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January 20, 2021

The Honorable Sam Hunt
Senate Committee on State Government & Elections
405 Legislative Building
Olympia, WA 98504-0600

Dear Chair Hunt and Members of the Committee:

We write in strong support of Senate Bill 5116, *An Act Relating to establishing guidelines for government procurement and use of automated decision systems in order to protect consumers, improve transparency, and create more market predictability*. The bill would be a landmark step forward by defining the baseline for meaningful algorithmic transparency, empowering citizens, limiting waste, and ensuring that the most dangerous automated decision-making systems do not impact the welfare or rights of the citizens of Washington.

Senator Hasegawa's bill is exactly the kind of legislation that should be enacted nationwide. There are significant risks posed by automated decision-making systems ("ADS") if they are deployed without transparency, oversight, and accountability mechanisms. ADS are already being used to determine eligibility for state benefits, credit, hiring, insurance, and other essential services. These ADS pose risks when used by the private sector, but the risks are even more acute when ADS are used by the state to life-altering decisions about individuals. In order to ensure that these ADS promote fairness, they be designed so that human judgment can intervene as needed to achieve reasonable outcomes for each person. And there must be accountability mechanisms available to address unjust outcomes. These fairness and accountability mechanisms are especially important where ADS are used for decisions or actions that have historically fostered discrimination.

The way SB5116 helps reduce the risk of discriminatory systems is simple: before a system is acquired, there must be public transparency and approval, and the system must be provably non-discriminatory. And the bill sets an appropriate redline: public agencies may not use an ADS that would impact the constitutional or legal rights of a Washington citizen. These are common sense measures that would put Washington at the forefront in demonstrating a commitment to fairness and transparency when it comes to the use of ADS.

EPIC's Work on Automated Decision-making Systems

The Electronic Privacy Information Center (EPIC) is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.[1] EPIC has promoted algorithmic transparency for many years and has litigated several cases on the frontlines of ADS policy in the federal government.[2] EPIC successfully obtained from U.S. Customs and Border Protection documents relating to its use of secret, analytic tools to assign "risk

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[1] EPIC, *About EPIC*, https://epic.org/epic/about.html.
[2] EPIC, *Algorithmic Transparency*, https://epic.org/algorithmic-transparency.

Privacy is a Fundamental Right.

assessments" to U.S. travelers.[3] In EPIC v. DHS, EPIC sought to compel the Department of Homeland Security to produce documents related to a program that assesses "physiological and behavioral signals" to determine the probability that an individual might commit a crime.[4] EPIC successfully sued the Department of Justice to produce documents concerning the use of "evidence-based risk assessment tools," algorithms that try to predict recidivism, in all stages of sentencing.[5] EPIC also petitioned the Federal Trade Commission to make rules for fair use of ADS and submitted complaints against AirBnb and Hirevue for unfair or deceptive practices through unfair or unsubstantiated ADS.

The systems at issue in EPIC's cases were classic examples of problematic uses of ADS, but these systems have continued to be adopted in many other areas. For example, there are ADS used for housing, basic benefits, healthcare, hiring, and criminal justice purposes.

EPIC has also made an open and inclusive process for U.S. policy on ADS a priority.[6] EPIC established transparency for the National Security Commission on Artificial Intelligence by obtaining a court order that the commission's records and meetings are open to the public.[7] EPIC has also submitted comments to the Commission, the Office of Management and Budget, the U.S. Patent and Trademark Office, the Federal Communications Commission, and the Department of Housing and Urban Development advocating for adoption of fair and accountable ADS policies.[8]

EPIC has also done substantial research into the issues posed by ADS uses. Recently EPIC published a report about Pre-trial Risk Assessments in the Criminal Justice System, *Liberty At Risk*. The report samples states use of these tools, defines key terms, contextualizes the use of risk assessment tools, offers recommendations, and samples litigation around the tools.

The Need for Transparency and Accountability

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[3] EPIC, *EPIC v. CBP (Analytical Framework for Intelligence)*, https://epic.org/foia/dhs/cbp/afi.
[4] EPIC, *EPIC v. DHS- FAST Program*, https://epic.org/foia/dhs/fast.
[5] EPIC, *EPIC v. DOJ (Criminal Justice Algorithms)*, https://epic.org/foia/doj/criminal-justice-algorithms.
[6] *See* Letter from EPIC et al. to Michael Kratsios, Deputy U.S. Chief Technology Officer (July 4, 2018), https://epic.org/privacy/ai/OSTP-AI-Petition.pdf ("Unless the channels of public input are formally broadened and deepened substantially, the Select Committee will fail to understand and mitigate the risks of AI deployment.").
[7] *EPIC v. Nat'l Security Comm'n on Artificial Intelligence,* No. 19-2906 (D.D.C. filed Sept. 27, 2019); EPIC, *EPIC Challenges Closed Door Meetings of US AI Commission* (Sept. 27, 2019), https://epic.org/2019/09/epic-challenges-closed-door-me.html.
[8] *See* EPIC, Comments to National Security Commission on Artificial Intelligence, *Solicitation of Written Comments by the National Security Commission on Artificial Intelligence*, 85 Fed. Reg. 32,055 (Sep. 2020) https://epic.org/apa/comments/EPIC-comments-to-NSCAI-093020.pdf; EPIC, Comments to Office of Management and Budget, *Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, "Guidance for Regulation of Artificial Intelligence Application,* 85 FR 1825 (Mar. 2020) https://epic.org/apa/comments/EPIC-OMB-AI-MAR2020.pdf; EPIC, Comments to United States Patent and Trademark Office, *Intellectual Property Protection for Artificial Intelligence Innovation*, 84 CFR 66176 (Jan. 2020); https://epic.org/apa/comments/EPIC-USPTO-Jan2020.pdf; EPIC, Comments to the Department of Housing and Urban Development, *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 24 CFR 100 (Oct. 2019) https://epic.org/apa/comments/EPIC-HUD-Oct2019.pdf.

Automated decision-making systems are currently used by states to determine bail and criminal sentences, evaluate public employees, determine government benefit eligibility, among other uses.[9] There is a significant risk of bias and discrimination in these systems, yet there are currently no systems in place to measure or account for their impact.

Criminal justice algorithms—which range from risk assessments to predictive policing to other "evidenced-based methods"—are controversial tools that purport to predict future behavior by defendants and incarcerated persons.[10] These proprietary techniques are used to set bail, determine sentences, and even contribute to determinations about guilt or innocence. Yet the inner workings of these tools are largely hidden from public view. Transparency is not a cure-all to the issues that the systems can create, reflect and perpetuate, but they are a critical starting point. Importantly, Washington has an opportunity to enact real transparency, aided by publicly availably Algorithmic Accountability Reports, which will aid the public in understanding systems without substantial technical sophistication.

Many "risk assessment" algorithms consider personal characteristics such as age, sex, geography, family background, and employment status. As a result, two people accused of the same crime may receive sharply different bail or sentencing outcomes based on inputs beyond their control—but have no way of assessing or challenging the results.[11] Specifically, pre-trial risk assessments try to measure "recidivism risk" and "flight risk" before trial. Criminal justice algorithms are used across the country, but the specific tools differ by state or even county. In addition, because such algorithms are proprietary, they are not subject to state or federal open government laws. this year, some of the organizations that developed and most strongly promoted adoption of Pretrial Risk Assessment tools began to caution against their use in the pretrial context. The Pretrial Justice Institute, who had supported the rapid adoption of these tools in the last 10 years, wrote this February that "We now see that pretrial risk assessment tools, designed to predict an individual's appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems."[12] Days later, an organization funded by the developers of the Public Safety Assessment, a widely used Pretrial Risk Assessment tool, wrote that "implementing an assessment alone cannot and will not result in the pretrial justice goals we seek to achieve."[13]

In *Liberty At Risk*, EPIC makes several recommendations about automated decision-making tools used in the Criminal Justice system, most of which SB5116 follows.[14] All individuals should have the right to know the basis of an automated decision that concerns them. And there must be independent accountability for automated decisions. SB5116 would provide accountability by requiring algorithmic accountability reports prior to their use by a state agency.

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[9] Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014).

[10] Danielle Citron, *(Un)Fairness Of Risk Scores In Criminal Sentencing*, Forbes (July 2016), https://www.forbes.com/sites/daniellecitron/2016/07/13/unfairness-of-risk-scores-in-criminal-sentencing/

[11] Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[12] Pretrial Justice Institute (PJI) *No longer recommend Risk Assessment Tools*, February 7, 2020.

[13] https://epic.org/LibertyAtRisk/LibertyAtRisk-Sept2020.pdf

[14] EPIC, *Liberty At Risk* at 15–16.

Without knowledge of whether a system is being used, what system is being used, and what factors the system uses as the basis for decisions, it is impossible to begin to understand whether the government engages in practices that are deceptive, discriminatory, or unethical. The Pew Research Center recently found that most Americans are opposed to algorithms making decisions with consequences for humans, and 58% think algorithms reflect human bias.[15] Without transparency about *what* systems are used and how throughout the state, which provisions in SB5116 will provide, the road past the problems of bias, fairness, and due process will remain elusive.

The layered nature of automated decision-making systems and the myriad factors that are critical to accountability: the developer, the factors used, the data sources, the weight of the factors, data use and management policies, and more, require robust transparency systems. All transparency is not created equal, but SB5116 creates substantial transparency. And beyond mere transparency, the bill introduces important landmark safeguards around data privacy and cybersecurity.

Recommendations

SB5116 will allow Washington to understand the uses of ADS by the state and move forward with knowledge, public input and principled regulation that maximizes the benefits of this technology while minimizing risk to citizens. Currently, the use of ADS by state agencies remains unknown and opaque to both lawmakers and citizens affected by it. The threshold must be a policy of meaningful disclosure and minimum standards.

EPIC particularly supports the provisions requiring agencies to examine the manner by which state agencies validate and test the automated systems they use; the fact that the algorithmic accountability report will be made publicly available on a website; the prohibition against discrimination; giving notice to individuals that a system is being used on them; requiring an ability to appeal; allowing for third party testing; and the regular testing and publication of these metrics. The ban of AI-enabled 'profiling in any place of public resort, accommodation, assemblage, or amusement…that produce legal effects" with the specific examples of criminal justice, hiring, and access to basic necessities is an extremely strong and urgently needed aspect of the bill.

These provisions should be preserved. EPIC would recommend that the legislature introduce penalties against certain violations of this law beyond injunction. EPIC suggests provisions to ensure that the reports are done in good faith and, in order to ensure that's the case, support from experts in statistics or data science in order to accurately complete the Algorithmic Accountability Report.

Regulatory efforts in other states

The dangers of ADS used by governments is a policy challenge every state, county, city, and government is grappling with. As various jurisdictions regulate the development and deployment of ADS, several are regulating specific technologies or establishing statewide commissions to study these systems.[16] A sampling of prominent U.S. laws and legislation is below.

Idaho's Transparency for Pre-trial Risk Assessments

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[15] Pew Research Center, *Public Attitudes Toward Computer Algorithms* (Nov. 2018), http://www.pewinternet.org/2018/11/16/public-attitudes-toward-computer-algorithms/.
[16] EPIC, State Artificial Intelligence Policy https://epic.org/state-policy/ai/

In 2019, Idaho enacted a law that requires "all documents, data, records, and information used by the builder to build or validate the pretrial risk assessment tool and ongoing documents, data, records, and written policies outlining the usage and validation of the pretrial risk assessment tool" to be publicly available; allowing a party in a criminal case to review the calculations and data underlying their risk score; and precluding trade secret or other intellectual property defenses in discovery requests regarding the development and testing of the tool.[17] This is an exemplar for states committed to using algorithms in pre-trial sentencing while retaining the notions of fairness and due process.

California's Right to Opt-Out of Automated Decision-Making

California's recently passed ballot initiative, Proposition 24, provides, for the first time in the U.S., a right to opt-out of automated decision-making.

AI Commissions:

Other jurisdictions have also taken action to address the issue of transparency and accountability for ADS. Many have created task forces or commissions which strive to provide a certain degree of transparency for state uses of AI and are directed to propose regulatory recommendations.[18] While these commissions were created with good intentions, they are often plagued with inefficiency and insufficient legal authority to require meaningful transparency. SB5116 would similarly achieve more meaningful transparency, provide legal authority for adequate investigation, and give immediate protection to Washington citizens from discriminatory uses of ADS.

Conclusion

Democratic governance is built on principles of procedural fairness and transparency. And accountability is key to a fair decision-making process. We must know the basis of decisions made by government, whether right or wrong. But as decisions are automated, and organizations increasingly delegate decision making to techniques they do not fully understand, processes become more opaque and less accountable. It is therefore imperative that algorithmic processes be open, provable, and accountable.

When the government uses ADS to make decisions about people, those systems present fundamental questions about accountability, due process, and fairness. Algorithms deny people educational opportunities, employment, housing, insurance, and credit.[19] Many of these decisions are

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[17] Idaho Code § 19-1910 (2019) https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118.pdf
[18] See NYC Local Law 49, Int No. 1696-A §1(b)(2) (2017) https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3137815&GUID=437A6A6D-62E1-47E2-9C42-461253F9C6D0; NY Senate 3971-B (February 22, 2019) https://www.nysenate.gov/legislation/bills/2019/s3971; VT. H. 378 (May 21, 2018) https://legislature.vermont.gov/bill/status/2018/H.378; AL. SJR71 (May 15, 2019) http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2019RS/PrintFiles/SJR71-int.pdf
[19] Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014).

entirely opaque, leaving individuals to wonder whether the decisions were accurate, fair, or even about them.

We recognize the potential value of ADS for a wide range of government programs. But government agencies that use ADS covered in SB5116 should ensure that the systems are tested, considered, and documented publicly.

Passage of SB 5116 will allow the Legislature and the citizens of Washington to understand how state agencies are using automated decision making, and will facilitate testing, advocacy, trust, and awareness about the systems the state uses. It is both beneficial to state administration and more importantly, human fairness. This is a crucial first step towards ensuring that accountability, transparency, public input, privacy, fairness, education, and due process must remain at the forefront of the rapid adoption of new automated decision-making systems.

If EPIC can be of any assistance to the Committee, please contact EPIC Equal Justice Works Fellow Ben Winters at winters@epic.org or EPIC Policy Director and Interim Associate Director Caitriona Fitzgerald at fitzgerald@epic.org.

Sincerely,

/s/ *Caitriona Fitzgerald*   /s/ *Ben Winters*
Caitriona Fitzgerald   Ben Winters
EPIC Interim Associate Director and   Equal Justice Works Fellow
Policy Director

Attachments

Liberty At Risk