Monash University Faculty of Law

Submission to the Human Rights Commission

Human Rights and Technology Inquiry

Prepared by Dr Maria O'Sullivan

Senior Lecturer, Monash Faculty of Law

████████████████████

Contents of Submission

A. Submission author information

Maria O'Sullivan is a Senior Lecturer in the Faculty of Law, Monash University. Her teaching and research interests are administrative law, public law and international refugee law. Maria has completed a PhD thesis on cessation of refugee status under the 1951 Refugee Convention and is the author of a number of international and national publications on the subjects of refugee law and public law. Her latest publication is 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 44(2) *UNSW Law Journal* (co-authored with Emily McDonald). She also produced an edited volume on access to refugee protection and procedures in 2017: 'States, the Law and Access to Refugee Protection - Fortresses and Fairness' (Hart; co-authored with Dallal Stevens, University of Warwick). This examines the current challenges faced by asylum seekers in gaining access to international refugee protection, including barriers to accessing a quality asylum procedure. Maria is a regular media commentator on refugee law and policy and has been published by The Conversation, Refugees Deeply and Asylum Insight.

She is currently undertaking a project looking at the application of automation and artificial intelligence in refugee status determination procedures.

B. Overview of Submission

This submission will focus on the decision-making aspects of the Human Rights and Technology Issue Paper, particularly procedural fairness, and its application to a particularly vulnerable cohort – asylum seekers and refugees.

Important lessons about technology and human rights can be gained from analysing the way in which automation has been used to date (eg by Centrelink in relation to the 'robodebt' system).[1]

However, because of the fast moving nature of technology and the implications this has for the law, regard must also be had to the potential areas of concern for **future** application of technology.

As I am a refugee law and administrative law expert, I have focused on the way in which automation/technology may be used in the immigration context.

The Department of Immigration currently utilises automation for certain visa categories. There is legislative provision for this set out in s 495A of the Migration Act.[2] Although the Department of Immigration are yet to use this for refugee status decision making, it is very likely that the Department will commence using automated systems/technology for aspects of refugee determinations. This is particularly so because **other countries** are trialling the use of artificial intelligence (AI) in refugee decisions, notably, Canada[3].

Due to the speed at which AI is developing, it is important that a legal framework be put in place **before** AI or any level of automation is introduced into refugee determination processes. This will ensure that, as far as possible, any harms are pre-empted and steps are taken in advance to ensure technology both serves the public interest as well as respects the individual rights of asylum seekers.

---

[1] See <https://www.smh.com.au/politics/federal/robodebt-has-harmed-thousands-say-senators-20170621-gwvgzg.html>.

[2] Migration Act 1958 (Cth). http://www5.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s495a.html

[3] The Citizen Lab and the International Human Rights Program at the University of Toronto's Faculty of Law, *Bots at the Gate: A Human Rights Analysis of Automated Decision Making in Canada's Immigration and Refugee System*, 2018 <https://citizenlab.ca/2018/09/bots-at-the-gate-human-rights-analysis-automated-decision-making-in-canadas-immigration-refugee-system/>

C. Submission in detail

1. The Procedural Fairness implications of Technology

Procedural fairness is comprised of the hearing and bias rules.

Broadly speaking, the hearing rule requires a person affected by a decision to 'know the case sought to be made against him and to be given an opportunity of replying to it'.[4] It is also accepted that 'the concern of the law is to avoid practical injustice'.[5] Procedural fairness is a central principle of Australian law and is regarded as cornerstone of the rule of law, with the former Chief Justice of the Australian High Court, Chief Justice French, describing procedural fairness as 'indispensable to justice'.[6] Procedural fairness is a flexible principle and, depending on the context of the decision, can include the making of written submissions, provision of translators and an oral hearing.

Under Australian Law, bias may be established if a fair-minded lay observer person would reasonably suspect or apprehend that the decision-maker is biased, that is, a decision-maker has:

- an interest in the outcome of the matter (eg some pecuniary interest, family relationship etc); or
- has prejudged it (eg; illustrated by comments during proceedings or outside the court/tribunal).[7]

I note that procedural fairness is not simply important for the individual applicant concerned, but also for the broader functioning of the administrative and judicial system, particularly public confidence in governmental decisions. This is an important consideration in the context

---

[4] *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550, 582 (Mason J).
[5] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [37] (Gleeson CJ).
[6] R French, 'Sir Anthony Mason Lecture: Procedural Fairness – Indispensable to Justice?' (University of Melbourne Law School, 7 October 2010), <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf>.
[7] See Mark Aronson, Matthew Groves and Greg Weeks 'Judicial Review of Administrative Action and Government Liability' (Thomson Reuters, 2017) Chapter 9.

of technology as it will be of vital importance that any automated system **works** but also that the public have **confidence** in the integrity and fairness of that system.

The problems posed by technology, particularly AI, under procedural fairness principles are as follows:

(i) Explainability

Procedural fairness will require the decision-maker to explain to the applicant how the algorithm works, what data it takes into account, how it weighs various factors, and the means by which it arrived at the decision about the applicant. This will have to be done in such a way that the applicant can understand the decision and has a meaningful opportunity to respond to it.

Automation raises concerns about whether decision-makers in charge of automated systems will be able to sufficiently understand the highly technical information which have been used in an automated decision. This is important as it raises related concerns about whether they will be able to communicate that to the affected application pursuant to procedural fairness requirements (the right of the person to know the case made against them).

(ii) Need for an oral hearing

Procedural fairness is designed to be a flexible principle that may require stronger procedural safeguards for vulnerable applicants. In some instances, procedural fairness will require an **oral hearing.** The problem with a fully automated system of decision making is that applicants may not be given an oral hearing on their case (unless that is built into the system). Therefore, in some decisions there will need to be a 'human in the loop'.

3. Case study - Application of Technology to Vulnerable groups - Refugees

As I and others have argued,[8] refugee status determination ('RSD') is a complex and difficult process requiring decision-makers to make findings on a wide range of evidence which is often highly contested. Key aspects of the process raise particular issues for fairness: central facts are often not able to be verified by documentation,[9] cases often turn on findings about an applicant's credibility and country information (the latter of which may be conflicting and unclear)[10]; and decisions involve speculative, prospective assessments about likely harm to applicants upon return to their home country.[11]

Often applicants are vulnerable within the process as they typically do not speak English and have little understanding of the Australian legal system.[12] These factors, together with the seriousness of the subject matter of the decision, suggest that a high standard of procedural fairness should be given to applicants.[13]

However, RSD is also usually a high volume area which means that decision-makers must make these decisions with both accuracy and *efficiency*. As I note below, the use of automation in RSD would serve that efficiency goal. The question then becomes how **fairness** can be implemented in the process.

---

[8] Emily McDonald and Maria O'Sullivan 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 44(2) *UNSW Law Journal* 1003-43.

[9] For instance, many asylum seekers do not have passports or documentary evidence of persecution; see James A. Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700, 700–01.

[10] See discussion in Robert Thomas, Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication (Hart, 2011), 168-171.

[11] See the Full Court of the Federal Court of Australia in *CSO15 v Minister for Immigration and Border Protection* [2018] FCAFC 14 at [23]: 'Both the refugee and complementary protection criteria, insofar as they require a focus on risk of harm (whether for specific reasons or not), require the decision-maker to engage in a predictive and therefore somewhat speculative task about what is likely to happen to a person in the reasonably foreseeable future on return to her or his country of nationality' [citations omitted].

[12] This may be exacerbated if the applicant does not have legal assistance. On the important of legal representation, see Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart, 2017), 25-26.

[13] The importance of the subject matter of the decision, which in refugee cases may involve risks to life or freedom if an asylum seeker is returned to their country of origin, has been recognised as requiring high procedural fairness standards in a number of cases, see for example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22, 206 CLR 57.

Possible benefits posed by use of technology in refugee status decisions re: procedural fairness and quality of decision-making

Technology can be beneficial to some aspects of decision making in the refugee context. Indeed, it can be transformative. For instance, note the use by stateless Rohingya using blockchain technology to give themselves digital identity when they do not have citizenship documents.[14]

Some specific benefits in relation to refugee status determination include:

- Legal advisers can use technology to communicate to asylum seeker clients in isolated places where they do not have access to phones.

- Automation and AI may be able to take into account more information than a human might be able to consider.

- It could contribute to improvements in consistency and certainty to this area. Consistency and certainty are recognised as important rule of law objectives as well as being desirable goals for good decision-decision making.[15]

- Technology could be used to increase efficiency in refugee decision processes. I recognise that the value of efficiency is a necessary part of the concept of good administration and that undue delay, particularly in RSD, is unwelcome aspect of a decision-making system. Many RSD processes, both in Australia and elsewhere, have been beset by significant issues of delay[16] and the judicious, careful use of AI **may** be able to add the value of efficiency to the process without limitations on fairness.

---

[14] Skot Thayer and Alex Hern 'Rohingya turn to blockchain to solve identity crisis', The Guardian, 21 August 2018 <www.theguardian.com/world/2018/aug/21/rohingya-turn-to-blockchain-to-solve-identity-crisis>.

[15] See discussion of this in Lisa Burton-Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) Chapter 1.

[16] See discussion in Emily McDonald and Maria O'Sullivan 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 44(2) *UNSW Law Journal*. See also Michael Lavarch, *Report on the increased workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT)*, Department of Immigration, June 2012.

- AI may be of benefit as it is a predictive tool. One of the questions at the heart of RSD is what will happen to the person in the 'reasonably foreseeable future'. This is a difficult decision to make and it may be that automation can more accurately and objectively consider this issue (particularly because of the volume and breadth of the data able to be inputted).

- A certain level of automation in appropriate areas of RSD may alleviate some concerns raised by entirely human-based decision-making. For instance, UNHCR has acknowledge that the repetitive nature of a refugee status decision-maker's role means that there is a risk that they will, consciously or unconsciously, apply predetermined assumptions of an applicant's credibility to their assessment.[17] This can create the following problems:
    - it can make it difficult for decision-makers to remain objective and impartial
    - constant exposure to stories of torture, violence, or inhuman and degrading treatment can have adverse psychological impacts on refugee status decision-makers. As a result, they may experience case-hardening, credibility fatigue, emotional detachment, stress and vicarious trauma[18]
    - Introduction of an automated component may alleviate some of those human-focused problems
    - This is recognised in the guidelines formulated for the EU General Data Regulation which notes that data controllers 'may wish to use automated decision-making, for example, because it: potentially allows for greater consistency or fairness in the decision making process (e.g. it might reduce the potential for human error, discrimination and abuse of power)'. [19]

---

[17] UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013), 79 [3.3], <www.unhcr.org/en-au/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html>.

[18] UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013), 79 [3.4], <www.unhcr.org/en-au/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html>.

[19] Article 29 Data Protection Working Party (European Commission), *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, adopted on 3 October 2017; Revised and Adopted on 6 February 2018; p.12 <http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612053>.

Possible disadvantages/concerns re procedural fairness

- There may be about the giving of 'consent' to the use of automation/technology. Unlike citizens who can 'opt out' of data systems such as MyHealthRecord, asylum-seekers typically do not have a choice in how their visa decisions are processed. If the Department of Home Affairs wish to use automation in assessing their claim, there is little room for choice or consent.

- Parts of refugee law raise particularly evaluative considerations which are ill-suited to automation/AI. These include whether it is 'reasonable' for a person to relocate within their country of origin to avoid persecution and whether it is 'reasonable' for a person to change their behaviour to avoid persecution.[20]

- Integrity of data and the automated system: automated systems rely on good data and good data management. The latter may pose issues for confidentiality of asylum seeker's identity. This was litigated in 2016 in the High Court in relation to the inadvertent publication by the Department of Immigration of a database containing the full names, nationalities, location, arrival date and boat arrival information on the department's website.[21]

- As noted above, significant difficulties are posed by AI/deep learning in the ability of decision-makers to provide the reasons for decision - the so-called 'explainability' of automated decisions.

---

[20] On the issue of evaluative considerations, see French CJ: 'The judicial function inevitably requires judgments which are normative or evaluative in character and cannot be explained only by the application of legal rules with logically mandated outcomes. Examples include decisions turning upon the characterisation of conduct as reasonable or done in good faith or careless or the characterisation of events following on from conduct as foreseeable or too remote to attract liability. In the field of discretionary decisions such as sentencing or the grant or withholding of equitable remedies, the judge's reasons are expected to explain the factual and legal basis of the decision including the significance attributed to different circumstances of the case. … It is possible but not easy to reduce the decision-making process to logical rules where evaluative elements are involved and even more so where the decision-maker's state of mind itself conditions the exercise of the power': http://www.fedcourt.gov.au/__data/assets/pdf_file/0008/47069/French-CJ-20171120.pdf.

[21] *Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI* [2016] HCA 29.

- Transparency: algorithms and the training data used for them are often subject to proprietary restrictions/trade secrets (and are classified as 'commercial-in-confidence). This poses significant obstacles for the ability of applicants to obtain information about how a decision which affects them has been made.

- Procedural fairness has been codified and restricted in some pieces of Australian legislation (see eg the Migration Act 1958 Cth, ss424A). The current procedural fairness provisions set out in legislation are predicated on having a 'human in the loop' in decisions. Therefore, legislation setting out procedural fairness requirements (such as s424A Migration Act) will need to be amended in order to reflect the different practical context of decision making using automation/AI.

- General country information is not usually the subject of procedural fairness requirements under the Migration Act. This would need to be reviewed if any level of automation or AI was introduced into refugee status decision-making in Australia. For instance, that restriction may need to be removed so that there **is** an obligation on a decision maker to give an applicant a summary of what data was inputted and how the computing system analysed the relevant country information.

- Many refugee decisions depend on the findings as to the applicant's credibility, which is often a highly subjective opinion made by the individual decision-maker.[22] Although I have flagged some potential advantages from automation in this context (a level of objectivity), the use of automated decision making in the refugee context may still require an oral hearing to be given to the applicant. As I have pointed out in my academic writing:

    'it is unlikely that the assessment of applicant credibility through consideration of their demeanor, reconciling inconsistences and paying attention to an applicant's individual vulnerabilities can be done comprehensively without gaining a personal impression via an oral hearing'.[23]

---

[22] See discussion in Emily McDonald and Maria O'Sullivan 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 44(2) *UNSW Law Journal* .

[23] Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 44(2) *UNSW Law Journal.*

- Evaluative considerations: RSD authorities are increasingly using concepts such as relocation[24] and behaviour modification.[25] I would argue that the factual questions which need to be asked as part of such assessments can only be adequately answered by way of a responsive oral interview (not merely by way of an AI system).

- There are also some particular concerns raised for the bias rule under procedural fairness. Typically, an applicant is able to argue that a decision-maker is biased because of the way in which the decision-maker has carried out the hearing or from the decision-record. The use of AI is problematic as the bias in the data or system may not be apparent to the applicant or the applicant's legal representative. This may make it very difficult for an applicant to challenge a decision based on the bias rule.

D. Recommendations

1. Proposed Legislative framework

A methodology or framework should be developed to determine the types of administrative processes and systems which are appropriate for the experimental use of automated decision system technologies, and which are not. This should be made public.

In formulating regulation, I note that there is a tension in this area between introducing limitations and providing reassurance for the public that using algorithms will provide fair and just outcomes, whilst on the other hand avoiding an undue stifling of the AI sector. This will need to be borne in mind in introducing regulation in this area. Further, regulation must be configured so it provides certainty but also allows for the technological advances. So it must be futuristic in nature.

---

[24] According to this principle, if a person is found to face a well-founded fear for a Convention reason in their country of origin, they may *not* be found to be a refugee if there is a place *within* their country of origin in which they do not face such a fear and to which they can reasonably be required to relocate.

[25] See discussion in Maria O'Sullivan, 'Minister for Immigration and Border Protection v SZSCA: Should Asylum Seekers Modify their Conduct to Avoid Persecution?' (2014) 36(3) *Sydney Law Review* 441-456.

Specific proposals:

a. An International AI Protocol

I propose the formulation of an international AI Protocol.

This could reflect some of the existing provisions of the EU General Data Protection Regulation (GDPR). For instance, Article 22 of the GDPR guarantees the right to challenge the automated decisions of algorithms, including the right to have a human review the decision.[26]

> The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.
>
> If automation is used, the decision maker shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

b. Legislation

The international instrument should be supported by national legislation or regulations.

The provisions in the international and domestic instruments should be informed by:

- Rule of Law values:
    - the need to make the law clear, certain and understandable;
    - the rules and law must be accessible and open;
    - laws and procedures should be fair.[27]

---

[26] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[27] See discussion of the different schools of thought on the rule of law in Lisa Burton-Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 5-15.

- Concepts which already exist at law but which can be adapted to the AI context. These include the 'best interests' principle and concepts such as fiduciary duty.

Best interests principle

The 'best interests' principle is set out in the Convention of the Rights of the Child (CROC). Article 3(1) of CROC states that:

> in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[28]

I suggest that this could be **adapted for use in the technology/AI context** so that a principle of AI would be that the best interests of humans should always be a relevant consideration. The formulation would be as follows:

> in all actions concerning technology, automation and artificial intelligence, whether undertaken by public or private institutions, courts of law, administrative authorities or legislative bodies, the best interests of the human shall be a primary consideration.

I also note that some commentators have discussed the use of other principles, such as fiduciary duty.[29] I would argue that the 'best interests' principle can be used in conjunction with this.

In addition, the regulations should provide the following procedures:

1. Applicants should be given **advance notice** that an automated decision system may be used to reach a decision.

2. A licencing system should be established to regulate the use of automation (particularly by companies). As part of this, governments and/or corporations must obtain an 'Algorithmic impact statement' prior to the use of automation systems in

---

[28] The Convention on the Rights of the Child, 20 November 1989, UNTS 1577, p. 3.
[29] See discussion in John Lightbourne, Algorithms and Fiduciaries: Existing and Proposed Regulatory Approaches to Artificially Intelligent Financial Planners, (2017) 67 *Duke Law Journal* 651-679 <.https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3920&context=dlj>

government-decision making. [30] This would operate in a similar way to the 'environmental impact statements' provided for in State environmental protection legislation.[31]

3. Enforcement and Institutional framework

The use of technology for government decision making will require an enforcement mechanism to ensure it is compliant with human rights.

I recommend the establishment of a Technology Ombudsman[32] who can conduct investigations into the actions of Australian government officials, agencies and their service providers.[33]

This could be done by adding a 'Technology Oversight' office to the existing Information Commissioner or, alternatively, by creating a special Data Commissioner or AI Ombudsman.

- o This body would hear complaints against a decision made by either a State-operated or private company's algorithm where an individual felt they had been discriminated against, or the decision needed explaining.
- o Possible existing models – Telecommunications Ombudsman.[34]

The above ideas are in draft form and, as such, require further development and refinement. Therefore, I am happy to discuss any of the above with members of the Commission as part of the Human Rights and Technology project.

---

[30] See discussion in Dillon Reisman, Jason Schultz, Kate Crawford, and Meredith Whittaker (2018), "Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability," *AI Now Institute* <https://ainowinstitute.org/aiareport2018.pdf>.

[31] See eg https://www.qld.gov.au/environment/pollution/management/impacts

[32] Or AI Ombudsman.

[33] This is either in response to complaints from individuals, groups or organisations. Ombudsman offices can also undertake 'own motion' investigations: see L. Burton-Crawford et al *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 137-139.

[34] https://www.tio.com.au/