Public Law Project Briefing: House of Commons AI debate

AI has tremendous potential for social good. However, it also comes with very real risks of unfairness, discrimination, and misuse. Public Law Project's research has shown that public authorities are increasingly using automated decision-making (ADM) and AI in a wide range of areas, including immigration, welfare benefits, policing and prisons, yet this is happening under the radar and without adequate safeguards.

If proper safeguards are not put in place, the use of AI by public authorities will undermine fundamental rights, degrade trust in our institutions and prevent individuals from feeling the intended benefits of introducing AI into public administration.

The Prime Minister's vision for the UK to become the 'home of global AI safety' is not matched by the Government's actions.[1] The Data Protection and Digital Information (No 2) Bill and the AI regulation White Paper put the UK 'behind the curve' on the regulation of public sector use of AI and ADM compared with other jurisdictions.

As reported earlier this month by the Daily Mail and BBC, 30 organisations, including Public Law Project, recently shared Key Principles for an Alternative AI White Paper, urging the Government to improve its proposals to regulate the use of AI by public authorities.

> "AI is hugely powerful. Chat GPT has caught everyone's attention, but public authorities have been using this tech for years and right now the Government is behind the curve on managing the risks.
> "We have seen public bodies using this tech in disturbing ways, from the use of discriminatory facial recognition by South Wales police, to the Department for Work and Pensions using AI to investigate benefits claimants."
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> *- Daily Mail: Shameem Ahmad, CEO, Public Law Project*

1. Public use of AI systems presents significant risks

The risks associated with the use of AI systems by public authorities are well established: they can discriminate, they can get things wrong, and they can be used in opaque ways, preventing access to justice.

Case study 1:

> In 2020, the Court of Appeal ruled that South Wales Police had not complied with the Public Sector Equality Duty in its use of facial recognition technology. The Court noted that there is evidence that facial recognition technology can result in unacceptable bias on the basis of race or sex, because it might be better at identifying faces of one sex or one race, and worse at identifying

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another. When deployed by police to help with identifying suspects and making arrests, this could lead to people with certain characteristics being more likely to be falsely identified and arrested.

Case study 2:

In the Netherlands, the tax authorities used an AI tool to help identify potential childcare benefit fraud, but the tool made thousands of mistakes.[2] Some wrongly accused families faced financial ruin, and several thousands of children were placed in state custody as a result of the accusations.[3] The victims had no way of knowing why they had been flagged, and the authorities did not make any general information about the system or how it worked public.[4] When victims tried to challenge the decision, they were told that officials couldn't access the algorithmic inputs, so couldn't say how decisions were made.[5] This meant that victims couldn't defend their innocence. This scandal was serious enough to cause the Government to resign.[6]

Case Study 3:

Here in the UK, the DWP has been experimenting with using AI for investigating benefits fraud. Since May 2020, over 188,000 claimants have had their benefits suspended by the Risk Review Team, one of three DWP teams we know are using automation, and 92% of those claimants' benefits are still suspended, awaiting a final outcome. Claimants whose benefits are suspended by the Risk Review Team are not given any information about why they have been referred for investigation, or how they can challenge the decision.

Currently, the risks associated with public use of AI are going mostly unchecked in the UK. PLP has gathered more than forty examples of ADM systems being used by public authorities in the UK through our investigative research, details of which are publicly available in our 'Tracking Automated Government' (TAG) Register.[7] We know that some of these systems use AI, but there is insufficient information available publicly to work out which. It should be a cause for concern that - due to the secrecy and lack of transparency around the use of such systems by public authorities - the information on the TAG Register had to be compiled through our own investigations, largely conducted through Freedom of Information Act requests.

At the moment, when a public authority uses AI to help make a decision, they don't have to tell the person affected that AI has been used and how it works, and they usually don't publish

[2] https://cadmus.eui.eu/bitstream/handle/1814/75390/Reclaiming_transparency_contesting_Art_2022.pdf?sequence=1&isAllowed=y

[3] https://www.europarl.europa.eu/doceo/document/O-9-2022-000028_EN.html

[4] https://cadmus.eui.eu/bitstream/handle/1814/75390/Reclaiming_transparency_contesting_Art_2022.pdf?sequence=1&isAllowed=y; https://www.amnesty.nl/content/uploads/2021/10/20211014_FINAL_Xenophobic-Machines.pdf?x64788

[5] https://cadmus.eui.eu/bitstream/handle/1814/75390/Reclaiming_transparency_contesting_Art_2022.pdf?sequence=1&isAllowed=y; https://www.amnesty.nl/content/uploads/2021/10/20211014_FINAL_Xenophobic-Machines.pdf?x64788

[6] Dutch government resigns over child benefits scandal | Netherlands | The Guardian

[7] trackautomatedgovernment.org.uk

enough information to tell us if the tool might be discriminatory, or how accurate it is.

2. The Government's plans for regulating AI don't address these risks adequately

The Government's current plans set out in the AI White Paper do not place any new obligations on public bodies to be transparent about their use of AI, to make sure their AI tools meet accuracy and non-discrimination standards, or to ensure there are proper mechanisms for challenge or redress when AI decisions go wrong.

Instead, the Government's White Paper – the focus of which is regulation of use of AI by the private sector – proposes a 'test and learn' approach to regulation. What this essentially means is 'hurt first, fix later'. AI systems are already used by public authorities and we cannot afford to wait and see how its use might cause harm, damage fundamental rights, or undermine trust in our institutions. Government needs to learn the lessons from misuse of AI in other jurisdictions like the Netherlands (see the case study above) and put in place protections now to avoid this kind of damage.

The White Paper makes almost no mention of the specific harms related to public sector use of AI. "Pro-innovation" might be a suitable approach to AI use in the private sector, but when it comes to state use of AI, there are unique considerations which are being ignored. Government decision-making often comes with greater risks to individual rights than decisions made by businesses, and unlike with businesses, people often don't have any choice about engaging with, for example, the tax authorities, the police, or immigration enforcement. The power imbalance between citizen and state means that Parliament needs to put in place careful guardrails for individual liberty and for access to justice in these contexts. This requires specific regulation for the public sector.

3. We need new legislation and a proper regulatory framework for public use of AI. Government needs to:

- **Strengthen, rather than undermine, our existing legislative protections**

Our existing legislative framework around public sector use of AI is being undermined at the same time as Government is talking about trying to be the "home of AI safety".[8] The Data Protection and Digital Information (No 2) Bill would water down existing protections, including by narrowing the application of Article 22 GDPR, so that automated decision-making would be permitted in more circumstances (including for some decisions around education

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[8] https://www.uktech.news/ai/sunak-uk-home-ai-safety-regulation-20230612

and access to finance), and by weakening requirements to do proper impact assessments.[9] Alongside this, legislation which disapplies parts of the Human Rights Act (and threats to leave the European Convention on Human Rights) put our human rights framework at risk. Government needs to be filling gaps in the existing patchwork of statutory requirements, rather than undermining it.

- **Make transparency mandatory**

Public bodies using AI in decision-making processes should be under a statutory duty to notify people who are subject to the decision that AI has been used and to explain how it works. They should also be required to publish general information about AI tools they use. The Government's Algorithmic Transparency Recording Standard (ATRS) could play a role here – but submitting reports is currently entirely optional, and even then, the ATRS does not ask for enough detail to ensure meaningful transparency.[10]

- **Improve routes for those affected by AI decisions to contest and seek redress**

When someone is negatively affected by public use of AI, there should be a specialist regulator they can go to, with the appropriate powers to hold public bodies to account.

For more information on why the Government's plans for AI regulation put rights and safety at risk, read our full response to the AI White Paper consultation here.

For an alternative approach to AI regulation, read our joint statement with 30 other civil society organisations, which sets out the principles which need to underpin reform.

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[9] Read more about the Bill in our briefing: PLP-Briefing-DPDI-Bill-No.2-Second-Reading-Final-1.pdf (publiclawproject.org.uk)
[10] Algorithmic Transparency Recording Standard Hub - GOV.UK (www.gov.uk) See more discussion of the ATRS in our full white paper response: Public-Law-Project-AI-white-paper-consultation-response.pdf (publiclawproject.org.uk)

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Public Law Project is an independent national legal charity.

We are researchers, lawyers, trainers, and public law policy experts.

For over 30 years we have represented and supported individuals and communities who are marginalised through poverty, discrimination, or disadvantage when they have been affected by unlawful state decision-making.

Our vision is a world where the state acts fairly and lawfully. Our mission is to improve public decision making, empower people to understand and apply the law, and increase access to justice.

We deliver our mission through casework, research, policy advocacy, communications, and training, working collaboratively with colleagues across legal and civil society.

Public Law Project contributes and responds to consultations, policy proposals, and legislation to ensure public law remedies, access to justice, and the rule of law are not undermined.

We provide evidence to inquiries, reviews, statutory bodies, and parliamentary committees and we publish research and guides to increase understanding of public law.

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