Financial Sector Reform Act 2022 (Cth); Foreign Influence Transparency Scheme Act 2018 (Cth); Healthcare Identifiers Act 2010 (Cth); Healthcare Identifiers Regulations 2010 (Cth); Identity Verification Services Act 2023 (Cth); Imported Food Control Act 1992 (Cth); Information Privacy Act 2014 (ACT); My Health Records Act 2012 (Cth); My Health Records Regulations 2012 (Cth); My Health Records Rules 2016 (Cth); My Health Records (Information Commissioner Enforcement Powers) Guidelines 2026 (Cth); National Cancer Screening Register Act 2016 (Cth); National Consumer Credit Protection Act 2009 (Cth); National Health Act 1953 (Cth); National Health (Privacy) Rules 2021 (Cth) Online Safety Act 2021; Personal Property Securities Act 2009 (Cth); Privacy (Tax File Number) Rules 2015 (Cth); Product Emissions Standards Act 2017 (Cth); Road Vehicle Standards Act 2018 (Cth); Social Security (Administration) Act 1999 (Cth); Student Identifiers Act 2014 (Cth); Taxation Administration Act 1953 (Cth) (handling of tax file numbers); Telecommunications Act 1997 (Cth); Telecommunications (Interception and Access) Act 1979 (Cth)

Our regulatory endeavours advance an approach that draws upon our collective legislative functions and powers to promote and uphold privacy and information access rights.

Consultation process

Request for feedback and comments

This paper seeks information and views to inform the OAIC's development of the ADM obligation guidance.

Questions are included throughout the paper to guide comments. You are invited to answer some or all questions, or to comment on issues more broadly.

Please ensure your submission includes the corresponding question numbers and submit via email to **privacyreformtranche1@oaic.gov.au**.

Please note, this consultation is not a statutory requirement. The OAIC has chosen to seek views to help inform the development of the guidance by identifying key implementation issues.

Your views and submissions

The new obligations commencing on 10 December 2026 require APP entities engaging in automated decision making to update their privacy policies to provide adequate information to individuals with on these decisions. Accordingly, transparency of use is central to the work we are advancing in our Guidance.

Your views and submissions on the following areas will assist us with developing guidance on the ADM obligation. Questions and **fictional** Edge Cases are provided to guide your responses.

In interpreting meanings of words of the ADM obligation, the OAIC has considered the ordinary meaning, objects of the Privacy Act, Explanatory Memorandum and provided contextual information from other sources.⁵

To make this consultation more accessible to you we have included different response options throughout the questions, including, free text, yes/no, agree/disagree. We have also included a 5-point ranking scale as follows:

1. Strongly disagree
2. Disagree
3. Neutral
4. Agree
5. Strongly agree

⁵ Section 15AA of the *Acts Interpretation Act 1901 (Cth)*

Publication of submissions and confidentiality

Submissions may be made available to the public on the OAIC's website. Please refrain from including any personal information in your submission. Any personal information that is included in the submissions will be redacted for publication purposes.

Closing date for submissions: **Monday 15 June 2026.**

Background

What is the ADM obligation?

Under the Privacy Act,⁶ from 10 December 2026, the types of ADM that require disclosure in APP entities' privacy policies are those that meet the following criteria:

1. 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
2. the decision could reasonably be expected to significantly affect the rights or interests of an individual; and
3. 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.

The meaning of making a decision and doing a thing, includes refusing or failing to make a decision or do a thing. And a decision may affect an individuals' rights or interests, whether the individual is adversely or beneficially affected.

From the commencement date, APP entities using the kind of ADM defined in the Privacy Act, as described above, will need to disclose the following information in their privacy policy:

1. *the kinds of personal information used in the operation of such computer programs; and*
2. *the kinds of such decisions made solely by the operation of such computer programs; and*
3. *the kinds of such decisions for which a thing, that is substantially and directly related to making the decision, is done by the operation of such computer programs.*⁷

Synergy with other requirements

The ADM obligation will give consumers information which can help them know when and how best to exercise information access or review options in other frameworks. For example, anti-discrimination law, administrative law and the General Insurance Code of Practice. These legislative and other obligations are discussed in further detail below.

Anti-discrimination law

The Australian Human Rights Commission⁸ investigates and conciliates complaints of unlawful discrimination under various anti-discrimination laws, including for age, disability, race and sex.

⁶ See Attachment A

⁷ APP 1.8

⁸ Australian Human Rights Commission (Web page) <<https://humanrights.gov.au/>>

Administrative law

Administrative decisions, including those that are automated, must comply with existing legal requirements. Administrative decisions can be challenged through merits review, judicial review, Ombudsman complaints and engagement with the decision-maker.⁹

FOI Act

All Government agencies that are subject to the FOI Act are required to comply with obligations of disclosure under the Information Publication Scheme (IPS). That obligation extends to publishing a plan showing how an agency will comply with the IPS and as well as information that sets out what the agency does, the way it does it, and operational information. Section 8A defines operational information to include “*information held by the agency to assist the agency to perform or exercise the agency’s functions or powers in making decisions or recommendations affecting members of the public*”. The section 93A Guidelines are in the process of being amended (currently being consulted on at: [Consultation on Part 13 of the FOI Guidelines – Information Publication Scheme | OAIC](#)) to make clear that ADM information, including when used for decision-making is proactively published under the IPS.

In October 2025, under section 8F(c) of the FOI Act, the OAIC conducted a desktop review to assess how transparent agencies are about their use of ADM.¹⁰ The OAIC identified 23 government agencies that have statutory authorisation to use ADM. The report focused on a broad and existing guarantee that operates collectively to ensure that the public is better informed.

The review found that whereas all agencies publish IPS related information on their websites, 17% of agencies disclosed the use of ADM in decision-making in their IPS, 9% were identified as ‘likely to be using ADM’ via external sources but had not disclosed use in their IPS information and 74% were not able to be identified as using ADM, using external sources or IPS information. The OAIC made four recommendations:

- 1) All agencies authorised under legislative statutes to use ADM should publish this information as part of the IPS. This should include the statute that grants them this power, and whether or not they utilise ADM to provide information and services to the public.
- 2) As part of their IPS, agencies should clearly state the types of ADM they use to make automated decisions, not just AI (i.e. from simple calculators to machine learning).
- 3) Agencies that use ADM should publish, as part of their IPS, both a list of decisions they use ADM for and relevant and easy to understand examples, so the public can better understand how it is being utilised to make decisions that affect them.

⁹ Monica Hurley and Jessica Trappel, ‘Challenging administrative decisions’ (Web page) <<https://www.austlii.edu.au/au/communities/NTLawHbk/OptionsForAPersonWithAComplaint.html>>; Administrative Review Council (Web page) <[Administrative Review Council Best Practice Guide: Statements of Reasons](#)>

¹⁰ OAIC, ‘Automated decision-making and public reporting under the Freedom of Information Act’ (Web page) <<https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/foi-reports/Automated-decision-making-and-public-reporting-under-the-Freedom-of-Information-Act#section-report-summary>>

- 4) Agencies that use ADM should publish, as part of their IPS, any policies that clearly set out the principles for when and how they use ADM to make decisions and recommendations affecting members of the public.

The new ADM obligations under the Privacy Act further guarantee an individual's knowledge of the circumstances in which their personal information is being used in the context of ADM. Transparency of use broadly underpins this obligation and has a direct relationship to the transparency obligations under the FOI Act in a Commonwealth government context.

General Insurance Code of Practice (GICP)

GICP gives customers rights to request review of property claims for catastrophe events and access information relied on in handling their insurance application, claim or complaint.

ADM work across governments

Commonwealth: use of ADM by government – Attorney-General's Department (AGD) consultation paper

Work is currently underway within the AGD in respect of ADM. Between 13 November 2024 and 15 January 2025 AGD held a public consultation on the government's use of ADM.¹¹

Western Australia: Privacy and Responsible Information Sharing Act 2024 (WA) Principle 10: ADM

Commencing 1 July 2026, WA regulated entities employing ADM using personal information to make significant decisions about individuals must, amongst other obligations, notify individuals, give them information about how the ADM is employed if requested, and enable requests for human intervention.

The POLA Act's ADM obligation gives no right to contestability or to request information, and no obligation to notify. It is a less onerous obligation on APP entities that only requires information to be provided in an entity's privacy policy.

Other

Other work completed by governments in relation to ADM includes:

- Commonwealth Ombudsman Automated Decision-making Better Practice Guide [Automated Decision-Making - Better Practice Guide](#)
- Select Committee on Adopting AI Final report, Chapter 5 – ADM;¹²

¹¹ Attorney-General's Department, 'Automated Decision-Making Reform' (Web page)
<<https://consultations.ag.gov.au/integrity/adm/>>

¹² Commonwealth, *Committee Report*, Parliament of Australia, November 2024 (Web page)
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Adopting_Artificial_Intelligence_AI/AdoptingAI/Report>

- NSW Ombudsman Compendium of ADM systems;¹³
- NSW Information and Privacy Commission (IPC) Desktop Review of Documented AI or ADM Use within AIGs and PMPs;¹⁴
- National Artificial Intelligence Centre (NAIC) AI Adoption Tracker;¹⁵and
- Digital Transformation Agency's Policy for the responsible use of AI in government.¹⁶

¹³ Ombudsman New South Wales, 'Compendium of ADM Systems' (Web page)
<<https://cmsassets.ombo.nsw.gov.au/assets/Reports/Compendium-of-ADM-Systems.pdf>>

¹⁴ Information and Privacy Commission 'Desktop Review of Documented AI or ADM Use within AIGs and PMPs' (Web page)
<<https://www.ipc.nsw.gov.au/resources/desktop-review-documented-ai-or-adm-use-within-aigs-and-pmps>>

¹⁵ Department of Industry, Science and Resources, 'AI Adoption Tracker' (Web page)
<<https://www.industry.gov.au/publications/ai-adoption-tracker>>

¹⁶ Digital.gov.au, 'Policy for the responsible use of AI in Government' (Web page) <<https://www.digital.gov.au/ai/ai-in-government-policy>>

Matters about which we are seeking your feedback

Meaning of computer program

The meaning of computer program is intended to be interpreted broadly. Paragraph 336 of the Explanatory Memorandum states that “The term ‘computer program’ in APP 1.7(a) is intended to take its ordinary meaning and encompass a broad range of matters, including pre-programmed rule-based processes, artificial intelligence and machine learning processes to make a computer execute a task.” Although ‘computer program’ is broad in scope, APP 1.7(a) narrows the types of computer programs, for example, to a thing that is “substantially and directly related to making, a decision”.

A wide range of technologies are likely to fall within the definition of computer program, including commonly-used software, apps, or word-processing tools. Generative AI tools used to generate text, images, videos, code or synthesis, including chatbots, all fall within the definition of computer program for the purpose of the ADM obligation.

Substantially and directly related to making a decision

Under APP 1.7, privacy policies must contain the information outlined in APP 1.8 if, amongst other things, the entity has arranged for a computer program to make, or do a thing that is *substantially and directly* related to making a decision (APP 1.7(a)).

Paragraph 337 of the Explanatory Memorandum states “The use of the words ‘do a thing that is substantially and directly related to making a decision’ in APP 1.7(a) reflects that a computer program may be used to recommend a decision to a human decision-maker, or guide a human decision-maker. Where this occurs, the thing must be substantially and directly related to making a decision to be captured:

- a. *substantially* means where it is a key factor in facilitating the human’s decision making; and
- b. *directly* means where the thing has a direct connection with making the decision.”

For example, if a pre-programmed formula in Microsoft Excel was used to score and triage people calling a domestic violence crisis hotline, which was a key factor in a human decision-maker making a decision of what order to attend a person’s call, this would be considered ‘directly related’ and ‘substantially related’ to making a decision.

However, if the pre-programmed formula in Microsoft Excel was used to only arrive at an age in years from a date of birth entered into the spreadsheet, this may be ‘directly related to’ making a decision, but would not be ‘substantially related to’ making a decision.¹⁷

¹⁷ The Explanatory Memorandum further states that ‘If Microsoft Excel was used to calculate a sum this may be ‘directly related to’ making a decision, but would not be ‘substantially related to’ making a decision if Microsoft Excel was only used for the purpose of adding numbers to arrive at a given sum.

Meaning of ‘substantially and directly related’ across other legal frameworks

It is useful to consider how the word ‘substantial’ is used across other legal frameworks.

For assessments of ‘substantial adverse effect’ for FOI disclosure, OAIC FOI Guidance adopts the meaning of substantial as interpreted in various cases determining substantial loss or damage. In these contexts, substantial means ‘real or of substance and not insubstantial [ephemeral] or nominal’.¹⁸

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

Please rank the factors using the above mentioned (1-5) ranking system and include any additional factors.

However, if Microsoft Excel was used to generate a score about an individual that was a key factor in a human decision-maker making a decision, this would be considered ‘substantially related to’ making the decision.

¹⁸ See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* [1979] FCA 85 - external site[14]–[15]; (1979) 27 ALR 367 [383]; per Deane J in relation to the meaning of ‘substantial loss’ in s 45D of the Trade Practices Act 1974 . Although Deane J noted that it was unnecessary that he form a concluded view, Deane J’s interpretation of ‘substantial’ provides general guidance on the interpretation of this term under the FOI Act. See also for example *Re Marko Ascic v Australian Federal Police* [1986] FCA 260.

Fictional Edge Case: Generative AI with human oversight

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.

Questions

2. Would you consider NACIA's described uses of GPTea to be substantially and directly related to making decisions? Yes/No
3. Can you provide your reasons for your response?

Meaning of significantly affect rights or interests

Under APP 1.7, privacy policies must contain the information outlined in APP 1.8 if, amongst other things, the decision could reasonably be expected to significantly affect the rights or interests of an individual (APP 1.7(b)).

APP 1.9(c) outlines that a decision may affect the rights or interests of an individual, whether the rights or interests of the individual are adversely or beneficially affected. APP 1.9(d) sets out the kinds of decisions that may affect the rights or interests of an individual.¹⁹ Examples of decisions include granting admission to a country or entitlement to a housing benefit,²⁰ a contract for a life insurance policy²¹ and access to healthcare services.²² The use of computer programs to target individuals with content and advertisements may have a significant effect on an individual if, for example, it results in differential pricing for provision of, or access to, significant goods or services, or limits access to employment opportunities.²³

¹⁹ (i) 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; (ii) a decision that affects the individual's rights under a contract, agreement or arrangement; (iii) a decision that affects the individual's access to a significant service or support.

²⁰ Explanatory Memorandum (n 2) 343(a).

²¹ Ibid 343(b).

²² Ibid 343(c).

²³ Ibid 343 (c).

Meaning of ‘significantly affect the rights or interests’ across other legal frameworks

Meaning of Rights

Australian law grants many legal rights, many which reflect human rights of international treaties to which Australia is a party. Article 22 of the EU and UK General Data Protection Regulation (GDPR), is worded to capture ADM which produces legal (or similarly significant) effects. The UK Information Commissioner’s Office Guidance states that when determining whether a decision has a similarly significant effect on someone, the extent to which the following are affected, should be considered: financial circumstances, health, reputation, employment opportunities and behaviour choices.²⁴

The EU Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (EU Guidelines or Guidelines) provide that for there to be a legal effect, a decision must affect an individual’s legal rights, such as the freedom to associate with others, vote in an election, or take legal action. A legal effect also occurs if the decision affects a person’s legal status or rights under a contract, such as cancellation of a contract, entitlement to a social benefit granted by law like child or housing benefit, or refused admission to a country or denial of citizenship.

Meaning of Interests

In understand the meaning of ‘interests’, the OAIC has considered how the word has been interpreted across other legal frameworks.

Firstly, in administrative law, procedural fairness assessments can consider adverse effects on interests, including legal, personal liberty,²⁵ status,²⁶ preservation of livelihood,²⁷ personal and commercial reputation,²⁸ property,²⁹ employment,³⁰ immigration,³¹ financial,³² commercial³³ and a child’s interest in the provision of a supportive, safe and secure home.³⁴

In its Guidelines on Procedural Fairness, the Western Australia Ombudsman outlines the following examples of decisions that negatively affect an interest of a person or corporation, cancelling a licence

²⁴ ICO, ‘What does the UK GDPR say about automated decision-making and profiling?’ (Web page) <[https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/automated-decision-making-and-profiling/](https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/automated-decision-making-and-profiling/what-does-the-uk-gdpr-say-about-automated-decision-making-and-profiling/)>

²⁵ *Kioa v West* (1985) 159 CLR 550, Mason J at 582.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.9].

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *L & Anor V State of South Australia; H-P V State of South Australia* [2017] SASCF 133.

or benefit, disciplining an employee, imposing a penalty and publishing a report that may damage a person's reputation.³⁵

In the context of vulnerable groups, such as children, the *Family Law Act 1975* considers the best interests of a child. Section 60CC(2)(2) lists some considerations including the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, and violence.

Recital 71 of the GDPR provides an example of a decision that negatively affects the interest of a person as an 'automatic refusal of an online credit application' or 'e-recruiting practices without any human intervention'.

The EU Guidelines, specify that for data processing to significantly affect someone, the effects of the processing must be sufficiently great or important to be worthy of attention. The Guidelines state that this means that the decision must have the potential to significantly affect the circumstances, behaviour or choices of the individuals concerned, have a prolonged or permanent impact on the data subject or at its most extreme, lead to the exclusion or discrimination of individuals. Examples of decisions that fall in this category include decisions that affect someone's financial circumstances, access to health services or access to education. Decisions that deny individuals (or put at a serious disadvantage) of an opportunity, such as an employment opportunity also fall into this category.

The Guidelines note that processing that might have little impact on individuals generally may in fact have a significant effect for certain groups of society, such as minority groups or vulnerable adults. The example the Guidelines provide is of a person known or likely to be in financial difficulties who is regularly targeted with adverts for high interest loans and may sign up for these offers and potentially incur further debt.³⁶

The Guidelines also note that ADM resulting in differential pricing based on personal data could have a significant effect if, for example, prohibitively high prices effectively bar someone from certain goods or services. They also note that 'similarly significant effects' could be triggered by the actions of individuals other than the one to which the automated decision relates. For example, if a credit card company reduced a customer's card limit based on criteria such as an analysis of other customers living in the same area or shopping at the same stores. Such a situation could deprive (or provide) someone of opportunities based on the actions of others.

Lastly, the EU AI Act's article 86³⁷ captures high-risk ADM which produce legal effects or similarly significantly affect a person, where there is a potential for an adverse impact on their health, safety or fundamental rights.

Examples from the Explanatory memorandum

Some examples of a decision that 'could reasonably be expected to significantly affect the rights or interests of an individual' include:

³⁵ Ombudsman Western Australia, *Procedural Fairness (Natural Justice)* (Guidelines, April 2019).

³⁶ Explanatory Memorandum (n 2) 340.

³⁷ EU Artificial Intelligence Act, 'The EU Artificial Intelligence Act Up-to-date developments and analyses of the EU AI Act' (Web page) <<https://artificialintelligenceact.eu/>>

- 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. For example, this may include a decision in relation to granting admission to a country or entitlement to a housing benefit;
- a decision that affects the individual's rights under a contract, agreement or arrangement. For example, this may include a contract for a life insurance policy;
- a decision that affects the individual's access to a significant service or support. For example, this may include access to healthcare services.
- the use of computer programs to target individuals with content and advertisements may have a significant effect on an individual if, for example, it results in differential pricing for provision of, or access to, significant goods or services, or limits access to employment opportunities.³⁸

Impact of decision for persons experiencing vulnerability

Circumstances may influence whether or not a decision could reasonably be expected to significantly affect the rights or interests of an individual, such as a child or vulnerable person. The effects must be more than trivial, and must have the potential to significantly influence the circumstances of the individual concerned. For example, a decision's effect on a child or person experiencing vulnerability may be considered significant compared to its effect on other individuals. Whether a person is a child or experiencing vulnerability is relevant, to the extent that a decision may have a greater impact on that person, as opposed to a person who is not a child or is not experiencing vulnerability.

Questions

4. 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.Please rank using the above mentioned ranking system and list any additional factors.
5. 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?
6. 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?³⁹ For example:

³⁸ Explanatory Memorandum (n 2) 343.

³⁹ For example, paragraph 343 of the Explanatory Memorandum states that this may include access to healthcare services.

- 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.

Please rank using the above mentioned ranking system and add any additional factors.

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

Fictional Edge case: Differential pricing

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 on Daintree when his book-club buddy, Charles, from a country town, paid only \$35 from Daintree.

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.

Questions

8. Restricting access to financial products or healthcare would clearly be a decision which significantly affects the interests of an individual. 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? For example, 5% price difference, 20% price difference or higher.
9. In judging whether differential pricing significantly affects rights or interests, how important would you consider the following factors on a scale from 1 to 6 (with 1 being not at all important and 6 being very important):
 - a. the dollar amount of differential pricing
 - b. the significance of the product or service being purchased?

Meaning of making a decision

The OAIc notes that APPs 1.7-1.9 refer to decision-making. APP 1.9 outlines that making a decision includes refusing or failing to make a decision, and doing a thing includes refusing or failing to do a thing.

Meaning of ‘decision’ across other legal frameworks

In order to assist with the interpretation of ‘decision,’ the OAIc has considered its meaning across other legal frameworks, including in Administrative law and Corporations law.

Administrative Review Tribunal Act 2024 (Cth) (ART Act)

Under section 9 of the ART Act, a decision, includes the following:

- a) making, suspending, revoking or refusing to make an order or determination;
- b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- d) imposing a condition or restriction;
- e) making a declaration, demand or requirement;
- f) retaining, or refusing to deliver up, an article;
- g) doing or refusing to do any other act or thing.

The definition of ‘decision’ in the ART Act is replicated from subsection 3(3) of the former *Administrative Appeals Tribunal Act 1975* (AAT Act), and is intended to have the same meaning.⁴⁰ The definition is cast deliberately widely, recognising that:

- the Act under which the decision is made will provide the content of the meaning of a ‘decision’; and
- the wide range of the kinds of decisions that stand to affect an individual’s rights and entitlements are diverse and cannot be neatly defined.⁴¹

Administrative Decisions (Judicial Review) Act 1977 (Cth)

In the context of judicial review, a decision generally, but not always, is practically final or operative and determinative of an issue of fact.⁴²

⁴⁰ Paragraph 149 of the Explanatory Memorandum to the Administrative Review Tribunal Bill 2023.

⁴¹ *Director-General of Social Services v Hales* (1983) 47 ALR 281, at 305-306 (Lockhart J); *Director General of Social Services v Chaney* (1980) 47 FLR 80, at 100-101 (Deane J)

⁴² *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 [335]-[336]

Corporations Act 2001 (Cth)

Corporations law adopts the same definition for decision as the *Administrative Review Tribunal Act 2024* (Cth). Furthermore, a business judgement is defined as any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

EU GDPR

Recital 71 of the EU GDPR states a decision may include a measure evaluating personal aspects relating to a person.

Fictional Edge case: Discriminatory targeted job ad

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.

Question

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

Meaning of 'arranged for'

APP 1.7(a) uses the wording, 'the entity has arranged for a computer program'. The words 'arranged for' clarify that it is the entity responsible for arranging the computer program to make or assist a decision which must meet the requirements in APP 1.7.⁴³ 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 assist a decision.

Accordingly, for the ADM obligation, entities must consider whether they arranged for ADM or simply operate ADM. During and after procurement, entities should monitor 3rd party ADM usage. Entities should actively identify, assess and keep oversight over how a 3rd party product/service uses ADM. Amongst other considerations, entities should understand how ADM is being used in a 3rd party product/service to make or assist decisions and what types of decisions are being made.

Examples of where 'an entity has arranged for a computer program to make a decision', may include:

⁴³ Explanatory Memorandum (n 2) 335.

- An entity procures another entity’s AI system to screen and rank job applications leading to a decision being made on who to employ;
- An employer permits or directs employees to use an AI chat tool to draft performance assessments that determine promotion decisions;
- An entity contracts a third party software company to automatically approve or decline refunds on its behalf; and
- An entity has a case management system that automatically escalates particular types of complaints.

Examples of where an entity may simply be operating ADM, may include:

- an entity develops and hosts a software that automatically approves or rejects customer applications but does not use the software itself; or
- an entity maintains the infrastructure for a fraud detection system, which automatically blocks or flags transactions.

Question

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

Extent of disclosure

The object of APP 1 is to ensure that APP entities manage personal information in an open and transparent way. To achieve this, APP 1.3 requires a clearly expressed and up-to-date policy about the management of personal information by APP entities.

Accordingly, the extent of disclosure to ensure compliance with APP 1.7-1.9 will require a balance between providing enough meaningful information for individuals to understand the use of ADM and avoiding excessive detail that obscures the purpose of transparency and clear communication.

The Explanatory Memorandum confirms that commercial-in-confidence information about automated decision-making systems is excluded from the requirement of APP 1.7.⁴⁴

Considering best practice

Trust Framework for Government Use of AI and ADM

The Trust Framework for Government Use of AI and ADM (Trust Framework) states that a privacy policy disclosure should consider how an affected person may understand an automated decision – the rules,

⁴⁴ Addendum to the Explanatory Memorandum, Privacy and Other Legislation Amendment Bill 2024 (Cth) 38

the evidence used, and how it led to the decision.⁴⁵ A requirement for trustworthy AI systems defined in the Assessment List for Trustworthy AI (ALTAI) framework is transparency. The ALTAI states that humans need to be aware that they are interacting with an ADM system, and must be informed of the system's capabilities and limitations. Furthermore, ADM systems and decisions should be explained in a manner adapted to the stakeholders concerned.⁴⁶

The Rules as Code (RaC) movement suggests that rules governing ADM should be visible to public, ideally in an accessible format, and able to be interrogated.⁴⁷

In their submission to the Robodebt Royal Commission, Australasian Society for Computers and the Law, The Allens Hub for Technology, Law and Innovation and The Gradient Institute, use the Trust Framework to show how the harms of Robodebt could have been mitigated.

Digital Transformation Agency (DTA)

Under the DTA's Policy for the responsible use of AI in government, agencies must make a publicly available transparency statement outlining their approach to AI adoption and use. The DTA's Standard for AI transparency statements states that statements must use clear, plain language that avoids technical jargon and is consistent with the Australian Government Style Manual, and must provide a contact email for public enquiries.

Statements are intended to provide only a high-level overview.⁴⁸

⁴⁵ Pia Andrews, 'A Trust Framework for Government Use of Artificial Intelligence and Automated Decision Making' 7 (Web page, 18 August 2022) <<https://arxiv.org/pdf/2208.10087>>

⁴⁶ Ibid, 13.

⁴⁷ Royal Commission into the Robodebt Scheme, 'Submission by the Australasian Society for Computers and the law, The Allens Hub for Technology, Law and Innovation and the Gradient Institute' 4 (Web page) <<https://robodebt.royalcommission.gov.au/system/files/submission/ANON-24KG-9BRC-8.pdf>> citing OECD, 'Cracking the code: Rulemaking for humans and machines', OECD Working Papers on Public Governance, No. 42, OECD Publishing, Paris (Web page) <https://www.oecd.org/en/publications/cracking-the-code_3afe6ba5-en.html>.

⁴⁸ At a minimum, agencies must provide the following information regarding their use of AI in their transparency statement:

- the intentions behind why the agency uses AI or is considering its adoption
- classification of AI use according to usage patterns and domains
- classification of use where the public may directly interact with, or be significantly impacted by, AI or its outputs without human review
- measures to monitor the effectiveness of deployed AI systems and protect the public against negative impacts
- overview of compliance with the requirements under the Policy for responsible use of AI in government
- compliance with applicable legislation and regulation
- when the statement was most recently updated.

ICO guidance

The UK ICO and The Alan Turing Institute co-badged guidance on Explaining Decisions made with AI⁴⁹ under the GDPR, which has more significant transparency requirements than Australia's ADM obligation. The guidance proposes six main AI decision-making elements:

1. rationale of decisions
2. who is responsible for the development, management and implementation of an AI system
3. what data was used
4. design and implementation steps to ensure fairness and unbiased decisions
5. design and implementation steps to ensure accuracy, reliability and security
6. design and implementation steps to consider and monitor impact on individuals and wider society.

The UK guidance suggests that the delivery of a disclosure and the priority of a disclosure should consider the domain the entity works in, impact on the individual, data used, urgency of the decision and audience.

For example, automated decisions using sensitive data, with a high impact on the rights of individuals may require proportionately expansive disclosure. Furthermore, privacy policies intended to be read by children should be easy to read.

The guidance notes that prioritisation of ADM disclosures may reflect what the majority of people you make decisions about want to know. It highlights that automated decisions should be meaningfully explained, truthful, and written and presented appropriately.

ICO AI tools in recruitment report

In 2024, the ICO audited the privacy practices of developers and providers of AI recruitment tools. Its subsequent report recommended the best practices to help balance privacy transparency with clear communication. It noted that entities should consider bite-sized informative pop-up messages or visual aids, check people actually understand how you process their information and avoid overly complex explanations, or technical or legalistic language.


Question

12. 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;

⁴⁹ ICO, 'Explaining decisions made with AI' (Web page) < <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/artificial-intelligence/explaining-decisions-made-with-artificial-intelligence/> >

- 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?



Attachment A

Subparagraph 13K(1)(b) of the Privacy Act 1988

(iia) Australian Privacy Principle 1.7 (contents of APP privacy policy—automated decisions)

Automated decisions

1.7 Without limiting subclause 1.3, the APP privacy policy of an APP entity must contain the information covered by subclause 1.8 if:

- (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.

1.8 The information covered by this subclause is:

- (a) the kinds of personal information used in the operation of such computer programs; and
- (b) the kinds of such decisions made solely by the operation of such computer programs; and
- (c) the kinds of such decisions for which a thing, that is substantially and directly related to making the decision, is done by the operation of such computer programs.

1.9 For the purposes of subclauses 1.7 and 1.8:

- (a) making a decision includes refusing or failing to make a decision; and
- (b) doing a thing includes refusing or failing to do a thing; and
- (c) a decision may affect the rights or interests of an individual, whether the rights or interests of the individual are adversely or beneficially affected; and
- (d) the following are examples of the kinds of decisions that may affect the rights or interests of an individual:
 - (i) 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;
 - (ii) a decision that affects the individual's rights under a contract, agreement or arrangement;
 - (iii) a decision that affects the individual's access to a significant service or support.