



TO: Amy Bihari
Ontario Digital Service

FROM: Susie Lindsay
LCO Policy Counsel

RE: Ontario Government Alpha Guidance Documents Concerning AI use by Government
LCO Comments

DATE: June 30, 2020

Thank you for sharing the Alpha Guidance Documents Concerning AI use by Government (“the documents”). The forward-thinking steps taken by the Province are admirable; many critical issues are addressed throughout these documents. The work of the Provincial Digital Services Team dovetails with the Law Commission of Ontario’s Project on Artificial Intelligence in the Civil Justice System.¹ The LCO has been investigating the use of AI systems in government decision making and we are delighted to participate in the Province’s efforts with these issues.

To provide thoughtful and relevant commentary on the Province’s early stage material, the LCO engaged in a three-step review process. The alpha documents were initially reviewed by legal counsel on the LCO’s Digital Rights Project. We then held a series of roundtable brainstorming discussions with LCO law students. Finally, we synthesized our thoughts into the letter below.

The Alpha Documents

We understand these documents are an early step in the process of developing guidelines and want to commend the Province for starting this initiative. The topics addressed throughout the documents are important and relevant and touch on crucial aspects of AI development and deployment. Our comments focus mainly on bolstering the important groundwork completed so far by the Province.

¹ <https://www.lco-cdo.org/en/our-current-projects/law-reform-and-technology/>

Creating documents of this kind is a difficult exercise. We expect they will be heavily reviewed and scrutinized by a variety of people with various expertise – including people with technological, policy, law or government administration training as well as those who are skeptical of technology. Based on our extensive review of materials addressing AI issues created by various governments and organizations around the world, we think there are some questions that the Province will encounter when these documents are distributed more widely. Below are lists of initial questions we believe parties are likely to raise with you. The questions are organized in three parts: (1) Questions relating to the overall purpose and concept of the documents; (2) Questions seeking clarification; and (3) Questions about issues not included.

1) Questions relating to the overall purpose and concept of the documents:

The introductions to the Ethical Principles and Transparency Guidelines both include information about their individual purpose, however, we imagine that readers will push the Province to provide more clarity and direction. We anticipate some questions the Province may receive are:

- *Why do these documents exist?* For example, is it because AI and data driven technologies have a role in delivering essential government services to Ontarians? Is it because the Province is encouraging the use of these systems in delivering government services? Is there a growth in the use of these services in Ontario government services? Is the Province responding to concerns voiced by specific parties, populations or organizations?
- *Who are these documents intended to apply to or be used by?* Provincial ministries? Government Departments? Third party vendors? Designers? Corporate and non-government organizations?
- *How are parties to use these documents?* As a reference point? As a guideline? As a policy? Is there any incentive or enforcement encouraging parties to follow the guidelines?
- *Are there additional documents or materials that will be created to compliment these documents?*
- *What commitments will the Province make regarding the issues listed in the documents?*
- *Will the Province provide independent oversight on parties' compliance with the guidelines, or are they suggesting self-governance?*
- *How do these documents align with the Ontario's Open Data Initiative?*

We note that a few jurisdictions have addressed some of the above issues in a clear and robust purpose statement. One of the strongest and most credible examples we have seen is the draft New Zealand Government Algorithm Charter.² We note that the Federal Directive “Guiding

² New Zealand Government Draft Algorithm Charter, October 2019. It is also worth looking at the New Zealand Algorithmic Assessment Report, October 2018.

Principles”³ and the “Purpose”, “Objective”, and “Scope” sections of the Directive on Automated Decision⁴ provide a plain language purpose statement to the document.

2) Questions Relating to Specific Challenges

We agree that working to address “a gap concerning specificity” is the right approach. Specificity is hard to achieve in this context. One of the greatest challenges to this work is conceptualizing principles, guidelines, rules or regulations that could apply to a broad spectrum of technologies being used by a myriad different government services whose decisions impact a huge number of individual rights. Regardless, the parties relying on these documents, especially lawyers who we expect will be scrutinizing them, will invariably seek clarification on how they are to interpret specific terms. To that end, we anticipate the Province will be asked clarification questions.

- Is it possible to provide a glossary or give certain terms more explanation? Some words that could perhaps use further explanation include:
 - “safe” and “safeguard” - what is being protected: individual privacy rights? ownership of data? protection of the source code? computer software reliability? What are the concerns that are being addressed here? Who is at risk of harm?
 - “accountable” – do you mean legally liable? “peer reviewed and audited” is great – is this a suggestion for independent oversight of AI use?⁵
 - “appropriate” – does this mean that AI should be directed at problems that need to be solved?
 - “user” – is user the person using the technology or the person impacted by the technology? If the former, why do they need to be protected?
 - “meaningful transparency” is a great term – can you give some direction as to what it means or what it might look like? Is the Province suggesting it would commit to disclose an inventory of all AI systems used in government decision making?⁶
 - What is the *Data Asset Inventory*?
 - “meaningful access” – allowing meaningful access is great, however, by “allow” do you mean promote or ensure? Does this mean that vendors or creators of data

³ <https://www.canada.ca/en/government/system/digital-government/modern-emerging-technologies/responsible-use-ai.html>

⁴ <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>

⁵ Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies (Engstrom, Ho, Sharkey & Cuellar/ Stanford University and New York University February 2020.) has a useful discussion of these issues. See especially Part III. <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf>; See also Human Rights and Technology Discussion Paper, Australian Human Rights Commission, December 2019 at page 125

⁶ See <https://www.muckrock.com/news/archives/2019/dec/03/nyc-ads-task-force-final-report-next-steps/>; and the discussions in NYC including AI Now’s list of AI uses in NYC ; and the bill proposed by Peter Yoo in NYC <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4265421&GUID=FBA29B34-9266-4B52-B438-A772D81B1CB5&Options=Advanced&Search=> requiring each city department to create an annual list algorithms in use and how they are used.

driven technology need to provide plain language explanation of what the source code does. The discussion of “access” in this section appears to focus on limits to access. How to strike a balance between proprietary and disclosure?

- There are numerous references to designers and developers – are these government employees or third parties or both?
- At what stage of the development, deployment and operational stage should parties consider these principles and guidelines?

3) Questions about areas not yet included/covered

As noted above, all of the issues raised in the documents are pressing and salient and useful to include. However, given the diverse body of people who are likely to be interested in and impacted by government use of AI systems, we expect that some interested parties will raise issues that they believe should be added. For example:

- “Identify Data Enhanced Decisions” and “Provide Public Notice and Clear Communication Channels” have a lot of good material. We anticipate the Province will face pressure to provide a list of where and how the Province is using, or expect to use, data driven technologies to deliver government services.⁷
- The documents refer to discrimination, however, there is no mention of differential impacts on racial groups and no reference of indigenous populations. Bias and discrimination are documented as being a central challenge in AI systems.⁸ The Province is likely to be encouraged to have more focus on and commitment to these issues and the importance of the BIPOC movement.
- There are references to the law and legal principles through each document. However, we expect the Province will face challenging questions about how the ethics principles and transparency guidelines interact with the legal issues of administrative due process, Charter rights, privacy, and human rights. Law will certainly apply to these AI systems. How does the government intend to address legal requirements?
- “Keep People in Focus and in the Loop” - conveying multiple perspectives is important and this section has the right idea. We anticipate there will be pressure for the Province to clarify a commitment to consult with community and address issues specifically relevant to marginalized populations. Consultation and participation have been demonstrated as necessary to improve AI systems and avoid major pitfalls.⁹

⁷ See footnote 6

⁸ See “The Challenges of Algorithmic Bias” by Jacquelyn Burkell, Special Lectures 2019: Innovation, Technology and the Practice of Law.

⁹ Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force, December 2019 <https://ainowinstitute.org/ads-shadowreport-2019.pdf>

- People with special needs will undoubtedly be impacted by AI systems – how will the systems be designed and implanted to consider accessibility?¹⁰
- “Process of redress” is an important concept and could be strengthened to include meaningful right of appeal. A meaningful right of appeal would include sufficient disclosure for the appellant to understand the case they need to make; and a trier of fact who has been properly trained to understand AI systems.
- Ensure there is training of government employees who will be developing, deploying and using AI technologies to make sure they are improving government services.¹¹
- There is discussion about machines being “human centric”. However, the documents could include guidance on AI supplementing or supplanting human decision making – including training for government employees implementing AI systems or making decisions that are informed by AI generated recommendations or predictions.
- Are there areas of government activity or certain decisions where AI should not be deployed?
- The Province should address the issue of Inter-governmental and inter-jurisdictional cooperation.

Closing comments

Regulatory attempts in this area tend to be divided into two categories. Regulations that foster the growth and implementation of AI as quickly as possible; and regulations that look at AI through a human rights lens. The best regulations will incorporate both. These documents are well positioned and structured to do this. The framework of the documents is strong. As with these things, it is the details that count. We are happy to discuss any of these issues further with the you and your team.

Over the last few years we have assembled boxes of reports, articles, precedents, and academic journals on topics related to many of issues discussed above. We are happy to share any of our resources with you.

Thank you again for creating these alpha documents and for the opportunity to provide initial comments.

¹⁰ *Human Rights and Technology Discussion Paper*, Australian Human Rights Commission, December 2019, see page 147.

¹¹ Government of Canada Guiding Principles on Responsible Use of Artificial Intelligence (AI) <https://www.canada.ca/en/government/system/digital-government/modern-emerging-technologies/responsible-use-ai.html>;