

July 13, 2023

Joint Committee on Advanced Information Technology, the Internet and Cybersecurity
Representative Tricia Farley-Bouvier and Senator Michael O. Moore, Co-Chairs

Testimony in Support of H.64 and S.33

**An Act Establishing a Commission on Automated Decision-Making
by Government in the Commonwealth**

Dear Representative Farley-Bouvier, Senator Moore, and members of the committee,

The ACLU of Massachusetts offers our strongest support for H.64 and S.33, *An Act Establishing a Commission on Automated Decision-Making by Government in the Commonwealth*, sponsored by Representatives Garballey and Cataldo and Senator Lewis.

This legislation would create a standing executive branch commission tasked with studying the use of automated decision systems (ADS) and artificial intelligence (AI) in state and local government operations and reporting back to the legislature about what, if any, regulations ought to govern the use of these technologies.¹

The Current Situation: Widespread Use with No Regulation or Oversight

Across the country and in Massachusetts, government entities are using artificial intelligence and algorithms to inform decisions that impact individual rights, freedoms, welfare, and access to services. Using modern technology to help agencies evaluate complex situations and make decisions can increase efficiency and streamline service delivery in some situations. But the use of these systems also carries risks, including challenges related to transparency and accountability, the replication of historical bias, inequitable outcomes, and due process.

These tools are already in use in our state, but no existing law or framework governs their deployment. For example:

- The Office of the Commissioner of Probation mandates the use of risk assessment instruments in the juvenile system and uses a risk assessment instrument in the adult system to inform decision-making pre-adjudication;
- The Department of Children and Families is planning to use a risk assessment instrument to inform decisions about whether children previously removed from their families should be reunited and reportedly also uses a risk assessment to aid in decision-making about emergency shelter needs;
- The Bail Reform Commission examined the idea of using risk assessment instruments to assist with pre-trial incarceration determinations; and
- The Disabled Persons Protection Commission uses a risk assessment instrument to help caseworkers identify people who may need services.

¹ Last session, this bill was amended and reported favorably by the Joint Committee on Advanced IT and Cybersecurity, then reported favorably by the Joint Committee on Rules. H.64 and S.33 reflect the committee's redrafted language. We urge the Joint Committee to advance the bill again and advocate for its enactment this session.

In recent years, automated decision systems were thrust into the center of public debate during the early days of the COVID-19 pandemic, as Massachusetts leaders and medical experts grappled with how they might distribute finite hospital resources like ventilators during a surge. Initially, Massachusetts officials released Crisis Standards of Care guidelines that would have led to the distribution of resources based on how long a patient was projected to live after surviving COVID-19. Disability and civil rights organizations, including the ACLU of Massachusetts, objected, pointing out that using this metric as a deciding factor would lead to unequal treatment based on disability, race, income, and other categories. In response to the outcry, the Baker administration changed the standards.

A Commission is Necessary to Understand the Landscape and Propose Safeguards

Despite significant and life-altering deployments of automated decision systems across Massachusetts government, the legislature currently does not have a window into the broad range of ways these technologies are being deployed in our state. Likewise, there are no laws on the books to regulate their use or to require basic accountability, transparency, or oversight.

This legislation would address both problems, by creating a standing commission housed in the Executive Office of Technology Services tasked with studying the use of AI and ADS in Massachusetts government and then reporting back to the legislature about what they find. The commission would consult with experts from academia, civil society, and industry, and help the legislature better understand the risks and benefits of automated decision-making so lawmakers can adopt appropriate regulations in the future. The commission would also provide key advice to the legislature on what regulations ought to exist in state law to protect the public interest and individual rights.

The proposed commission's work is necessary to ensure Massachusetts government is effective, efficient, equitable, transparent, fair, and accountable.

Technology is not neutral

It can be tempting to believe that decisions made by computers are objective or even infallible. But ADS and AI are as subjective and biased as the people that program them. Technology is not neutral, but rather reflects the biases, interests, and worldviews of its creators. Furthermore, AI and ADS are trained on historical data, making them susceptible to reinforcing past mistakes. That is why there is a famous cliché in the machine learning community: artificial intelligence is a great tool if you want to make the future look like the past. Obviously, in a society riddled with historical inequalities along lines of race, class, gender, and more, we must be vigilant that our use of these technologies does not inadvertently exacerbate long-standing discrimination or bias.

We cannot manage what we do not evaluate

One of the ways we can ensure we do not accidentally extend discrimination through digital decision-making systems is by being deliberate and intentional about our adoption and use of these technologies. To do so, we must first understand the landscape. Transparency protects the public interest, ensuring government agencies adopt and use systems that function adequately and equitably. The use of proprietary AI and ADS can shield misconduct and wasteful programs. In

Idaho, for example, litigation revealed that the state had purchased a highly flawed algorithmic decision-making system, amounting to digital snake oil.² Sunlight is the best disinfectant.

The commission's work is necessary to ensure our democracy remains vibrant and accountable in the digital 21st century. People and institutions have widely divergent views about how and where it is appropriate to use AI and ADS.³ Surfacing information about how the government is currently using these tools will allow experts and the public to assess how these systems are implemented; afford people impacted by these systems an opportunity to understand how and why certain decisions were made; and give us all the ability to freely evaluate and debate whether and when these systems ought to be used, and subject to what checks and balances.

Conclusion

We respectfully ask that this legislation be advanced and passed as soon as possible. Last session, we were pleased to work with the committee to strengthen the bill that was initially filed last session. The legislation before you reflects those important substantive improvements and was favorably reported by this committee. We would be glad to be a resource to the committee and its staff as you consider these important bills. Thank you.

² Jay Stanley, "Pitfalls of Artificial Intelligence Decisionmaking Highlighted In Idaho ACLU Case," ACLU, June 2, 2017. <https://www.aclu.org/news/privacy-technology/pitfalls-artificial-intelligence-decisionmaking-highlighted-idaho-aclu-case>

³ The Leadership Conference on Civil and Human Rights, "More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment," July 30, 2018. <https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/#>