Briefing on Safe, Responsible and Transparent Automated Decision Making in the Public Sector

Data Protection and Digital Information Bill

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For further information contact

Ellen Lefley, Lawyer, elefley@justice.org.uk
Caroline Selman, Senior Research Fellow, c.selman@publiclawproject.org.uk
Mia Leslie, Research Fellow, m.leslie@publiclawproject.org.uk

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. Public Law Project ("**PLP**") is an independent national legal charity. We are researchers, lawyers, trainers, and public law policy experts. Our aim is to make sure state decision-making is fair and lawful and that anyone can hold the state to account.

3. **This briefing addresses amendments to the Data Protection and Digital Information Bill ("**DPDI Bill**") concerning automated decision making systems in the public sector. It sets out JUSTICE and PLP's support for new clause amendments after Clause 14, tabled by Lord Clement-Jones, which ensure public sector automated decision-making is safe, responsible and transparent.**

Summary

4. Artificial intelligence ("**AI**"), algorithmic and automated tools are increasingly being used across the public sector to make and support many of the highest impact decisions affecting individuals, families, and communities, across healthcare, welfare, education, policing, immigration, and many other sensitive areas of an individual's life.

5. The speed and volume of decision-making that new technologies will deliver is unprecedented. Their introduction creates the potential for decisions to be made more efficiently and at lower costs – however as recent scandals such as Horizon in the UK, and Robodebt in Australia demonstrate, it also comes with very real risks of unfairness, discrimination and misuse.

6. As the Bletchley Declaration signed by the UK and summit attendees states,

    > "[F]or the good of all, AI should be designed, developed, deployed, and used, in a manner that is safe, in such a way as to be human-centric, trustworthy and responsible."[1]

7. We therefore welcome the recent commitments made in the Government's response to the AI Regulation White Paper to:

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[1] UK Department for Science, Innovation & Technology, Foreign, Commonwealth & Development Office, "Policy paper: The Bletchley Declaration by Countries Attending the AI Safety Summit, 1 – 2 November 2023"

- Adopt five cross-sectoral principles (1. Safety, security and robustness, 2. Appropriate transparency and explainability, 3. Fairness, 4. Accountability and governance, 5. Contestability and redress) to drive the development of safe and responsible AI innovation, and

- Improve transparency by making the Algorithmic Transparency Recording Standard ("**ATRS**") a requirement for all government departments to adopt.

8. **We believe that the DPDI Bill presents a timely opportunity to deliver on these commitments by introducing:**

- **<u>A statutory duty</u> on public sector actors to have 'due regard' to ensuring automated decision systems are responsible and minimise harm to individuals and society at large, and**

- **<u>A statutory transparency requirement,</u> placing the requirement for public sector actors to comply with the ATRS on a statutory footing.**

1. A statutory duty for safe and responsible automated decision making

9. When technology is used to make decisions about people's lives, it must be done ethically. This includes being safe, responsible and transparent about the technology and its use. The imperative is wider than automated decision making in the data protection context: it is required whether the data is "personal data" or not, i.e. if someone can be identified by it, and when the process is partly as well as entirely automated. Indeed, the Post Office-Horizon scandal has devastatingly demonstrated the disastrous consequences which can occur when faulty technology is not used ethically by the humans involved.

10. Ensuring core ethical duties are in place is a matter of increasing importance given the accelerating pace of progress in AI. AI is already being used across the public sector, and the Secretary of State for Science, Innovation and Technology has stated the Government intends to "revolutionise our public services" using AI.[2]

11. Outwardly, the Government seems to agree. Its cross-sectoral ethical principles of AI feature both substantive and procedural principles:

- Safety, security and robustness.

- Appropriate transparency and explainability.

- Fairness.

- Accountability and governance.

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[2] DSIT, *A pro-innovation approach to AI regulation: Government response* (February 2024), The Rt Hon Michelle Donelan MP, Secretary of State for Science, Innovation and Technology, Ministerial foreword.

- Contestability and redress.

12. Indeed, the Government has stated that safety is a priority: it has positioned itself as a world leader in AI safety, seen fit to create an entire new AI Safety Institute, and publicly committed to "advancing AI safety in the public interest."[3]

13. **However, the legal reality is that the Government has elected not to secure such principles on a statutory basis**. Its preferred non-statutory approach instead relies on regulators, such as the Competition and Markets Authority and the Information Commissioner's Office ("**ICO**"), to implement these optional principles, while trusting those exercising power in the public sector (for example, processing non-identifiable data to make decisions, which falls outside the remit of the ICO) to opt in, with no obligation to do so. The public therefore have to rely on good will, legacy legal obligations and avenues of enforcement, and voluntary dedication of public resources into preventing new harm from new technologies.

14. The non-statutory basis of the AI principles is part of an overall step in the wrong direction. It takes us away from a regime in which the starting point is protecting individuals and pre-empting harm to individuals before it occurs, and towards a regime in which ethical principles are for guidance only, and individuals bear the burden of incurring harm followed by the confusing and stressful task of challenging it, without any clear, legally enforceable overarching duties.

15. **This is a missed opportunity to create ethical, transparent and safe standards for automated decision systems including AI systems**, as highlighted by many members at second reading, including Lord Knight, Lord Kamell, Lady Young, the Bishop of Southwell and Nottingham, Lord McNally, Lady Kidron, Lord Clement-Jones and Lord Holmes.

    JUSTICE and PLP urge Peers to respond to this missed opportunity by supporting the below New Clauses, under the name of Lord Clement-Jones, which create statutory obligations for ethical, safe and transparent automated decision systems.

A New Clause on Safe and Responsible Automated Decision Systems

16. The New Clause amendment on "Safe and Responsible Automated Decision Systems" in the name of Lord Clement-Jones seeks to shift the burden back on public sector actors. It puts the onus on them to ensure safety and prevent harm, rather than waiting for harm to occur and putting the burden on individuals to challenge it.

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[3] ibid

17. It imposes a *proactive* statutory duty, similar to the public sector equality duty under s.149 Equality Act 2010, to have "due regard" to ensuring automated decision systems are responsible and minimise harm to individuals and society at large. (**Subsection 1**)

18. The duty incorporates the key principles in the Government's AI white paper, and therefore is consistent with its substantive approach. It also includes duties to be proportionate, give effect to individuals' human rights and freedoms, and to safeguard democracy and the rule of law.[4] (**Subsection 2**)

19. It applies to all "automated decision systems": these are any tool, model, software, system, process, function, program, method and/or formula designed with or using computation to automate, analyse, aid, augment, and/or replace human decisions that impact the welfare, rights and freedoms of individuals.[5] This therefore applies to partly automated decisions as well as those entirely automated, and systems in which multiple automated processes take place.[6] (**Subsection 6**)

20. It applies to traditional public sector actors, i.e. public authorities; those exercising public functions, including private actors outsourced by Government to do so; those who may exercise control over automated decision systems, therefore including regulators; as well as those using data collected or held by a public authority, again who may be public or private actors. (**Subsections 1 and 7**)

21. It then provides one mandatory mechanism through which compliance with the duty must be achieved: impact assessments (**Subsections 3**). The term used – Algorithmic Impact Assessments ("**AIA**") – is adopted from Canada's analogous Directive on Automated Decision-Making, which mandates the use of AIAs for all public sector automated decision systems.[7] The obligation is on the Secretary of State, via regulations, to set out a framework for AIAs (**Subsections 4-5).** The framework would help actors uphold their duty to ensure automated decision systems are responsible and safe; understand and reduce the risks in a proactive and ongoing way; introduce the appropriate governance, oversight, reporting and auditing requirements; and communicate in a transparent and accessible way to affected individuals and to the wider public.

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[4] See Leslie, Burr, Aitken, Cowls, Katell, and Briggs*, Artificial intelligence, human rights, democracy, and the rule of law: a primer.* (The Council of Europe, 2021).

[5] As adopted in Washington State Bill SB 5116 (not passed) Establishing guidelines for government procurement and use of automated decision systems in order to protect consumers, improve transparency, and create more market predictability.

[6] On how this can then be presented in an accessible way, see System Cards, a new resource for understanding how AI systems work (meta.com)

[7] Canada, Directive on Automated Decision Making 2019. "Algorithmic" is used interchangeably with "automated decision system" to denote the automated process which is being assessed for its impact.

2. Transparency in public use of automated decision systems

22. Transparency about how systems operate and how they affect decision-making is essential to building and maintaining public trust. Without this information, individuals will remain cut off from being able to properly understand how these technologies affect their lives and, crucially, from being able to seek redress if systems fail, make the wrong decisions, or operate unlawfully.

23. The Central Digital and Data Office ("**CDDO**") and Centre for Data Ethics and Innovation ("**CDEI**"), now the Responsible Technology Adoption Unit launched the Algorithmic Transparency Recording Standard ("**ATRS**") in November 2021. The idea for the ATRS arose from a recommendation by the CDEI that "the UK Government should place a mandatory transparency obligation on public sector organisations using algorithms to support significant decisions affecting individuals".[8] It is intended to help public sector organisations provide clear information about the algorithmic tools they use, how they operate and why they're using them.

24. The ATRS is a promising initiative that could go some way to addressing the current transparency deficit around the use of algorithmic and AI tools by public authorities. Organisations are encouraged to submit reports about each algorithmic tool that they are using that falls within the scope of the Standard[9].

25. We welcome the recent commitment made in the Government's response to the AI Regulation White Paper to make the ATRS a requirement for all government departments. However, we believe that Government has a timely opportunity to deliver on this commitment through the DPDI Bill by placing it on a statutory footing rather than it being limited to a requirement in guidance.

26. This is because the current non-statutory status of the ATRS has not proved effective at achieving its aims. Only a very small number of the algorithmic decision-making tools which are used by public authorities appear on the register.

   - Since the inception of the ATRS, only 7 transparency reports have been released.

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[8] Cabinet Office, UK government publishes pioneering standard for algorithmic transparency: (29 November 2021): https://www.gov.uk/government/news/uk-government-publishes-pioneering-standard-for-algorithmic-transparency

[9] Central Digital and Data Office and Centre for Data Ethics and Innovation, Guidance for organisations using the Algorithmic Transparency Recording Standard (5 January 2023), https://www.gov.uk/government/publications/guidance-for-organisations-using-the-algorithmic-transparency-recording-standard

- Many of the key government departments using tools that fall within the scope of the ATRS, such as the Home Office and Department for Work and Pensions[10], have never submitted a report[11].

- The Cabinet Office's recent report on the use of a digital file-review tool is the first transparency report released since 2022.

27. It is therefore clear that the non-statutory approach to date has been ineffective and that placing the ATRS requirement in legislation is necessary to ensure that government departments and other public authorities have a legal duty to adhere to the requirement to submit reports. Such a duty is proportionate to the nature and impact of the risk posed by the widespread and fast growing use of AI and algorithmic tools and will ensure that public authorities can be held accountable for failure to comply with the duty.

New Clauses on Algorithmic Transparency Recording Standard

28. At House of Commons Public Bill Committee stage Stephanie Peacock, Labour MP and then opposition spokesperson for the Bill, tabled a new clause entitled "**Transparency in use of algorithmic tools**". The clause aimed to put a legislative obligation on Government departments, public authorities and Government contractors using algorithmic tools to process personal data to use the ATRS.[12]

29. An equivalent new clause amendment has now been tabled in the name of Lord Clement-Jones as a new clause to be inserted after clause 14 of the Bill (entitled "**Use of the Algorithmic Transparency Recording Standard**").

    JUSTICE and PLP urge Peers to support this new clause.

30. Should this new clause be rejected, we urge Peers to consider the following alternative new clauses:

    i) **"Obligation to use the Algorithmic Transparency Recording Standard"**

       - Government's position as announced in response to the AI White Paper consultation is that it plans to take a phased approach to introducing the ATRS, by

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[10] See Public Law Project's Tracking Automated Government (TAG) Register for further information on the use of automation, algorithms and AI by public authorities. Public Law Project, Tracking Automated Government 'TAG' Register (9 February 2023) http://trackautomatedgovernment.org.uk/

[11] Central Digital and Data Office and Centre for Data Ethics and Innovation, Algorithmic Transparency Reports (13 February 2023) https://www.gov.uk/government/collections/algorithmic-transparency-reports

[12] House of Commons, Public Bill Committee (Bill 265), Data Protection and Digital Information (No. 2) Bill (23 May 2023), New Clause 9, 284, https://publications.parliament.uk/pa/bills/cbill/58 03/0265/PBC265_DataProtectionBill_1st-8th_Compilation_23_05_2023.pdf

initially making it a requirement (in guidance) for Government bodies only, before expanding it across the wider public sector over time.[13] If the preferred new clause referred to at paragraph 29 above ("**Use of the Algorithmic Transparency Recording Standard**") is rejected on the basis of wanting to adopt an equivalent phased approach**,** we urge Peers to support the alternative new clause entitled "**Obligation to use the Algorithmic Transparency Recording Standard**" instead.

- This alternative new clause requires the Secretary of State to put a legislative obligation on Government departments to comply with the ATRS. It also requires the Secretary of State to place a similar obligation on public authorities that are not Government departments, but only if the Secretary of State considers it appropriate to do so. If the Secretary of State does not consider it appropriate, then they must provide their reasons to Parliament at six-month intervals.

ii) **"Reporting framework for transparency in the public use of algorithmic tools"**

- At the House of Commons Public Bill Committee stage, Sir John Whittingdale, Minister for Data and Digital Infrastructure, rejected the equivalent of the preferred new clause described at paragraph 29 ("**Use of the Algorithmic Transparency Recording Standard**") on the basis that the "algorithmic transparency recording standard is still a maturing standard that is being progressively promoted and adopted". He stated that its evolving nature means that "enshrining the standard into law at this point of maturity could hinder the ability to ensure that it remains relevant in a rapidly developing technology field".[14]

- Since then, as set out above, Government has committed to making the ATRS a requirement "[f]ollowing a successful pilot of the standard, and publication of an approved cross-government version last year".[15] We therefore anticipate that the concerns of Sir John Whittingdale no longer apply. However, if the new clause is rejected on these grounds, we urge Peers to support the alternative new clause entitled "**Reporting framework for transparency in the public use of algorithmic tools**" instead.

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[13] DSIT, *A pro-innovation approach to AI regulation: Government response* (February 2024), paragraphs 93, 103 and 150

[14] Sir John Whittingdale, Public Bill Committee Debate, 23 May 2023, Data Protection and Digital Information Bill (eighth sitting), column 286, https://hansard.parliament.uk/Commons/2023-05-23/debates/8a27fce9-285d-4e1b-8c1e-662f3600d681/DataProtectionAndDigitalInformation(No2)Bill(EighthSitting)

[15] DSIT, *A pro-innovation approach to AI regulation: Government response* (February 2024), paragraph 150

- This new clause requires the Secretary of State to introduce regulations that place an obligation on government departments, public authorities and all persons in the exercise of a public function to complete and publish algorithmic transparency reports that contain a base level of information about algorithmic tools in use. This captures the same key disclosure requirements contained in the ATRS without referring to the ATRS by name.

iii) **"Transparency in Public Use of Algorithmic Tools"**

- If the new clause entitled "**Reporting framework for transparency in the public use of algorithmic tools**" is also rejected, we urge Peers to support the alternative new clause entitled "**Transparency in Public Use of Algorithmic Tools**" instead.

- This new clause requires the Secretary of State to introduce a compulsory transparency reporting requirement (such as the ATRS) provided that they consider it appropriate to do so. If the Secretary of State does not consider it appropriate, then they must provide their reasons to Parliament at six-month intervals (which is the current frequency with which the ATRS is being reviewed).

- This is the least prescriptive of the proposed new clauses but seeks to ensure that there is a requirement to keep a mandatory transparency requirement in consideration.