# Submission to Portfolio Committee No. 1: Inquiry into Artificial Intelligence in New South Wales

## The role of the NSW Ombudsman relevant to the subject matter of this inquiry

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.

The terms of reference of the present inquiry are broad ranging, as it will consider the extent, nature and impact of AI in NSW, including the risks and challenges it presents.

Given the Ombudsman's statutory functions, our particular interests in relation to AI (and therefore those areas on which we may be in a position to usefully contribute to the Committee's inquiry) are generally focused as follows:

(a)  We are primarily concerned with the development, acquisition, adoption and use of AI *by NSW public authorities*, including (but not limited to) their use of AI to make or assist in making administrative decisions (automated decision-making (**ADM**)). Public authorities include State Government departments and agencies, NSW statutory bodies, and local councils.[1]

(b)  We do not generally oversight the activities of the private sector, except where legislation has extended our jurisdiction to include non-government entities commissioned to provide government-funded public or community services. Examples include the private managers of correctional facilities and non-government service providers (such as foster care providers) under community welfare legislation. In this submission, when we refer to public sector use of AI, we mean to include the use of AI by all bodies and persons over which we have oversight.

(c)  Consequently, we will not have a direct role in scrutinising the broader development or use of AI across business and the community. That said, broader issues of that nature may come to our attention through our oversight of public authorities in their role as users of technology or as regulators of the use of AI by the private sector. For example, the conduct of a relevant regulator in failing to adequately enforce regulations or to protect the public from harm may be a matter of relevance to an Ombudsman.[2]

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[1]  Certain conduct of certain public authorities is excluded from the Ombudsman's complaint-handling and investigation functions by Schedule 1 of the Ombudsman Act. This includes all conduct of the NSW Police Force (clause 13, Schedule 1), which is now oversighted by the Law Enforcement Conduct Commission. Of particular relevance to the current topic, conduct of any public authority relating to alleged violations of the privacy of persons is also excluded conduct under the Ombudsman Act, as such conduct is subject to the oversight of the NSW Privacy Commissioner (clause 17, Schedule 1).

[2]  An example in this regard includes the work the NSW Ombudsman has done concerning the adequacy of regulatory responses to asbestos risk in New South Wales: see eg., our report on *Responding to the asbestos problem – The need for significant reform in NSW*.

(d) There is, separately, the question of the extent to which AI (including ADM) may be used by the Ombudsman itself in the exercise of its own functions, which we will briefly canvas at the end of this submission.

## The NSW Ombudsman's 2021 report on ADM

In November 2021, we tabled a report titled, '*The new machinery of government: Using machine technology in administrative decision-making*' (**machine technology report**).

The report includes a case study of our work with Revenue NSW, in which we had identified that its use of automation for the purposes of its debt-recovery (garnishee) processes had been unlawful.

We include a copy of the full machine technology report with this submission, and ask that it be considered as a part of this submission. As such, we will not repeat its contents here.

However, we draw the Committee's attention particularly to Part 3 of the report, which canvasses the following issues:

- We identify five key pro-active and practical steps that we suggest are essential when government agencies are considering the design and adoption of ADM. These are:

  1. **Assemble the right multi-disciplinary team**: This must involve lawyers – typically, legislation will be the source of agencies' decision-making powers and agencies need people expert in statutory interpretation and application, as well as policymakers, and operational and technical experts.

  2. **Determine the role of staff at the outset**: Deciding how far a process can be automated is not an easy question. It needs to be assessed in the context of the agency's functions and legislation. Merely placing a human on top of a process may not be sufficient to properly authorise automated decision-making.

  3. **Ensure transparency**: We recommend agencies identify early in the project how they will be transparent about their ADM use, including providing meaningful reasons for decisions made using ADM where required.

  4. **Test early and often**: We highlighted that just like other tools that support administrative decision-making, ADM systems need to be tested before going live and at regular stages once in operation to ensure decisions are legal, accurate and unbiased.

  5. **Consider legislative amendment**: We recommended that agencies consider seeking legislative amendment to expressly authorise and address the use of ADM, especially when it might otherwise be legally risky to proceed with ADM.

- Further to the fifth step above, we discuss in some detail (at pages 76-79) the question of whether legislation is, or should be required to be, enacted to expressly authorise an agency to adopt ADM for a particular statutory decision-making function. We note that the advantages of requiring agencies to obtain such express legislative approval include enhancing public transparency and providing the opportunity for public and Parliamentary debate, not just about whether ADM is appropriate, but also about what mandated minimum properties and protections should apply in the particular case.

- A key theme of our report is that existing laws and norms of administrative good conduct should and will control the use of public sector ADM. However, we also note that there are uncertainties about exactly how those laws and norms will apply in all cases – for example, even when it is clear that reasons must be provided for a decision, what constitutes a reason in the context of an automatically AI-generated decision is not yet clear. There may also be gaps, including for example the absence of

a legal duty on agencies to inform those affected by a decision if and how the decision was automated.

- We conclude by raising the question as to whether institutional changes may be required, including whether Parliament should 'consider scaffolding a governance framework' around the use of these technologies. This may include stipulating certain requirements, which could include: minimum accuracy standards; mandatory pre-deployment legal audits by an independent body; requirements for internal review avenues from automated decisions; and so on.

## Our current role in oversighting AI use in the public sector

The Ombudsman has various statutory functions, central among which is receiving complaints about, and where necessary investigating, the conduct of NSW public authorities. The purpose of this work is to identify and correct maladministration, particularly maladministration that has directly affected members of the public as users of agency services or the subjects of agency decisions.

The Ombudsman also has an important role in seeking to avoid future maladministration, and promoting best practice public administration, including through systemic reviews and recommendations, the provision of guidance and advice to public authorities, and education and training.

When public authorities are developing, acquiring, adopting or using AI (and especially when using AI for ADM), their actions in doing so constitute 'conduct' that, like any other conduct, may involve risks of maladministration. As such, it may be the subject of complaint to, and investigation or other scrutiny by, the Ombudsman.

Maladministration here refers to conduct of a kind set out in section 26 of the Ombudsman Act. It includes but is not limited to conduct that is unlawful. Conduct that the Ombudsman finds to be unreasonable, unjust or otherwise wrong is also maladministration.

The Ombudsman therefore will have an important role to play in oversighting public sector development, adoption and use of ADM and other uses of AI. This is necessary and important, but of itself is not sufficient, to address the risks and challenges.

As outlined in our machine technology report (pages 80 - 81) Ombudsman institutions seem particularly well-placed to play an active role in this area, given their independence, ability to operate more flexibly than judicial processes, powers to compel agency co-operation and access, ability to make proactive inquiries into systemic issues, and ability to report publicly. However, we also recognised that ombudsman institutions are limited at present by a lack of deep technical skills and resources that may be required for effective scrutiny and investigation of AI.

## Current work of the NSW Ombudsman

### Revenue NSW investigation

We are currently finalising our investigatory work in relation to Revenue NSW's garnishee order system, which has continued following our 2021 report. As the garnishee system, and in particular the manner and extent to which it is automated, has varied over the years having regard to concerns we raised and various legal opinions that have been obtained, our current investigation will address the legality of the system at all times since 2016, including in its current form.

We expect to finalise our investigation report, and table a public report, in the first quarter of 2024.

## Guidance published on our website

Drawing on our machine technology report, we have added guidance to our website[3] to support agencies when considering the introduction or review of ADM. These include the 5 pro-active steps set out above, and which are likely of broader relevance to public sector AI projects more generally.

## Other publications and public discussion

Other recent publications by the NSW Ombudsman that pick up some of the themes from the machine technology report include:

- Speech '*Avoiding (and investigating) automated maladministration*' by the NSW Ombudsman at the 13th National Investigations Symposium, 25 May 2023.

  In this speech, we considered how a maladministration investigation relating to public sector use of ADM is the same as, and the ways it will differ from, any other maladministration investigation. While noting the challenges for Ombudsman and other oversight bodies, the speech highlights a key point that, like all other maladministration investigations, an investigation concerning the use of ADM ultimately involves asking whether relevant agencies and officials have conducted themselves in a way that complies with the law, is reasonable, non-discriminatory, and just.

- Submission dated 26 July 2023 to the Commonwealth Government's discussion paper on 'Safe and Responsible AI in Australia.'

  In this short submission, we express a caution about the introduction of the term 'Responsible AI' into the lexicon. We note that AI itself cannot be 'responsible' in any meaningful legal or moral sense. Rather, any legally or morally relevant decisions – such as about how to design, use, test, or monitor AI – are all made by *people*. Questions that need to be considered include: *who* is responsible, to whom, and for what conduct or consequences. Any regulatory framework needs to make it clear that it is people (and which people) are ultimately responsible for making sure the technology and its uses are compliant with relevant standards. This responsibility does not end with implementation – it exists throughout the lifecycle of any given use case of ADM and AI.

## ADM 'mapping' project

A significant concern of our machine technology report was the current lack of visibility around the uses of ADM across the public sector. (We note that a similar concern has also been raised by the Information and Privacy Commission.)[4]

Accordingly, in January this year (and as foreshadowed in our machine technology report) we commenced a project seeking to map, as comprehensively as possible, the current and planned types and uses of ADM systems in the NSW public sector. The project is a collaborative project supported by all NSW Government departments, and its purpose is primarily to provide a descriptive snapshot of the current landscape. It does not involve the use of Ombudsman investigatory powers, and does not seek to identify or otherwise make findings about maladministration.

The project is ongoing, and its findings will likely be of interest to the Committee in respect of the current and future nature and extent of public sector uses of ADM and AI. We expect to table a report in Parliament with the outcomes from that project in the first quarter of 2024.

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3   'Automated decision-making', *NSW Ombudsman* (Web Page) <https://www.ombo.nsw.gov.au/guidance-for-agencies/automated-decision-making-in-the-public-sector>.

4   Information and Privacy Commission, *Scan of the Artificial Intelligence Regulatory Landscape – Information Access & Privacy* (Report, October 2022) 12-16 <https://www.ipc.nsw.gov.au/sites/default/files/2022-11/IPC_Scan_of_the_Artificial_Intelligence_Regulatory_Landscape_October_2022_0.pdf>.

While the mapping project is not yet complete, publicly available information indicates that the use of ADM to perform government functions (and AI more broadly) is prevalent, and becoming more prevalent, across all portfolios.

Examples of projects announced publicly[5] include:

- **Domestic Violence – Triage Risk Assessment Scale (DV-TRAS).** This is an automated risk assessment tool that can be used to rapidly estimate custody-based domestic violence offenders' likelihood of domestic violence recidivism, using official administrative data that are routinely collected by Corrective Services NSW.[6]

- **AI-based Remote Patient Monitoring System.** Facial recognition technology was trialled in one Local Health District to monitor patients' vital signs remotely during standard telehealth appointments – eg, measuring heart rate, blood pressure, oxygen, pain and anxiety levels based on patient's face based on photoplethysmography (using light to measure blood flow changes under the skin).[7]

- **Smarter, Cleaner Sydney Harbour initiative.** AI capabilities will be used to identify the types of litter moving along waterways and stormwater drains. This information will assist local governments with their cleaning schedules, community education and enforcement activities – all to help reduce stormwater pollution before it reaches Sydney Harbour.[8]

- **Safety After Dark CCTV trial.** A system deployed at Wollongong Station to improve the safety of customers, particularly women, travelling on transport at night in Greater Sydney. It uses AI technologies to inform assessments of the likelihood of violence detected at Wollongong Station. To test the accuracy of the AI, it cross-references incidents detected by AI technologies against the Sydney Trains record of incidents.[9]

- **Photo Verification Technology.** The Department of Customer Service has reported that individuals will soon be permitted to complete government transactions and services online by verifying their identity through live image capture.[10]

## Use cases for AI by the Ombudsman

It is likely that some forms of AI will become ubiquitous, to the extent that all agencies will be unable to avoid using AI to some extent. Indeed, this is likely already the case, with the use of tools such as standard internet search engines. There may, furthermore, be opportunities for bodies like ombudsman to consider AI to improve their accessibility, effectiveness and efficiency. These might include technologies such as digital customer assistance (chat bots), complaint triaging tools, as well as generative AI technologies (eg,. document chronology generators).

While the NSW Ombudsman is not currently actively exploring the adoption of any specific AI technology, we have (in the absence of any NSW public sector wide rules governing the use of open-

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[5] We note that a public announcement as such does not mean that for instance, where a technology was trialled, the agency then implemented that technology, nor that the technology is currently in use.

[6] Mark Howard, Zhigang Wei, Yun Zhang and Simon Corbon 'Actuarial assessment of domestic violence recidivism risk among custody-based males: The Domestic Violence – Triage Risk Assessment Scale (DV-TRAS)' (2022) 53 *Corrective Services NSW Research Bulletin*. URL: <https://www.correctiveservices.dcj.nsw.gov.au/documents/research-and-statistics/DV-TRAS.pdf >.

[7] 'Using AI to enhance remote patient care' *Nepean Blue Mountains Local Health District* (Web Page) <https://www.nsw.gov.au/health/nbmlhd/news/stories/ai-enhances-remote-patient-care >.

[8] 'Smarter, Cleaner Sydney Harbour' *Department of Planning and Environment* (Web Page) <https://www.nsw.gov.au/business-and-economy/smart-nsw-case-study-library/listings/smarter-cleaner-sydney-harbour>.

[9] 'Safety After Dark CCTV trial commences at Wollongong Station', *Transport for NSW* (Web Page) <https://www.transport.nsw.gov.au/projects/current-projects/safety-after-dark-cctv-trial-commences-at-wollongong-station>.

[10] 'Putting you in control of your ID' *Department of Customer Service* (Web Page) <https://www.nsw.gov.au/nsw-government/projects-and-initiatives/nsw-digital-id>.

access generative AI), recently implemented a provisional policy on the use of open-access generative AI technologies by our staff. A copy is available on our website if the Committee would like to refer to it.[11]

## NSW AI Assurance Framework

The NSW Government's AI Assurance Framework (together with the AI Strategy and AI Ethics Policy) is relatively new. We understand that NSW was the first jurisdiction to adopt an AI Assurance Framework in Australia. The Framework is designed to assist government agencies design, build and use AI-enabled products and solutions.

The Framework has been adopted as policy and is expressed as being to 'assist' agencies, rather than as setting out legal requirements.

We have not identified information in the public domain that indicates how many government agencies have:

- adopted the mandatory policy principles (as per Department of Customer Service Circular DCS-2022-01 *Use of Artificial Intelligence by NSW Government Agencies*) as part of their internal policy framework and practice
- commenced projects that fall within the scope of the AI Assurance Framework
- completed mandatory self-assessments in accordance with the AI Assurance Framework
- submitted Assurance assessments to the AI Review Committee.

This information, in addition to any outcomes, would clearly be valuable to the Committee when considering the effectiveness of the NSW Government's policy response to AI.

On the available information, we make the following general observations about the scope of the current Framework:

- the AI Assurance Framework only applies in circumstances including if the project uses AI and costs more than $5 million or was funded from the State's Digital Restart Fund or if the project uses AI and mid-range or higher risks (according to the framework) remain present after mitigations[12]
- a proportion of ADM systems currently in use in the public sector may not be captured by the policy scope because they do not utilise AI technologies (as defined) or do not meet the above criteria; it is likely there may be differences of view as to whether particular projects are captured by the Framework
- the AI Assurance Framework came into effect in March 2022, prior to generative AI tools such as ChatGPT becoming widely available (the Digital.NSW website notes that large language models and generative AI tools are within scope of the framework).

### Relevance of the AI Assurance Framework to our work

The AI Assurance Framework may provide a useful reference point for our office if we undertake an investigation associated with an agency's use of AI.

For example, we could make inquiries about how an agency considered and applied the framework, noting that a failure to have done so could amount to unreasonable conduct and therefore a finding of maladministration. However, consideration of compliance with the ethical AI principles and AI Assurance

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[11] *Generative Artificial Intelligence – Use by NSW Ombudsman officers* (August 2023) <Generative Artificial Intelligence – Use by NSW Ombudsman officers>

[12] Department of Customer Service, *Artificial Intelligence Assurance Framework* (March 2022) <https://www.digital.nsw.gov.au/sites/default/files/2022-09/nsw-government-assurance-framework.pdf>.

Framework in their current form would not necessarily answer all important questions that would be relevant to an Ombudsman investigation, such as whether the particular application of AI in the exercise of a statutory function was legally consistent with the statute that confers that function.

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