Submission in Response to Government of Ontario Trustworthy AI Consultations

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Thank you for the opportunity to provide input on the development of trustworthy AI in Ontario. Due to time pressures my comments will be relatively brief. Hopefully there will be other opportunities to engage with this process.

Developing a framework for the governance of AI in Ontario is important, and it is good to see that this work is underway in Ontario. I note that the current consultation focuses on AI for use in the public sector. Similar work needs to be done for the governance of AI that will be developed and deployed in the private sector context. I hope that this work is also being contemplated.

As I am sure you know, the federal government has already developed a [Directive on Automated Decision-Making](#) (DADM) which applies to a broad range of uses of AI in the federal public sector context. It comes with an [algorithmic impact assessment tool](#). Although I appreciate the sensitivities around sovereignty within a province's own spheres of competence, there is much to be said for more unified national approaches to many regulatory issues – particularly in the digital context. One option for Ontario is to use the DADM as a starting point for its approach to public sector AI governance, and to assess and adapt it for use in Ontario. This would allow Ontario to take advantage of an approach that is already well developed, and into which a considerable amount of thoughtful work has been invested. It is both unnecessary and counterproductive to reinvent the wheel. Serious consideration should be given – as a matter of public policy – to adopting, where possible, harmonized approaches to the governance of digital technologies.

At the same time, I note that the consultation document suggests that Ontario might go beyond a simple internal directive and actually provide an accountability framework that would give individuals direct recourse in cases where government does not meet whatever requirements are established. A public accountability framework is lacking in the federal DADM, and would be most welcome in Ontario.

The proposed public sector framework for Ontario is organized around three broad principles: No AI in secret; AI use Ontarians can trust; and AI that serves all Ontarians. These are good, if broad, principles. The real impact of this governance initiative will, of course, lie in its detail. However, it is encouraging to see a commitment to transparency, openness and public participation. It is also important that the government recognize the potential for AI to replicate or exacerbate existing inequities and to commit to addressing equity and inclusion.

My comments will address each of the principles in turn.

1. **No AI in Secret**

The consultation document states that "for people to trust that the use of AI is safe and appropriate they must first be aware that the AI exists. As a result, the government needs to be transparent

about how, when, and why these tools are used so that people have a right to address potential biases created by the AI algorithms." I agree. A public register of AI tools in use by government, along with access to details about these tools would be most welcome.

I do question, however, what is meant by "government" in this statement. In other words, I would be very interested to know more about the scope of what is being proposed. It was only a short while ago that we learned, for example, that police services in Ontario had made use of Clearview AI's controversial facial recognition database. In some cases, it seems that senior ranks of the police may not even have been aware of this use. Ontario's Privacy Commissioner at the time expressed concerns over this practice. This case raises important questions regarding the scope of the proposed commitment to transparency and AI. The first is whether police services will be included under government AI governance commitments – and if they are not, why not, and what measures will be put in place to govern AI used in the law enforcement context. It is also important to know what other agencies or departments will be excluded. A further question is whether AI-related commitments at the provincial level will be extended to municipalities, or whether they are intended only for use in the provincial public sector. Another question is whether the principles will only apply to AI developed within government or commissioned by government. In other words, will any law or guidance developed also apply to the myriad services that might be otherwise be available to government? For example, will new rules apply to the decision by a department to use the services of a human resources firm that makes use of AI in its recruitment processes? Will they apply to workplace monitoring software and productivity analytics services that might be introduced in the public service? On this latter point, I note it is unclear whether the commitment to AI governance relates only to AI that affects the general population as opposed to AI used to manage government employees. These issues of application and scope of any proposed governance framework are important.

2. Use Ontarian's can Trust

The second guiding principle is "Use Ontarians can Trust". The commitment is framed in these terms: "People building, procuring, and using AI have a responsibility to the people of Ontario that AI never puts people at risk and that proper guardrails are in place before the technology is used by the government."

One of the challenges here is that there are so many types of AI and so many contexts in which AI can be used. Risk is inevitable -- and some of the risks may be of complex harms. In some cases, these harms may be difficult to foresee. The traffic predicting algorithm used as an illustration in this part of the consultation document has fairly clear-cut risk considerations. The main issue will be whether such an algorithm reduces the risk of serious accidents, for example. The risks from an algorithm that determines who is or is not eligible to receive social assistance benefits, on the other hand, will be much more complex. One significant risk will be that people who need the benefit will not receive it. Other risks might include the exacerbation of existing inequalities, or even greater alienation in the face of a seemingly impersonal system. These risks are serious but some are intangible – they might be ignored, dismissed or underestimated. Virginia Eubanks and others have observed that experimentation with the use of AI in government tends to take place in the context of programs and services for the least empowered members of society. This is troubling.

The concept of risk must be robust and multifaceted. Decisions about where to deploy AI must be equitable and unbiased – not just the AI.

One of the initial recommendations in this section is to propose "ways to update Ontario's rules, laws and guidance to strengthen the governance of AI, including whether to adopt a risk-based approach to determine when which rules apply." I agree that work needs to be done to update Ontario's legal frameworks in order to better address the challenges of AI. Data protection and human rights are two obvious areas where legislative reform may be necessary. It will also be important for those reforms to be accompanied by the necessary resources to handle the complex cases likely to be generated by AI. If legal protections and processes are enhanced without additional resources, the changes will be meaningless. It may also be necessary to consider establishing a regulatory authority for AI that could provide the governance, oversight and accountability specifically required by AI systems, and that could develop the necessary expertise. Challenging algorithmic decision-making will not be easy for ordinary Ontarians. They will need expert assistance and guidance for any challenge that goes beyond asking for an explanation or a reconsideration of the decision. A properly-resourced oversight body can provide this assistance and can develop necessary expertise to assist those who develop and implement AI.

3. AI that Serves all Ontarians

The overall goal for this commitment is to ensure that "Government use of AI reflects and protects the rights and values of Ontarians." The values that are identified are equity and inclusion, as well as accountability.

As noted above, there is a tendency to deploy AI systems in ways that impact the most disadvantaged. AI systems are in use in the carceral context, they are used for the administration of social benefits programs, and so on. The very choices as to where to start experimenting with AI are ones that have significant impact. In these contexts, the risks of harm may be quite significant, but the populations impacted may feel most disempowered when it comes to challenging decisions or seeking recourse. This part of the consultation document suggests as a potential action the need to "Assess whether the government should prohibit the use of AI in certain use cases where vulnerable populations are at an extremely high risk." While there likely are contexts in which a risk-based approach would warrant an early ban on AI until the risks can properly addressed, beyond bans, there should also be deliberation about how to use AI in contexts in which individuals are vulnerable. This might mean not rushing to experiment with AI in these areas until we have built a more robust accountability and oversight framework. It may also mean going slowly in certain areas – using only AI-*assisted* decision making, for example, and carefully studying and evaluating particular use cases.

In closing I would like to note as well the very thoughtful and thorough work being done by the Law Commission of Ontario on AI and Governance, which has a particular focus on the public sector. I hope that any policy development being done in this area will make good use of the Law Commission's work.