



15 May 2020

Ed Santow
Human Rights Commissioner
Human Rights and Technology Project
Australian Human Rights Commission
by email: tech@humanrights.gov.au

Dear Commissioner Santow

Submission to the Human Rights and Technology Discussion Paper, December 2019

Thank you for the opportunity to comment on the Australian Human Rights Commission's Human Rights and Technology Discussion Paper, December 2019. The Financial Rights Legal Centre (**Financial Rights**) was unable to provide a comprehensive submission in the allotted time due to the impact of the Covid-19 on consumers and the financial services sector. We are nevertheless keen to provide a short response to the Paper.

We strongly support the discussion paper's 19 proposals as sensible and practical approaches to the issues faced by consumers and the handling of their data. However we do wish provide the following input into the ongoing inquiry addressing a number of issues that have been raised in the Discussion Paper.

Question A

The Commission proposes to define 'AI-informed decision making' with the following two elements: there must be a decision that has a legal, or similarly significant, effect for an individual; and AI must have materially assisted in the process of making the decision.

The decision making that takes place in the financial services sector impacting consumer includes amongst others:

- decisions on credit applications
- decision on interest rates and other pricing offers
- decisions to offer or not offer insurance coverage
- decisions on insurance premium pricing either in a traditionally static form or in a dynamic form using telematics;
- decisions to undertake insurance claims investigations

- decisions on paying insurance claims.;
- decisions on algorithmically created credit scores

Furthermore AI is likely to be involved in these decision making processes as well as more generally:

- underwriting processes (real-time or otherwise);
- credit scoring;
- responsible lend checking; and
- interest rate setting.

As we read the proposal, such AI-informed decision making in this context will fall within the “similarly significant, effect for an individual” arm of the test – in that these decisions are not necessarily legal in nature but they may nevertheless impact upon a consumer’s individual legal status or rights. The example used at page 62 of an “automatic refusal of an online credit application” suggests that this reading is correct however we are keen to ensure that the impact of the decision is not necessarily limited to access only but other impacts on an individual’s circumstances, behaviour or choices. These could include access to credit at inappropriately inflated levels, or the provision of insurance only at unrealistically high prices (impacts both borne of inappropriate price discrimination and/or risk segmentation).

The UK Information Commissioner’s Office application of this test includes the following guidance:

If you are unsure whether a decision has a similarly significant effect on someone you should consider the extent to which it might affect, for example, their:

- *financial circumstances;*
- *health;*
- *reputation;*
- *employment opportunities;*
- *behaviour; or*
- *choices.*¹

If the Australian proposal were to follow a similar approach then we believe that these would be appropriately captured. However we would support the AHRC being more explicit in its expectation of the proposal’s reach and application.

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/automated-decision-making-and-profiling/what-does-the-gdpr-say-about-automated-decision-making-and-profiling/>

Question B, Proposal 7 & 8

We note that proposal 7 is for legislation to be introduced to make clear that, if an individual would have been entitled to an explanation of the decision were it not made using AI, the individual should be able to demand:

- a) a non-technical explanation of the AI-informed decision, which would be comprehensible by a lay person, and
- b) a technical explanation of the AI-informed decision that can be assessed and validated by a person with relevant technical expertise.

While we support this proposal – particularly the inclusion of technical and non-technical explanations - we do not think it goes far enough.

The decisions in the financial services sector we have described in answer to Question A are not ones where the consumer is ordinarily entitled to an explanation of the decision if it were not made using AI. Some decisions are contestable and if disputes are raised at external dispute resolution or in a court proceeding, explanations may be sort by an ombudsman or a court. However there are no specific regulatory requirements for explanations of decisions outside the provision of disclosure documents, or requirements to provide an explanation committed to under a self-regulatory code of practice.²

If the result of the proposal is that a financial services decision is *not* required to be explainable to a financial services consumer then we cannot support the proposal in its current formulation. The requirement for explanations could therefore be limited to government decisions only. If it does extend to financial services sector decisions then this needs to be clarified or made more explicit.

We note too that Proposal 8 could be applied to the broader category of decisions to which a consumer may not be automatically entitled to an explanation (including AI-informed financial services decision). If this is the case then where an AI-informed decision-making system in the financial services sector does not produce reasonable explanations for its decisions, that system would not be able to be deployed in any context where decisions could infringe the human rights of individuals.

While this has the potential to prevent the use of AI-informed decision infringing on human rights in the financial service sector, this may not necessarily capture all the AI decisions in this context unless a broad interpretation of human rights were applied.

Further there remains no requirement on the AI-informed decisions to provide their explanation to a consumer where they *can* produce an explanation.

Our view is that where an AI-informed decision is made and an explanation is able to produced it must be provided to the consumer, no matter whether there is a current requirement to

² For example Clause 74 of the Banking Code commits banks to the following: “If we decide not to approve a loan to a small business we will tell the small business the general reason why unless it is reasonable for us not to do so.” No similar commitments exists for consumer loans. Clause 177 commits banks to providing reasons for the decision not to provide financial hardship.

explain a decision or not. The use of AI in decision making - one divorced from human intervention or at times comprehension - has serious ethical and human rights consequences as a process in and of itself.

On our reading Proposals 7 and 8 do not go far enough to ensure that consumers are able to obtain explanations for AI-informed decisions that will impact their lives.

Question C

Finally, we support the Australian law being reformed to make it easier to assess the lawfulness of an AI-informed decision-making system, by providing better access to technical information used in AI-informed decision-making systems such as algorithms.

We strongly believe that regulators such as ASIC and the ACC need to be explicitly empowered, resourced and *required* to use RegTech to access to AI technologies, ensure compliance, improve their supervisory capabilities and prevent harm to consumers.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact [REDACTED] on [REDACTED].

Kind Regards,

[REDACTED]

[REDACTED]

Policy and Advocacy Officer
Financial Rights Legal Centre

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About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.