

Submission to the Government of Ontario  
Treasury Board Secretariat/Ontario Digital Service

# Public Consultation on “Trustworthy Artificial Intelligence (AI) Framework”

By Community Legal Aid  
June 4, 2021



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## 2 INTRODUCTION

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Community Legal Aid ('CLA') is grateful for the opportunity to participate on behalf of our law students and clients in this government consultation. CLA's mandates include the provision of legal services that engage various government agencies and actors. Our clients include marginalized and vulnerable Ontarians. This places us in the unique position to offer our insights.

CLA appreciates the government's efforts to engage Ontarians in providing their feedback on its framework. However, we are concerned by how the feedback is being collected and notice of the consultation was provided.

The government announced on May 10th, 2021, a public consultation on Ontario's trustworthy artificial intelligence or AI framework. The first step the government proposes to take is to create guidelines for its use of AI. The articulated intention is to use AI responsibly to minimize misuse and maximize benefits for Ontarians.<sup>1</sup>

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<sup>1</sup> <https://www.ontario.ca/page/ontarios-trustworthy-artificial-intelligence-ai-framework-consultations>

The development of Ontario's AI framework will follow the principles articulated in the Open Government Partnership. The goal of which is to demonstrate the government's commitment to transparency, accountability and working in the open.<sup>2</sup>

#### 2.1.1 Process for Consultation

The public was invited to participate through two methods. The first method of participation was an online survey that was open from May 7, 2021 through June 4, 2021. The survey asked participants to rank in order of priority action items under the three prongs of priority articulated by the government. The questions focused on the notice of the use of AI, rules and tools in using AI for government programs and services based on risk and using AI that serves all Ontarians. There was additional room for the participant to offer their own action items.

The second method of participation in the consultation was contacting the government via email.

The writer learned of the public consultation through a community partner. While the announcement was posted to the government website, there has been little other publicity promoting public participation in the consultation process. Vulnerable and marginalized Ontarians affected by the AI use in government programs were given four weeks to participate. Their participation requires access to digital technologies. The COVID-19 pandemic shed a spotlight on the clear inequities that exist amongst Ontarians in accessing digital resources and the varying levels of digital literacy.<sup>3</sup> The government incorrectly assumed that all Ontarians can participate online having access to computers, and data plans and the ability to navigate an online platform.

As ACORN Canada reported most low-income Canadians do not have internet subscriptions.<sup>4</sup> Those low-income Canadians who do subscribe to internet services end up spending a proportionally larger amount of their income on it.<sup>5</sup> This digital divide was acknowledged by the creation of grants to provide cellphone subscriptions and data plans to low-income Canadians in response to the COVID-19 pandemic.<sup>6</sup>

The government also provided notification of the consultation through Civic Tech Toronto on YouTube.<sup>7</sup> As of May 19, 2021, the video has 37 views. The low viewership may imply that remote consultations are not effective.

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<sup>2</sup> Id 1

<sup>3</sup> <https://policyresponse.ca/the-digital-divide-is-about-equity-not-infrastructure/>

<sup>4</sup> <https://acorncanada.org/resource/internet-essential-service>

<sup>5</sup> Id at 4.

<sup>6</sup> <https://www.unitedway.ca/campaign/national-covid-19-response/>

<sup>7</sup> <https://www.youtube.com/watch?v=mPz3qZrYcdE>

The digital divide prevents low-income Ontarians and those not digitally literate from effectively participating in a consultation that directly impacts them. This process falls short of the government's commitment to openly work with the public.

The consultation process must be balanced and inclusive. It must be fair and be promoted in a manner that will solicit active participation from all Ontarians. This requires reaching out to communities directly, in addition to key stakeholders.

The consultation process must be fair and should endeavour to overcome the digital divide in soliciting public participation. The public participation should involve those communities most directly affected by the proposed technology. It has been the experience of CLA that our clients are left behind as the government embarks to forge ahead with the use of technology. Access to justice is being impeded by a lack of access to reliable technology and to digital literacy. The premise that everyone has access to a computer or a data plan is incorrect and public consultations should not be offered only by means to digital platforms.

## 2.2 RECOMMENDATIONS

- 1) CLA supports the recommendations set out by the Law Commission of Ontario in their Executive Summary: Regulating Ai: Critical Issues and Choices<sup>8</sup>
- 2) Extend the period of public consultation acknowledging that COVID-19 has created various other concerns that have the public's attention
- 3) Develop a non-digital means for public consultation
- 4) Ensure the process is fair in acknowledging and addressing the digital divide

## 3 NO AI IN SECRET

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The government has committed to the transparent use of AI. It focuses on four key factors:

- a. Ontarians being told **when** AI is being used
- b. Ontarians being told **why** AI is being used
- c. Ontarians being told **how** AI is being used and
- d. Ontarians being told what their **rights** are **if** harm occurs

The three articulated 'potential actions' the government proposes to initially recommend are premised on the existence and use of algorithms. In other words, the government is not proposing prophylactic recommendations by developing regulations prior to the use of AI. It is premising its recommendations on the permissible use of AI.

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<sup>8</sup> <https://www.lco-cdo.org/wp-content/uploads/2021/04/LCO-Executive-Summary-Regulating-AI-Critical-Issues-and-Choices-Toronto-April-2021-1.pdf>

### 3.1.1 Notification

The government proposes to be fully transparent by developing rules that require public notification when interacting with a ‘machine’ or having ‘decisions’ made about them by an algorithm. This recommendation contains various terms that require clear definition. As it stands its vagueness increases the chances for harm to the public. The recommendation proposes notification. As evidenced by the methodology of the consultation itself, notice must be grounded in fairness. Fairness requires an acknowledgment of the digital divide and a procedure that ensures equitable notification to all Ontarians, not just those who have access to digital resources and are digitally literate. Finally, the government proposes that this goal be carried out by ‘rules’. Rules are created by the governing organization or agency. It is best to avoid silos of jurisdiction and to approach regulation broadly to ensure a uniform protection of Ontarian’s rights. We suggest that regulations will better serve this purpose.

### 3.1.2 Accountability

The government proposes to achieve accountability by giving Ontarians the right to address potential biases created by the AI. Much has been written about tackling bias in AI, including scholarship on not only have to detect bias but also how to mitigate its damage.<sup>9</sup> It is not a question of whether bias exists it is a question of what to do about it. The government must then ensure that it safeguards against bias by requiring error analysis.

The government uses examples such as ‘the right to explainability, right to contest, and right to opt out’ as a means of addressing bias. These are good first steps to be implemented. The focus on the recipients’ rights. However, a fulsome approach would also entail the use of protocols, by way of regulations, that require the user to constantly monitor the error rates.

Accountability should include an individual’s right to know which data set factors were used to determine their decision. They should also have access to the audit reports, be provided with confirmation that the AI or algorithm was inspected regularly and all this information should be presented in a clear, comprehensive manner.

### 3.1.3 Clarity and transparency

The government wants to provide ‘clarity’ and ‘transparency’ to Ontarians on how it will collect their data for use in algorithms. It is exploring the options of updating notices of collection. Currently in Canada there are various legislations that govern the use and collection of data.

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<sup>9</sup> <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>

*The Privacy Act*<sup>10</sup> and the *Personal Information Protection and Electronic Document Act*<sup>11</sup> are examples. The acts are founded on various principles, some of which are articulated in the government's initial recommendations. Clarity and transparency are two of these principles. Building from the principles of natural justice; notice must be adequate. As such, notice must be provided in a format and by means that allow proper notice. Notice should also be continuous. Keep Ontarians informed.

### 3.2 RECOMMENDATIONS

- 1) The government should take a harm deferring approach by ensuring that regulations are in place prior to the use of AI
- 2) Clearly define the terms 'machine', 'algorithm' and 'decision'
- 3) Ensure notification is not just electronic
- 4) Develop regulations that require notification
- 5) Develop regulations that require the use of error analysis
- 6) Ensure notice requirements utilize various methods of communication include, mailed notification, attaching notices to applications forms, allowing for various language translation and making them accessible to those with disabilities
- 7) Develop regulations on the rights to appeal from decisions, ensuring that information such as factors used for the data set and audit records are accessible to the appellant in a comprehensible manner that allows an equitable appeal

## 4 AI USE ONTARIANS CAN TRUST

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The Ontario government is committing to rules and tools that will permit the 'safe' and 'secure' application of algorithms to its programs and services based on 'risk'. The government rightfully acknowledges the need to ensure that proper safety measures are implemented prior to the application of AI. It is also correct in ensuring that it takes a risk-based approach in its attempt to keep Ontarians safe and secure. However, its approach is to proceed with the implementation of these measures as AI continues to be used and to attempt to curtail potential 'risky' use cases by applying rules after the fact.

This approach mimics the process that was used in the "digital first" approach<sup>12</sup> applied to Tribunals Ontario. The ramifications of this approach were those harms, anticipated or not,

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<sup>10</sup> <https://laws-lois.justice.gc.ca/ENG/ACTS/P-21/index.html>

<sup>11</sup> <https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/index.html>

<sup>12</sup> <https://news.ontario.ca/en/backgrounder/60642/ontarios-justice-accelerated-strategy>

were first suffered by users before remediation efforts took place. Public discourse was replete with the stories of harms suffered by this approach.<sup>13</sup>

In embarking on this consultation, the government should take note of the shortcomings in the process and procedures used in digitalizing Tribunals Ontario. There is currently differential treatment occurring with individuals appearing before the Landlord and Tenant Board. For example, CLA has observed that tenants are appearing more often by telephone and are less represented than landlords, who are appearing on video and with representation. This example is set out to warn that differential treatment, despite being unintentional is discriminatory. The government should reflect on the issues that arose with this approach and treat them as a cautionary tale when implementing its current recommendations. Do not wait for the risk to manifest itself.

The second caution to this approach is in the definition of risk. Lessons can be learned for experiences of other governments. For example, the state of Michigan relied on the use of the Michigan Integrated Data automated System for its unemployment claims. The program had an error rate of 93% that resulted in false fraud allegations.<sup>14</sup> The state of Michigan is currently embroiled in a class action over this matter. The ‘risk’ to the public included illegal wage garnishments, high fines, collections, and loss of public benefit entitlements. The ‘risk’ had a significant detrimental effect on the user.

In addressing the ‘risk’ the government posits whether it should use an algorithmic assessment tool to measure risk, security and quality. This should not be the only means to address this concern. The government should engage in full, transparent, meaningful and purposeful consultation in the cross-sectors of our province. All three factors, risks, security and quality directly affect the public. The degree of effect is felt differently depending on the other factors such as race, ethnicity, socio-economic levels, and culture, as a few. In addition to an algorithmic assessment tool, human review should be permitted or integrated in the risk assessment process. The goal is to ensure that the use of AI and algorithms does not result in the differing treatment of Ontarians based on known vulnerable factors such as socio-economic status, poor housing or mental health. These factors contribute to the marginalization of vulnerable Ontarians.

The final recommendation that the government makes is to ensure that processes are implemented so that algorithms are continuously tested and evaluated for bias/risk. CLA agrees with this recommendation and urges the government to mandate this requirement and to develop a public register to collect the results of these processes. In addition to mandatory testing and evaluation, there should be audits and human oversight. Appeal rights should permit for access to the results of these measures.

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<sup>13</sup> <https://www.tvo.org/article/is-the-landlord-and-tenant-boards-digital-first-approach-leaving-ontario-renters-behind>

<sup>14</sup> <https://www.governing.com/archive/tns-michigan-unemployment-fraud.html>

## 4.1 RECOMMENDATIONS

- 1) Expand and accurately define the meaning of risk, with a focus on the effect on the public
- 2) Deploy a clear and concise framework prior to permitting the use of AI
- 3) Go slow. Place a moratorium on the use of AI until the clear and concise framework is implemented
- 4) Lengthen the public consultation method
- 5) Expand the public consultation process to ensure it engages with members of the public from various communities in the province

## 5 AI THAT SERVES ALL ONTARIANS

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The government sets out three recommendations to help it achieve its goal of a government use of AI that “reflects and protects the rights and values of Ontarians”. The examples set out in the first recommendation are a means to mitigate potential harms and should be regulated by the government.

Data sets are fundamental to machine learning. Thus, the composition of the data set and its validation is key. The process of machine learning involves three data sets; the training set, validation set and test set.<sup>15</sup> Unfortunately, data is subject to bias. A great risk in the use of algorithms and AI is the prejudicial effects that can result for use of biased data. This is a growing area of academic research with academics warning about the harm that can result particularly in access to justice and social justice.<sup>16</sup>

The data set requirements, traceability and accountability should be regulated. The regulations should call for assurances that these factors are measured by quality, and adaptability. This means that the processes are controlled and measured regularly and that the process is subject to review.

There is no consensus on a uniform, standard, definition of “trustworthy AI”. The government recommends engagement with sector leaders and civil society to develop the standard and to use this standard to certify vendors. It is worth repeating, engagement must be purposeful and meaningful. This means ensuring there is no power imbalance at the consultation table. The government should hear from a cross-section of Ontarians.

The government also recommends assessing whether AI use should be prohibited in certain instances with attention to vulnerable populations who are at an extremely high risk. This

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<sup>15</sup> <https://towardsdatascience.com/how-to-build-a-data-set-for-your-machine-learning-project-5b3b871881ac>

<sup>16</sup> <http://hrlr.law.columbia.edu/hrlr/locked-out-by-big-data-how-big-data-algorithms-and-machine-learning-may-undermine-housing-justice/>



analysis should be undertaken for all risks not just high risks. It is clear from past government agency experiences that risk cannot be predicted accurately and predications can be manipulated. Due diligence requires careful consideration of risk. There need not be a sliding scale of harm. For example, the UK was forced to abandon use of an algorithm that predicted exam results when it was shown to be biased against students from lower socio-economic communities.<sup>17</sup> The government decision came as a reaction, after the harm was suffered.

## 5.1 RECOMMENDATIONS

- 1) Data sets, traceability and accountability should be regulated to ensure quality and adaptability
- 2) Open, accessible consultation with affected Ontarians particularly in vulnerable communities
- 3) Assess risk in reviewing potential prohibitions

## 6 CONCLUSION

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Ontario's membership on the Open Government Partnership places the province on a global platform. The framework is going to double as the action plan. As such, the necessary front end work should be done with a goal of preventing harm. Harm prevention, not harm reduction is key.

The use of AI and algorithms by any agency is akin to a small group making decisions that effect the lives of a large population. The foundational data that AI and algorithms are based on must be screened for and scrubbed clean from discriminatory practices and bias. This must be done succinctly and with precision. The government should avoid vague terms and definitions such as "risk", "bias" and "harm". It should implement regulations, rules and guidelines to address this.

There is ample scholarship warning that the weakness in AI and machine learning is the traditional computer science cliché "Garbage in, Garbage out". Data sets are collected by humans. The data itself may be the result of human decisions. For AI to be trustworthy it must be developed and implemented in a manner that does not continue past discriminatory practices and inadvertently uphold systemic barriers.

Government services directly intersect with individual rights. Access to services is not interchangeable with access to justice. Efficiency is not efficacy. The use of AI by the government should be equitable. This begins by consulting with a majority of Ontarians

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<sup>17</sup> <https://www.bbc.com/news/uk-wales-53807854>

representative of our entire province. It is also important to ensure that various communities, particularly those most affected by the introduction of AI in government services are heard. The consultation process should be lengthened and embark to be far reaching.

Do not leave vulnerable and marginalized Ontarians out of the conversation. Ensure this is done by conducting consultations in a meaningful manner that permits full participation. Consider other means of permitting Ontarians to participate that is not electronic based. You make wish to mail out print copies of surveys and circulate them among community partners, local municipal services offices, places of worship etc. The pandemic has forced a lot of activities online and in remote settings. In addition to surveys and emails, the government can hold town hall meetings and policy roundtables. These could be effectively conducted through local community partners who work closing with diverse segments of our province's population. Our clients were left behind when the transition to digital platforms took place. A majority do not have access to technology, and stable or reliable data plans. Uphold the open and transparent principles by disclosing the consultation statistics which should reflect participation from all segments of our province.

CLA appreciates the opportunity to participate in this consultation. As a legal service provider for vulnerable members of our community we want to help improve the experience our clients will have with AI and algorithms. Should you wish further input from CLA on these submissions, we would welcome the opportunity.