

Human Rights and Technology Discussion Paper

Submission to Australian Human Rights Commission

4 March 2020

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide a response to the discussion paper released by the Australian Human Rights Commission ('the Commission') regarding human rights and technology.
2. The ALA commends the Commission on the discussion paper and the 29 proposals that are included.
3. The contents of this submission will be confined to the matter of how the government uses artificial intelligence ('AI') to make decisions and the issue of explainability, as the issue is canvassed in Question B:

'Where a person is responsible for an AI-informed decision and the person does not provide a reasonable explanation for that decision, should Australian law impose a rebuttable presumption that the decision was not lawfully made?'

4. The ALA agrees with the Commission's view that AI-informed decision-making must be accountable.

The key ingredients of AI-informed decision-making

5. The ALA agrees with the Commission's preliminary view that where there is a legal requirement for a decision to be explainable, there is no justification for discarding or reducing this requirement simply because AI has been used in the decision-making process. The ALA agrees that an individual affected by an AI-informed decision should have the right to an explanation for the decision which is accurate and sufficient to enable the individual to understand and, if necessary, appeal the decision.
6. While explainability is a necessary element of such decisions the ALA submits that all decisions, including those that are AI-informed, must also give proper consideration to the relevant human rights contained in the United Nations Conventions, which the Australian government has signed.²

² These are: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture

The consequences for failing to provide a meaningful explanation

7. The Commission has sought feedback on whether there should be a new evidential rule that imposes a rebuttable presumption that an AI-informed decision is not lawful where a meaningful explanation cannot be provided to an individual affected by the AI-informed decision.
8. The ALA submits that while such an evidential rule is important, it does not provide sufficient protection for individuals affected by an AI-informed decision. Moreover, while an AI-informed decision may be presumed to be unlawful if it is not accompanied by a reasonable explanation to the individual affected, it may not be invalidated merely by reason of the presumed unlawfulness. This is particularly relevant to AI-informed decisions that are made by government bodies.
9. The ALA submits that where a meaningful explanation cannot be provided to an individual affected by an AI-informed decision, that decision should be presumed to be both unlawful and invalid. The ALA submits that this needs to be clearly articulated in legislation, so that it is clear that the requirement to provide a meaningful explanation for the decision is a necessary pre-condition to the exercise of the function of making the decision, and there is clear legislative intent that non-compliance would lead to invalidity.
10. As was noted by Warren CJ of the Victorian Court of Appeal in *Bare v IBAC* [2015] VSCA 197, ‘... the key consideration in assessing validity is whether it was the purpose of the legislation that the relevant requirement be an element of the conferral of the power’.³ She goes on to state:

‘... the authorities make it clear that in determining invalidity in an administrative law context the focus is on the intention of the legislature as to whether an act done in breach should result in invalidity. This occurs whether or not one understands the issue as one involving mandatory consideration, or a statutory requirement that is a necessary pre-condition to the exercise of a function.’⁴

and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

³ *Bare v IBAC* [2015] VSCA 197, per Warren CJ, paragraph 143.

⁴ *Ibid*, per Warren CJ, paragraph 144.

11. The ALA submits that in addition to the presumption that an AI-informed decision is not lawful where a meaningful explanation cannot be provided to an individual affected by the AI-informed decision, there also needs to be a clear statutory requirement that the provision of a meaningful explanation for the decision is a necessary pre-condition to the decision-making function. This will provide a clear indication that the legislature intended that non-compliance with the requirement to provide a meaningful explanation would lead to invalidity.
12. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the High Court considered whether unlawful administrative action gives rise to jurisdictional error where, if the administrative action was a decision, thereby making that decision invalid. In their joint judgment, McHugh, Gummow, Kirby and Hayne JJ articulated the key consideration in assessing validity, namely whether it was the purpose of the legislation that the relevant requirement be an element of the conferral of the power:

'A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".⁵

13. The ALA therefore submits that a presumption that an AI-informed decision is both unlawful *and* invalid where a meaningful explanation cannot be provided to an individual affected by the decision needs to be clearly expressed in legislation.

The consequences for failing to give proper consideration to relevant human rights

14. The ALA also submits that, where an AI-informed decision fails to give proper consideration to the relevant human rights of an affected individual, there should be a rebuttable presumption that the decision is unlawful and invalid. For the reasons outlined above, this presumption should be clearly expressed in legislation so that there is clear legislative intent that a failure to give proper consideration to the relevant human rights of an individual

⁵ (1998) CLR 194 355 at 390.

affected by an AI-informed decision will give rise to a presumption that the decision is both unlawful *and* invalid.

Conclusion

15. The ALA commends the Commission on the outstanding discussion paper *Human Rights and Technology* and welcomes the opportunity to provide further comments regarding the need for accountable AI-informed decision-making.

16. The ALA would be pleased to provide further assistance regarding the issues raised in Question B in the discussion paper, concerning the need to provide a reasonable explanation for an AI-informed decision and the need for such a decision to give proper consideration to the relevant human rights of an affected individual.

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[REDACTED]

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