NEW ZEALAND COUNCIL FOR CIVIL LIBERTIES

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Submission Algorithm Charter

About the New Zealand Council for Civil Liberties

1. The New Zealand Council for Civil Liberties is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization that works through education and advocacy to promote a rights-based society and prevent the erosion of civil liberties.

2. In 2015, the Council merged with Tech Liberty New Zealand[1]. Since then the Council has had technology governance and policy as a focus area.

Introduction

3. The Council welcomes the Algorithm Charter and the associated public engagement. The Council proposes the following improvements for consideration.

4. The Council noted the 2018 Algorithm Assessment Report[2], but did not prepare a response. It was the first such report, and as such was an improvement over past practice. However, it fell far short of our expectations. The Council felt that any comment we could make would be obvious and therefore unproductive, so we did not respond.

5. The Council notes that the 2018 Report is readily misinterpreted. Among many examples, it implies that New Zealand Police do not have facial recognition or similar systems, when they are currently deploying their second system[3].

6. The Council notes with concern that rather than publishing a 2019 report with marked improvement over the first attempt, no report was published in 2019.

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[1] http://techliberty.org.nz/

[2] https://www.data.govt.nz/use-data/analyse-data/government-algorithm-transparency-and-accountability/algorithm-assessment-report/

[3] https://www.stuff.co.nz/national/117957684/privacy-concerns-over-polices-new-state-of-the-art-facial-recognition-system

Instead a draft algorithm charter[4] was published for public comment roughly one year after the 2018 report.

Analysis

7. The Council notes the Charter is a short page of principles without supporting documents. It is the start of a process which will require repeated public engagement at increasing levels of detail.

8. The Council notes with concern that it has taken a year to draft the Charter and that signatories propose to give themselves another 5 years to implement the resulting charter. Algorithms have been in use by New Zealand government agencies for decades, and their use is accelerating. Our communities deserve much more urgent action.

9. The Council notes that algorithms are nothing more than sets of rules, and their use and governance predates computers. Our system of government originates from the Magna Carta[5], whose motivation and function are to ensure fair and consistent behaviour from the Executive. Consistent and transparent application of rules is a legal requirement. Automation only complicates the challenge of meeting this legal requirement.

10. The Council notes with concern that the Charter does not take a stance on the transparency or explainability of algorithms. The Council acknowledges that this is a difficult topic, with moral and geopolitical consequences. However, the Council believes that ignoring the subject can not be expected to result in either a consistent or a well-considered decision.

11. The Council believes that explainability of decisions is a principle mandated by our Judicial system. As such, the Council believes that neither the Executive nor Legislative branches of government have the authority to authorise the use of algorithms which can not be explained in circumstances when those algorithms affect legal persons. These unexplainable algorithms, often referred to as "black-box" algorithms, are common in contemporary machine learning, but by existing law must be restricted to internal or non-decision influencing uses.

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[4]https://www.data.govt.nz/use-data/analyse-data/government-algorithm-transparency-and-accountability/draft-algorithm-charter/

[5] https://en.wikipedia.org/wiki/Magna_Carta

12. Furthermore, the Council notes that section 22(1) of the Official Information Act (1982) (OIA), requires that the entirety of any algorithm whose use affects legal persons be disclosed should anyone request that information.

13. Finally, the Council notes that commitment 7 of the *Action Plan for Open Government*[6] calls for the proactive release of all information which is subject to the OIA. Therefore, the phrase "upon request" in the Charter's "upon request, offer technical information about algorithms and the data they use" runs counter to government strategy.

14. The draft Algorithm Charter refers to inclusion of a range of perspectives without specifying how this will be achieved. Much policy development now takes a co-design approach where different perspectives are included from the start of the process. This may include co-governance by groups most directly affected.

International Comparisons

15. The Council acknowledges with sympathy that governance of automated algorithms is globally an immature field. We note that standards bodies, like the Institute of Electrical and Electronics Engineers, have only begun to consider this issue and have published almost no useful guidance. We expect that when IEEE P7001[7] or competing standards are released they will be adopted by future reports. There is, however, an emerging global consensus on governance of algorithms, which provides significant guidance.

16. The Toronto Declaration[8] makes concrete recommendations. Its section 31, on risks, recommends:

   a. *Conducting regular impact assessments prior to public procurement, during development, at regular milestones and throughout the deployment and use of machine learning systems to identify potential sources of*

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[6] https://ogp.org.nz/assets/Publications/91b28db98b/OGP-National-Action-Plan-2018-2020.pdf

[7] https://standards.ieee.org/project/7001.html

[8] https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf which in turn builds on the The International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 15 [https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx], the Montreal Declaration [https://www.montrealdeclaration-responsibleai.com/the-declaration], and the Vienna Declaration [http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx].

discriminatory or other rights-harming outcomes–for example, in algorithmic model design, in oversight processes, or in data processing.

b. *Taking appropriate measures to mitigate risks identified through impact assessments–for example, mitigating inadvertent discrimination or underrepresentation in data or systems; conducting dynamic testing methods and pre-release trials; ensuring that potentially affected groups and field experts are included as actors with decision-making power in the design, testing and review phases; submitting systems for independent expert review where appropriate.*

c. *Subjecting systems to live, regular tests and audits; interrogating markers of success for bias and self-fulfilling feedback loops; and ensuring holistic independent reviews of systems in the context of human rights harms in a live environment.*

d. *Disclosing known limitations of the system in question–for example, noting measures of confidence, known failure scenarios and appropriate limitations of use.*

17. The Council notes that external audits are accepted practices throughout our society for all subjects requiring both expertise and oversight.

18. Section 32 of the Toronto Declaration recommends the following for accountability and transparency:

a. *Publicly disclose where machine learning systems are used in the public sphere, provide information that explains in clear and accessible terms how automated and machine learning decision-making processes are reached, and document actions taken to identify, document and mitigate against discriminatory or other rights-harming impacts.*

b. *Enable independent analysis and oversight by using systems that are auditable.*

c. *Avoid using 'black box systems' that cannot be subjected to meaningful standards of accountability and transparency, and refrain from using these systems at all in high-risk contexts.*

19. The AI Now Institute's *Practical Framework For Public Agency Accountability*[9] aligns with the Toronto Declaration. The framework identifies four goals for algorithm governance:

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[9] https://ainowinstitute.org/aiareport2018.pdf

a. *Respect the public's right to know which systems impact their lives by publicly listing and describing automated decision systems that significantly affect individuals and communities;*

b. *Increase public agencies' internal expertise and capacity to evaluate the systems they build or procure, so they can anticipate issues that might raise concerns, such as disparate impacts or due process violations;*

c. *Ensure greater accountability of automated decision systems by providing a meaningful and ongoing opportunity for external researchers to review, audit, and assess these systems using methods that allow them to identify and detect problems; and*

d. *Ensure that the public has a meaningful opportunity to respond to and, if necessary, dispute the use of a given system or an agency's approach to algorithmic accountability.*

20. The European Union's *A governance framework for algorithmic accountability and transparency* (PE624.262)[10] is also aligned with the Toronto Declaration and the AI Institute's on process. As a government report, it also goes further in the areas of rights and oversight.

21. Section 3.2 of PE624.262 notes that the design goals and implementation trade-offs will frequently be a source of public concern and scrutiny.

22. Section 3.10.1 of PE624.262 proposes a "Right to Reasonable Inferences." Under this proposed right the legal person using an algorithm shoulders the burden of proof of demonstrating that the decision is supported by the data when interacting with another legal person.

23. Section 3.10.3 of PE624.262 proposes that a central agency to regulate the use of algorithms by other agencies. It proposes a framework similar to the testing of new medications, where the new algorithm must prove that it has passed a series of trials.

24. Section 4.1 of PE624.262 calls for increased whistleblower protections in response to the growing reality that only the staff closest to an algorithm's operation are likely to have the understanding necessary to evaluate the algorithm.

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10 http://www.europarl.europa.eu/RegData/etudes/STUD/2019/624262/EPRS_STU(2019)624262_EN.pdf

25. Finally, the Council notes that section 4.3 of PE624.262 proposes that any agency charged with algorithm assessment needs investigative powers and the ability to bring an action to the courts to obtain damages on behalf of the public.

Recommendations

26. The Council recommends that policies which will enact the Charter should be written and released for public comment without delay.

27. The Council recommends that the Charter itself should be amended to be specific on what is meant by "embed a Te Ao Māori perspective in algorithm development or procurement".

28. The Council recommends that decisions affecting communities, such as LGBTQI+, Māori, Pasifika or people with disabilities, are made in consultation with those communities. Where there is a potential range of views, the perspectives of those most directly affected should be paramount.

29. The Council recommends inclusion of a right to reasonable inferences in the Charter aligned with Section 3.10.1 of PE624.262. The Council's considered opinion that this right already exists in New Zealand.

30. In accordance with section 22(1) of the OIA, the Council recommends that the Charter be altered to clearly specify that all algorithms which affect people must be explainable in a court of law. This statement would supersede the final point of the Charter which currently reads "clearly explain who is responsible for automated decisions and what methods exist for challenge or appeal via a human."

31. The Council further recommends that section 20 of the OIA be amended to require that all government algorithms be published in a catalog of government algorithms.

32. Based on the Council's long and deep engagement with the OIA, the Council recommends that the Charter be amended to provide a mechanism whereby any interested person or group is entitled to access working copies of any algorithm along with the training and operational data in a controlled environment, as long as the person(s) involved sign modest privacy agreements and meet minimal standards of character. For clarity, the Council intends that these agreements

should encourage the publication of results without approval or censorship.

33. In order to align with the *Action Plan for Open Government,* The Council recommends altering the phrase, "Regularly collect and review data relating to the implementation and operation of algorithms, and periodically assess this for unintended consequences, for example bias." We suggest "Regularly *publish sufficient* data relating to the implementation and operation of algorithms *to allow any interested group or person to assess the algorithm* for unintended consequences, for example bias."

34. The Council recommends that the Charter be altered to include risk assessments as proposed in Section 31 of the Toronto Declaration, including regular external audits. In accordance with Section 3.2 of PE624.262 these assessments should include the design goals and trade-off decisions.

35. The Council recommends vast increases to the transparency principles of the Charter, in line with Section 32 of the Toronto Declaration and with the *Practical Framework For Public Agency Accountability.* Specifically, the Council calls for Algorithm Impact Assessments to be published for public scrutiny along with external auditor's reports prior to every implementation or substantial alteration to every algorithm.

36. The Council recommends the creation of a regulatory agency for algorithms, aligned with Sections 3.10.3 and 4.3 of PE624.262. This agency requires the ability to compel cooperation with its investigations, and therefore might be best placed within the Police or the Courts rather than central government.

37. The Council recommends adding a commitment to educating groups or stakeholders with an interest in the outcomes of algorithm applications so that they may be able to make meaningful contributions in the future.

38. Finally, the Council recommends that increased whistle blower protections, aligned with section 4.3 of PE624.262, are necessary for any of the other measures to have practical effect. We need to govern a largely opaque system of machines within agencies many of whom have cultures which value secrecy. We will not be successful without making it much safer for people to report the instances where improvement is required.

Conclusion

39. The Council is aware that our recommendations are a significant departure from current practice, and will introduce both cost and delay. However, without this public oversight the Council believes these algorithms pose a credible threat to our liberties, and that the measures we propose are reasonable and commensurate to that threat.