![Public Law Project logo]

Central Digital and Data Office

Algorithmic Transparency Standard Pilot

Public Law Project's Feedback

Introduction

1. Public Law Project (PLP) is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice. One of our strategic focus areas is public law and technology.

2. Transparency in the use of government algorithms is one of PLP's objectives in this area. Developing disclosure obligations is in our view an essential step to improving fairness in the use of algorithmic technology.

3. The Algorithmic Transparency Standard has been developed by the Central Digital and Data Office (CDDO) and applies to algorithmic tools used by public sector organisations. The Standard aims to "help public sector organisations provide clear information about the algorithmic tools they use, and why they're using them… in a complete, open, understandable, easily-accessible, and free format." It is in its pilot phase.

4. PLP provides this document by way of feedback. At the end of the document, we make a number of specific proposals for improvement.

Initial views from PLP

5. PLP considers that transparency in government decision making is a requirement of procedural fairness, essential in upholding the rule of law and a key part of good administration in a democratic society. This applies to algorithmic decision making as much as it does to analogue decision making. Public law principles of transparency, procedural fairness, the duty to give reasons and the duty of candour are all likely to be engaged here − particularly where algorithmic decisions affect individuals' legal and economic rights.

6. At this early stage, it is difficult to tell how public authorities will engage with the Standard, apply the principles, and seek to make information available. On the basis of what we currently know, there are a number of issues that are likely to require further work and focus.

7. One of the main concerns is the legal status of the Standard. Given the widespread acceptance of the important and growing role of algorithms in public sector decision making, it is concerning that transparency requirements are not being developed via legislation. The lack of compulsory transparency may in itself offend against public law principles. We are also concerned that ongoing opacity around algorithmic decision making adds to mistrust in public authorities and is a regressive step away from an accountable state.

8. Especially given the lack of statutory footing or compulsion around the Standard, we anticipate that its intersection with the data protection laws and the Freedom of Information Act 2000 (FOIA) is likely to create unwelcome complexity and tension with those regimes. For example, it may be that government departments use compliance with the Standard as an excuse for failing to comply with freedom of information obligations.

9. We also note that the Standard is being developed in a context where major changes to data protection law have been proposed (see [Data: a new direction](#)), and we are concerned that the overall direction of travel is towards reduced information and data protection rights. It is of fundamental importance in a democratic society that individuals have legally enforceable rights allowing them to participate in and understand government decisions made about them. If the Standard is not put on a statutory footing, and is implemented within a wider landscape of potentially weakened data protection law, it will be seriously limited in this regard. Further, an optional Algorithmic Transparency Standard where individuals may not know in advance how the algorithmic tools will operate (so as to be able to prepare and participate), cannot understand the kind of information that is held about them, how it may be used as a basis for decisions impacting their legal or economic rights or entitlements, or the reasons for decisions made in their cases, may pose a significant relaxation of current common law public law principles.

10. Our experience is that government departments are generally unwilling to share information about their algorithmic tools. We anticipate that the effectiveness and value of the Standard will depend to a large extent on the criteria for any compulsory engagement. If engagement is to be made compulsory, there will be a number of further considerations including: whether engagement be compulsory in respect of all algorithmic tools, or only tools meeting certain criteria, perhaps modelled on the prioritisation criteria set out above;

whether exemptions apply to the provision and/or publication of all or some information about certain algorithmic tools; the nature of any such exemptions, which could, for example, be modelled on exemptions under the FOIA.

11. The existing prioritisation criteria for publication fall into three groups: i) technical specifications, ii) potential public effect and iii) impact on decision making. For an algorithm to get priority publication, it must meet one criterion in each of the three groups. PLP considers it reasonable for the prioritisation criteria – and any criteria for compulsory engagement – to include ii) potential public effect and iii) impact on decision making, provided that 'impact on decision making' retains a wide definition, intended only to rule out algorithmic tools used for activities separate from any decision making process. However, i) technical specifications should not be a necessary condition for priority publication, and certainly not for compulsory engagement. If, for example, an algorithm assists human decision making and affects substantive rights or has legal impact on individuals, this is a sufficient basis for requiring transparency – even if it is a simple algorithm that does not use machine learning, or complex statistical analysis or data analytics. In these circumstances, disclosure of key information, such as the algorithm's criteria, will be necessary for individuals to understand the gist of a significant decision affecting them.

12. The inclusion of impact assessments within Tier 2 is very welcome. However, there is otherwise a lack of focus within the Standard on the monitoring and evaluation work conducted by public authorities in relation to their algorithmic tools. Public authorities adopting algorithmic tools will need to consider on a regular basis the impact and efficacy of these tools, and their compliance with equality duties. We consider that monitoring and evaluation work should be disclosed along with the other information set out in the Standard. Monitoring and evaluation data is an essential part of the information picture, and disclosure of this data will be key to ensuring openness in the way algorithmic tools support public decision making.

13. Another concern is a potential lack of useful and important operational detail (or 'design-process information') that would fall to be disclosed under the Standard as it currently stands. As currently drafted, neither Tier 1 nor Tier 2 requires sufficient operational details for individuals to understand the decision making process to which they have been subjected. This will seriously hamper an individual's ability to challenge an adverse decision. Further, it will hamper their ability to prepare in advance for, say, a welfare benefits or visa application. In the analogue decision making world, policies and guidance are generally publicly available, and individuals and their legal advisers can use this to prepare for an application. An equivalent level of detail should be provided in respect of

algorithmic tools. At Tier 1, organisations are asked to explain 'how the tool works' but accompanying guidance would need to make clear that adequate operational detail is required. As currently drafted, there is no reference to any criteria or rules used by simpler algorithmic tools. At Tier 2, there is no requirement to provide an executable version of the tool i.e. a version that people can run and test for themselves. The 'technical specification' seems to require only a brief descriptor of the type of system used e.g. 'deep neural network'. The 'system architecture' is described in the Standard as 'the URL reference to documentation about the system architecture. For example, a link to a GitHub repository image or additional documentation about the system architecture.' If this requires nothing more than a screenshot showing the files contained in a private GitHub repository, it will not be very illuminating, in terms of understanding how the algorithm works.

14. At the moment, it seems that there are no guidelines for updating the information provided. If the Standard is to be impactful and facilitate meaningful transparency, it will be necessary for the information to remain up-to-date, especially if there are significant changes to, say, the way the algorithm works or personnel changes.

15. The initiative seeks to engage 'public sector organisations', but this term is not defined. It would be helpful if the guidance accompanying the Standard gave examples. PLP would welcome a broad definition of the term, not limited to government departments and local authorities. For example we would welcome a definition along the lines of section 6(3)(b) of the Human Rights Act 1998 (HRA), under which a 'public authority' includes "any person certain of whose functions are functions of a public nature".

Proposals for improvement

16. PLP makes the following proposals for improvement:

   i)   Requirements such as those within the Algorithmic Transparency Standard should be on a statutory footing. All public sector organisations should have statutory transparency obligations, in respect of all algorithmic tools involved in decision making with potential public effect. There will need to be careful consideration of how to make this new legislative scheme work alongside existing data protection laws and the FOIA.

   ii)   'Public sector organisation' should be broadly defined, along the lines of section 6(3)(b) HRA under which a 'public authority' includes organisations whose functions are of a public nature.

   iii)   There should be no exemptions to the compulsory provision of information to the Algorithmic Transparency Standard. There should, however, be some limited

exemptions to publication, the applicability of which falls to be determined not by the user of the algorithmic tool but by the operator of the Algorithmic Transparency Standard. These exemptions could be modelled on the FOIA. Exemptions should not apply to the publication of high-level information, including the fact that there is an algorithmic tool in use in a particular context. If more detailed information about a particular tool is withheld on the basis of an exemption, there should be readily accessible avenues for challenging this, with the possibility of review by an independent regulator such as the Information Commissioner's Office.

iv) It should be compulsory for organisations to update the information periodically, for example, every six months, and/or whenever there is a significant change.

v) The existing documents should be redrafted for clarity, and should include clearer and more detailed guidance about the information to be provided.

vi) At Tier 1, the high level explanation of how the algorithm works should include rules or criteria used by the algorithm. At Tier 2, there should be sufficient detail for an individual whose rights may be affected to fully understand how the process works. For example, we invite the Cabinet Office to consider whether a link to an executable version should be a requirement.

vii) Alongside impact assessments, Tier 2 should include other ongoing monitoring and evaluation work conducted by government departments, such as data on the impact and efficacy of their algorithmic tools.

viii) The Cabinet Office should evaluate the pilot and publish the outcome of this evaluation. It is highly likely that a second iteration will be required. PLP would be pleased to assist with evaluating the pilot and shaping the second iteration.

Public Law Project
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