Assemblée générale

Conseil des droits de l'homme
Quarante-huitième session
13 septembre-1er octobre 2021
Point 3 de l'ordre du jour
Promotion et protection de tous les droits de l'homme,
civils, politiques, économiques, sociaux et culturels,
y compris le droit au développement

Communication de la Commission pour l'égalité et les droits de l'homme du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord*

Note du secrétariat

Le secrétariat du Conseil des droits de l'homme a l'honneur de transmettre une communication soumise par la Commission pour l'égalité et les droits de l'homme**, reproduite ci-après conformément à l'article 7 b) du Règlement intérieur figurant dans l'annexe de la résolution 5/1 du Conseil, qui dispose que la participation des institutions nationales des droits de l'homme s'exerce selon les modalités et les pratiques que la Commission des droits de l'homme a arrêtées, notamment dans sa résolution 2005/74, du 20 avril 2005.

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* Institution nationale des droits de l'homme accréditée avec le statut « A » par l'Alliance mondiale des institutions nationales des droits de l'homme.

** La communication est reproduite en annexe telle qu'elle a été reçue, dans la langue de l'original seulement.

Report of the EHRC in response to the thematic report on the effects of artificial intelligence on the enjoyment of the right to privacy – Report of the United Nations High Commissioner for Human Rights

Artificial Intelligence (AI) and Automated Decision Making (ADM) have been increasingly incorporated into public and private services, including content moderation on online and social media platforms, benefits provisions, verifying the authenticity of marriages, protecting energy infrastructure, or responding to customers' queries. Noting the influence and scale of these technologies, AI/ADM has been referenced in a recent report by the UK Taskforce on Innovation, Growth and Regulatory Reform, which confirmed "[a]rtificial intelligence (AI) has a key role to play in innovation, both in the UK, and globally over the coming years."[1]

Automated facial recognition (AFR) in policing

The Equality and Human Rights Commission (EHRC), in partnership with the Northern Irish Human Rights Commission (NIHRC) submitted evidence related to AFR use by law enforcement in response to the report laid at the 47th session of the UN Human Rights Council by the UN Special Rapporteur on the Right to Privacy following his 2018 visit to the United Kingdom.[2] This submission highlighted the Court of Appeal ruling in a case involving South Wales Police's trial of AFR. The court identified "fundamental deficiencies"[3] in the legal framework governing the use of automated facial recognition and that it was in breach of the right to privacy (Article 8 ECHR), the Data Protection Act 2018 and the Public Sector Equality Duty.[4] The submission also highlighted the statement of the Information Commissioner's Office (ICO)[5] that data protection law sets high standards in relation to the use of these technologies in a law enforcement context and when used in public places. In its latest opinion, the ICO highlights the concern that these "systems may also work less effectively for people from different demographic groups. This could potentially lead to unfairness in the form of discrimination and bias."[6]

Artificial intelligence and benefit fraud detection

Increasingly, automated systems are used to monitor and track potentially fraudulent benefits claims. As part of the roll out of Universal Credit, the Department of Work and Pensions (DWP) has identified automatic fraud prevention as an important element of this process, as remarked in a National Audit Office (NAO) report: "The Department [DWP] intends to develop a fully automated risk analysis and intelligence system on fraud and error."[7]

Since 2011, the DWP has encouraged local authorities to use Risk Based Verification (RBV) "to assess the risk of 'fraud and error' in welfare claims"[8]. This was encouraged to "streamline benefit applications by allowing low risk applicants for housing benefit and

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[1] Taskforce on Innovation, Growth and Regulatory Reform (2021), Independent Report.

[2] Equality and Human Rights Commission and Northern Ireland Human Rights Commission (2021), Report of the EHRC and the NIHRC following the UN Special Rapporteur on the Right to Privacy's visit to the UK in June 2018.

[3] Court of Appeal (2020), R (Bridges) –v- CC South Wales & ors.

[4] Ibid.

[5] Information Commissioner's Office (2019), Information Commissioner's Opinion: The use of live facial recognition technology by law enforcement in public places.

[6] Information Commissioner's Office (2021), Information Commissioner's Opinion: The use of live facial recognition technology i n public places.

[7] National Audit Office (2018), Rolling out Universal Credit.

[8] Big Brother Watch (2021), Poverty Panopticon.

council tax support to supply fewer documents to support their claims and to allow councils to focus resources on verifying riskier applications."[9] Concerns regarding the transparency of these tools have been identified by Big Brother Watch following freedom of information requests to local councils: "[n]ot even the local authorities who buy RBV software are given a complete account of what data points and characteristics are modelled to produce risk scores, with Xantura [a provider of the RBV model] claiming that commercial interests means they must keep this secret."[10]

This absence of transparency and accountability could hinder scrutiny as to the basis upon which the processing takes place. Countries such as France and Canada have established legal provisions aimed at ensuring transparency as to the functioning of algorithmic processes deployed by public bodies, while others have established guidance and criteria around transparency in relation to procurement.[11] In a report on Artificial Intelligence and Privacy, and Children's Privacy, authored by the UN Special Rapporteur on the Right to Privacy, the Rapporteur outlined "[a]s the processing of personal data of individuals always intrudes on the rights of the data subject, the data processing underlying an AI solution must have a sound ethical and legal basis."[12] This is also supported by the Article 22(1) of UK GDPR regulations, which states:

> the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly affects him or her.[13]

Further concerns have been raised regarding how the data used in these systems may refer to protected characteristics, both directly or via proxies. For instance, Xantura's RBV model uses eight 'supergroups' established by the Office of National Statistics' 2011 Area Classification for Output Areas[14] to segment geographic locations. A number of these groups explicitly refer to ethnicities, such as "ethnicity central", raising concerns that RBV may target specific ethnicities, a protected characteristic within UK equality law, through inferences made based on geographic location. The chief executive of Xantura has stated "information about neighbourhoods and sex were only used to check if the system was operating in a biased way after decisions had been taken."[15] However, due to the lack of access to the RBV model, this claim cannot be independently corroborated.

While the use of proxies for data on protected groups could facilitate indirect discrimination, the perception of limited direct discrimination as a result of these technologies has shaped how some local authorities have responded to their obligations in line with equality legislation. According to Big Brother Watch's investigation, the "majority of Equality Impact Assessments (EIA) we obtained…were limited at best and showed a lack of understanding as to how algorithms can introduce indirect discrimination into decision making."[16] Local authorities such as South Ribble and West Lothian Council did not complete EIAs, with West Lothian Council stating that as RBV "does not take into account any of the protected characteristics dealt with by the Equalities Act, there is no need for a full equality impact

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[9] Ibid.

[10] Ibid.

[11] Ada Lovelace Institute, AI Now Institute and Open Government Partnership (2021), Algorithmic accountability for the public sector.

[12] United Nations Special Rapporteur on the right to privacy, Joseph A. Cannataci (2021), Artificial intelligence and privacy, and children's privacy.

[13] Information Commissioner's Office, What does the UK GDPR say about automated decision-making and profiling?

[14] Office of National Statistics (2011), About the area classifications.

[15] The Guardian (2021), Calls for legal review of UK welfare screening system which factors in age.

[16] Big Brother Watch (2021), Poverty Panopticon.

assessment"[17]. While other authorities stated they would monitor for overrepresentation of protected groups in RBV model, "[i]n light of the Covid 19 pandemic, the DWP had suspended the need to review the policy by local authorities."[18] RBV is often not mentioned in privacy notices for either housing benefits or council tax by public authorities, or, as in the case of Colchester Borough Council, it only includes the provider's name.[19] Due to the complexity of the automated processes and the proprietary nature of the mechanisms, it is unclear whether they are in the position to offer more information to the public.

In a review led by the Centre for Data Ethics and Innovation (CDEI) on bias in algorithmic decision-making within the UK, they acknowledged "[i]t is difficult to map how widespread algorithmic decision-making is in local government".[20] Further to this, CDEI identified a gap between local authorities and the knowledge of the broader equality framework: "There is currently little guidance for local authorities wanting to use algorithms to assist decision-making. We found that whilst many local authorities are confident in understanding the data protection risks, they are less clear on how legislation such as the Equality Act 2010 and Human Rights Act 1998 should be applied."[21]

Potential discrimination in online job adverts

Research carried out by Global Witness has highlighted how the algorithm used by Facebook Careers to promote job adverts may encourage discrimination. Global Witness "created two job ads with the intention of using different forms of discriminatory targeting: one ad was targeted to exclude women, the other to exclude people over the age of 55."[22] While Facebook required them to comply with the platform's non-discrimination policy through a tick-box, both ads were approved by Facebook. Global Witness also created four ads for vacancies for mechanics, nursery nurses, pilots and psychologists and set no parameters as to how Facebook should target the adverts, leaving the platform's algorithm as the sole driver for the promotion. This experiment found that "almost all Facebook users shown adverts for mechanics were men, while ads for nursery nurses were seen almost exclusively by women."[23] Schona Jolly QC assessed the experience and stated: "Facebook's system itself may, and does appear to, lead to discriminatory outcomes".[24]

Automated facial recognition in the gig economy

There is increasing concern that facial recognition software may be placing people from ethnic minority groups at a disadvantage in the gig economy. Research has shown that false positive and negative results from facial recognition software disproportionately affect ethnic minority groups, with an increased rate of failure for Black women.[25] In the context of border control, similar issues have been identified after Freedom of Information requests to the HM Passport Office highlighted issues with the passport checker deployed at airports, which was less effective for people with "very light or very dark skin".[26] On this issue, the EHRC commented "[w]e are disappointed that the government is proceeding with the

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[17] Ibid.

[18] Haringey Council (2020), Report of the Director for Customers, Transformations and Resources.

[19] Colchester Borough Council (2020), Housing Benefit and Local Council Tax Support privacy notice.

[20] Centre for Data Ethics and Innovation (2020), Independent report - Review into bias in algorithmic decision-making.

[21] Ibid.

[22] Global Witness (2021), How Facebook's ad targeting may be in breach of UK equality and data protection laws.

[23] BBC (2021), Facebook accused of allowing sexist job advertising.

[24] Global Witness (2021), How Facebook's ad targeting may be in breach of UK equality and data protection laws.

[25] Massachusetts Institute of Technology Media Lab (2018), Gender Shades.

[26] What do they know (2019), Freedom of Information request 'Skin colour in the Photo Checking Service'.

implementation of this technology despite evidence that it is more difficult for some people to use it based on the colour of their skin."[27]

Concerns have been raised by private hire taxi drivers and couriers that have been publicised in media reporting.[28] Many Uber drivers are required to take a real-time photograph of themselves for verification via facial recognition software before accessing the app. The photo is then checked against the driver's account. Drivers from ethnic minority backgrounds have failed the facial recognition check, and been unable to work as a result. In an interview with ITV, "Imran Raja says he was fired by Uber after the verification software failed to recognise his face, leaving his family without his income for three months."[29] There are concerns that the software could be indirectly discriminatory because of race.

Algorithmic systems and immigration

In the recent years, a significant part of the UK immigration process has been automated. In 2020, legal action against the Home Office documented the use of an algorithm to streamline the visa application process. According to the Joint Council for the Welfare of Immigrants (JCWI) who brought the action alongside Foxglove, since 2015, the "Home Office algorithm has used a traffic-light system to grade every entry visa application to the UK. The tool, which the Home Office described as a digital 'streaming tool,' assigns a Red, Amber or Green risk rating to applicants."[30] This coding system also related to nationalities, which Foxglove claimed amounted to "a secret list of suspect nationalities automatically given a 'red' traffic-light risk score – people of these nationalities were likely to be denied a visa."[31] Both JCWI and Foxglove stated that the algorithm established a feedback loop where previous decisions based on this system would reinforce future decisions, making it more likely for individuals from the flagged nations to be coded as high risk. The algorithm was suspended in August 2020, pending a redesign of the process that looked at "issues around unconscious bias and the use of nationality".[32]

The Home Office has also automated aspects of its procedures aimed at identifying 'sham marriages'. According to The Bureau for Investigative Journalism (TBIJ), "[s]hould either or both parties be from a country outside of the UK, Switzerland and the European economic area, or have insufficient settled status or lack a valid visa, the couple is referred to the triage system."[33] Once this data was compiled, the system assigned a green or red light to the marriage, which could lead to further investigation and potential legal action and deportation. According to the Public Law Project who originally gained access to the Home Office documents, "[t]he Home Office has – so far – refused to disclose all of the 'risk factors' used by the algorithm to rate a case."[34] In an Equality Impact Assessment (EIA) completed by the Home Office, they acknowledged that data regarding age, sex and nationality is captured by marriage notifications. The EIA goes on to state that while there is no evidence of direct discrimination based on age, there "is the potential for indirect discrimination based on age as the triage process uses the age difference between couples."[35] The EIA also outlines the outcome of a Home Office review that identified "the nationalities with the highest rate of triage failure – between 20% and 25% – are Bulgaria, Greece, Romania and Albania. Those most frequently referred to the triage system include Albania, India, Pakistan and

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[27] New Scientist (2019), UK launched passport photo checker it knew would fail with dark skin.

[28] Wired (2021), Couriers say Uber's 'racist' facial identification tech got them fired.

[29] ITV (2021), Uber drivers claim they were fired after company's identification software failed to recognise their faces.

[30] Joint Council for the Welfare of immigrants (2020), We won! Home Office to stop using racist visa algorithm.

[31] Foxglove (2020), Home Office says it will abandon its racist visa algorithm – after we sued them.

[32] Free Movement (2020), Government to "redesign" controversial visa algorithm.

[33] The Bureau of Investigative Journalism (2021), Home Office algorithm to detect sham marriages may contain built-in discrimination.

[34] Public Law Project (2021), 'Sham marriages' and algorithmic decision-making in the Home Office.

[35] What do they know (2020), Freedom of Information request 'Sham Marriages'.

Romania."[36] While data regarding nationality is used to identify whether individuals are referred to the triage system as outlined above, the EIA states[37] that beyond this, it is not a criterion for the triage system. For this reason, the EIA states there is "no direct discrimination on this basis".[38] The Home Office also claims the absence of indirect discrimination based on nationality because the likelihood of a candidate failing the triage system is down to a combination of criteria and not nationality alone.

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[36] Ibid.

[37] According to the EIA: "Only couples that include one or more person who is not a 'relevant national' (a relevant national is someone who is British Citizen, Swiss National, or EEA national) are required to follow the notification process as set out in Part 4 of the 2014 Immigration Act. Beyond that nationality is not used as a criterion of the triage process and there is no direct discrimination on this basis."

[38] Ibid.