GARDEN COURT

CHAMBERS

Artificial Intelligence and Automated Decision Making in Public Bodies: What are the Implications for Housing Cases?

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13 May 2024

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AI and the DWP

Louise Hooper, Garden Court Chambers

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Definitions

- AI is an umbrella term for a range of technologies and approaches that often attempt to mimic human thought to solve complex tasks. Things that humans have traditionally done by thinking and reasoning are increasingly being done by, or with the help of, AI. (UK, ICO)

- OECD definition gaining broad acceptance:

An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.

Techniques and approaches of software

- Machine learning- including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning

- Logic and knowledge based approaches (including knowledge representation, inductive (logic) programming, knowledge bases, inference/deductive engines, (symbolic) reasoning and expert systems;

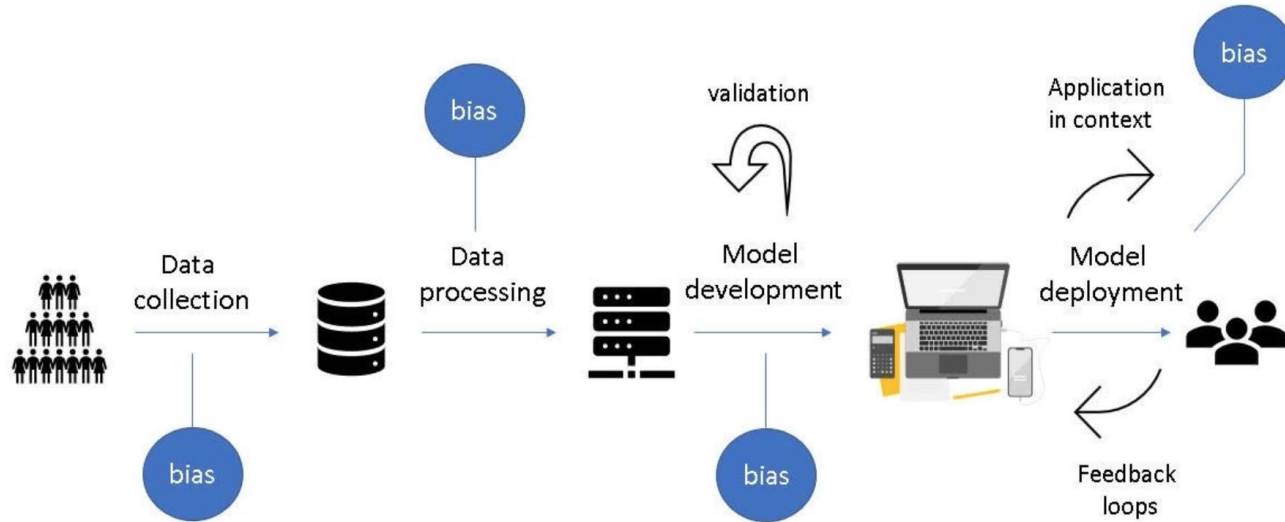- Statistical approaches, Bayesian estimation, search and optimisation methods

Surveillance and profiling

- **Surveillance tech:**
  - Automated facial recognition: Webcams, CCTV
  - Computer use- keystrokes, voice recognition, websites visited, content created

- **Emotion recognition tech**:
  - Facial expression recognition
  - Eye tracking
  - Voice stress analysis
  - Functional magnetic resonance imaging

- **Profiling**:
  - Predictive algorithms e.g. COMPAS sentencing algorithm in the US, OASyS recidivism assessments, welfare fraud, migration and border control
  - Safety tech in schools

- **Combination of the above**
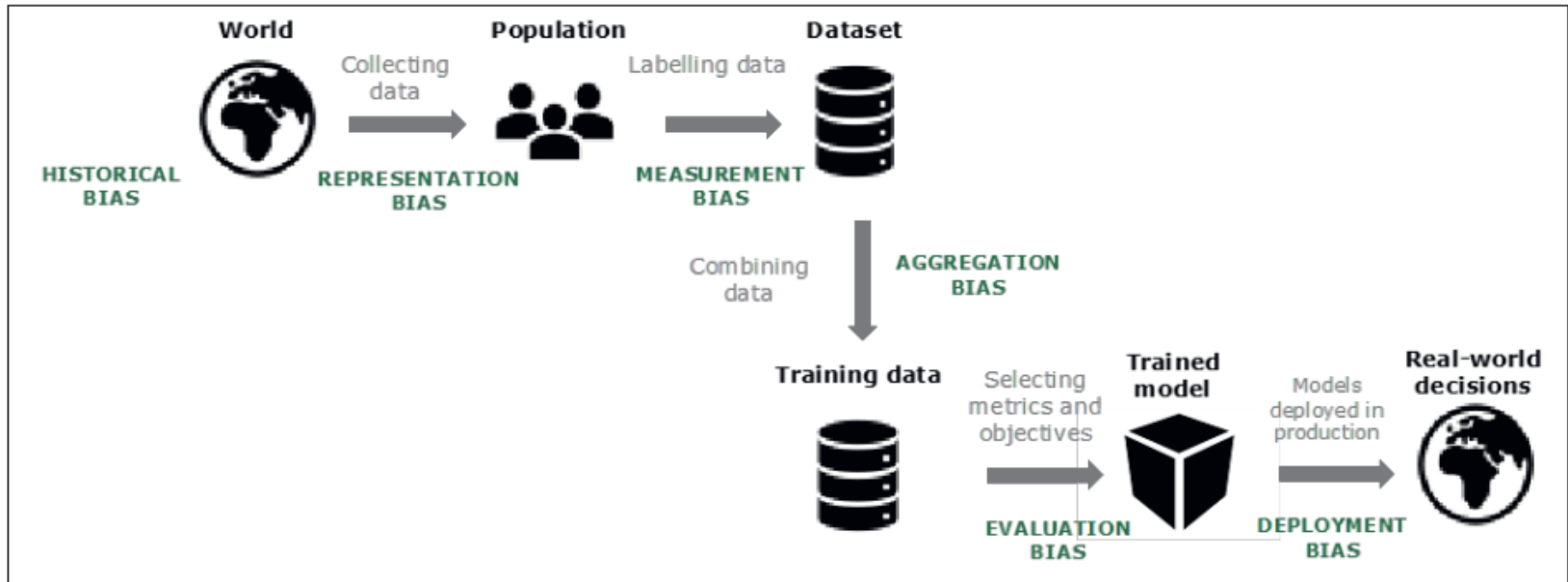
How does bias enter a system?

Source: https://bhm.scholasticahq.com/article/38021-misguided-artificial-intelligence-how-racial-bias-is-built-into-clinical-models

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Types of bias

Table and definitions below from: A Framework for Understanding Sources of Harm throughout the Machine Learning Life Cycle[22]

What do we know about DWP use of AI?

Big Brother Watch: Poverty Panopticon
- Risk based verification
- Housing benefit fraud risk profiling
- RentSense and Rental analytics
- Digital care for older people
- Predictive analytics:
    - Policy in Practice's Low Income Family Tracker
    - Bristol City Council's Children's Analytics
    - Hillingdon's Project Axis (includes Gangs Matrix analysis)
    - Xantura's One View- homelessness, covid

What do we know about DWP use of AI?

Public Law Project Tracking Automated Government Register

- Common Risk Engine, assigns UC claims referred to the counter fraud and compliance directorate a risk score
- General Matching Service (GMS) and Fraud Referral and Intervention Management System (FRAIMS)- particularly used to identify claimants or dependants who may have undisclosed capital or other income
- DWP running fraud and error detection pilot in housing, targets people living together, self-employment, capital and housing, deploys ML to flag benefit claims for review by a caseworker. The DWP has noted some bias in this system owing to training dataset and inherent risk of bias identified by NAO
- Fraud risk model to analyse Universal Credit advance payment claims to identify risks of error and fraud
- Housing management system – a points based system05 for prioritising social housing waiting lists (used in Wigan)
- RentSense- identifies social housing tenants at risk of failing to pay rent by looking at payment patterns

Mel Stride to Stephen Timms, 4 December 2023

"The Department is piloting AI to scan our inbound contact channels to alert for potential risks of harm. Our 'White Mail' AI technology has further increased the speed at which we are able to identify vulnerable people from the around 22,000 letters the department receives each day. This process, which now takes a day rather than weeks, means those most in need can be more quickly directed to the relevant person who can help them.

We are exploring how Generative AI can be used across the Department through our Lighthouse Programme. The programme is exploring the use of AI in several use cases which include:

- Trialling AI-enabled projects to complement the services work coaches provide to customers in job centres;
- Trialling how AI can write, update, or organise code to address the current digital skills shortage in areas like software engineering;
- Trialling productivity tools for all colleagues to use, such as rapidly summarising policy documents or providing simple tools to gather information for frontline colleagues."

DWP and benefit fraud

Public accounts committee:
"there are legitimate concerns about the level of transparency around DWP's use of these tools and the potential impact on Claimants who are vulnerable or from protected groups'

Recommended the DWP should consider explicitly the impact of data analytics and machine learning on legitimate claims being delayed or reduced, the number of people affected and whether this is affecting specific groups of people.'

- DWP was arguing that providing information about the models it used this could be exploited and disagreed with a recommendation to provide specific metrics for publication

- PAC were unhappy about this noting that high level figures such as the number of people with delayed or reduced claims could be reported without revealing details of the machine learning models or how they deal with claimants.

DWP and AI

Some Concerns:
- Lack of transparency- is a model being used? What does it do? What is the error rate? How is it tested?
- Accepted existence of bias in the models- what is the extent of the bias? How is it tested?
- Difficulty in obtaining evidence
- Poor record in responding to FOI requests
- Privacy notice is not transparent
- Unclear if the tech works or works sufficiently well to justify the surveillance

Remedies for individuals:
- Equality Act
- Human Rights Act
- Data Protection issues, challenges, complaints to ICO
- Judicial review

Human in the Loop

- UK GDPR Recital 71: data subject has the right not to be subject to a decision which may include a measure, evaluating personal aspects relating to the data subject which is solely based on automated processing (including profiling) and which produces legal effects concerning a data subject or similarly significantly affects them.

- Article 22: right not to be subject to a decision based solely on automated processing where that decision has a significant impact on them

- BUT: This is subject to exceptions. Does not apply where the automated decision is
  - Necessary for entering into or performing a contract with the data subject
  - Required or authorised by domestic law (fraud or tax evasion?)
  - Based on explicit data consent

DWP personal data policy

Artificial intelligence

DWP uses artificial intelligence (AI) to help deliver efficient and effective services and to help detect and prevent fraud and error.

We take appropriate steps to obtain assurance that our use of AI meets data protection requirements.

DWP does not use AI to replace human judgement to determine or deny a payment to a claimant.

Automated decision making

DWP uses automated processing in some decision making to help us deliver efficient services.

DWP will not make any decision based solely on automated processing which has a significant effect on you unless the law allows this.

You have rights relating to this type of decision. We will tell you more about this if we make any such decision.

- [Personal information charter - Department for Work and Pensions - GOV.UK (www.gov.uk)](www.gov.uk)

Human in the Loop

Lord Harris of Haringey ›
(Lab)

The Minister has said repeatedly that he wants the public to have trust in the use of AI in the system. Can he therefore tell us what proportion of cases where AI has been used are subsequently checked by a human? Will he publish the results of that analysis to show whether the AI decisions are the same as human decisions, or perhaps better, or worse?

Viscount Younger of Leckie ›
(Con)

I can give the noble Lord some reassurance on the processes that we have in place. AI is an evolving, iterative process and it is important to highlight the fact that we have a test- and-learn approach. We must proceed with extreme caution in what we are doing. Test-and-learn means that we need to get to a point where we are assured that this will work and that nobody will be affected detrimentally. Then we can accelerate our programmes.

Data Protection and Digital Information Bill

Automated Decision Making- amendments permit solely automated decisions on a wider basis than previously and water down safeguards (current clause 14)
- May be of particular relevance to welfare because problems in the system can arise from innocuous datasets (eg household water usage)but lead to accusations of benefit fraud (SyRI)

Mass state surveillance
- Access to bank accounts
- Powers of search and seizure
- Powers of arrest
- Civil penalties

This proposal raises very significant privacy and equality issues.

Big Brother Watch briefing on this available: https://bigbrotherwatch.org.uk/wp-content/uploads/2024/03/BBW-DPDI-Briefing-for-House-of-Lord-Committee-Stage.pdf

Thank you

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The Global Context

- "World stumbling zombie-like into a digital welfare dystopia" Philip Alston, UN Special Rapporteur on extreme poverty and human rights – report of 2019

- Warned about the dangers of the digital transformation of the State, where digital technologies are being used to "automate, predict, identify, surveil, detect, target and punish" people.

- Flagged issues in systems in several countries including the United Kingdom, in particular Universal Credit

SyRI Case - Background

- *Systeem Risico Indicatie* (SyRI), was a Dutch legal instrument that allowed the linking and analysing of data from a range of government agencies with the goal of preventing "taxes and social security fraud and non-compliance with labour laws."

- SyRI legislation, provided for SyRI-projects to link and analyse data from different government agencies to produce a risk report of people. When a risk report is filed, an individual is "deemed worthy of investigating with regard to possible fraud".

- Government agencies providing data included municipal governments, the Netherlands Tax and Customs Administration, the Social Insurance Bank, the Immigration and Naturalisation Service, the Employee Insurance Agency, and supervisory authorities like the Social Affairs and Employment Inspectorate. Kinds of data included 17 general types of data, including data on health, finance, education, fiscal payments, employment and "integration".

SyRI Case – Key points

- 2018 - key legal challenge to SyRI brought by a coalition of Civil Society Organisations

- Individuals whose data was involved in a SyRI project were only informed when an official investigation followed up on a risk report.

- The risk model, indicators, threshold values, types of data and people targeted were unknown to the Court, the individuals involved and society at large.

- Government confirmed that SyRI was only ever used to analyse people in specific neighbourhoods, described as "problem" neighbourhoods.

- Government did not seek to appeal the judgment but did follow up with new legislative proposals for Automated Decision Making in light of the judgment.

SyRI Judgment Key Points

- 2020 – District Court of the Hague found SyRI was a violation of the right to private life (Article 8 ECHR)
    - Court used the general principles of data protection from Article 5 GDPR to substantiate the requirement of Article 8 ECHR
    - The principle of transparency, the principle of purpose limitation and the principle of data minimisation were used to assess whether the requirements of necessity, proportionality and subsidiarity were met
    - Lack of transparency as to what SyRI was and how it operated led Court to decide that Government secrecy itself added to the seriousness of the violation of right to privacy.
    - Secrecy was also a factor in assessing whether SyRI was *"in accordance with the law"* – reference to *S and Marper v UK*
    - Focus of judgment is whether *"necessary in a democratic society"* rather than legality

SyRI Judgment key points continued

- Risk of discrimination compounded by opacity led the court to include discriminatory impact and risk of bias within analysis of Article 8 without Article 14 ECHR.
- Insufficient safegyards as SyRI legislation paid "insufficient attention to the principle of purpose limitation and the principle of data minimisation" in violation of Article 8(2) ECHR
- SyRI legislation did not provide for a comprehensive or independent review prior to the data processing by the Minister, to assess necessity, proportionality and subsidiarity "in light of all the files that are linked in a project considering the specific purpose of that project".
- government to have "a special responsibility when applying new technologies to strike the right balance between the benefits the use of such technologies brings as regards preventing and combating fraud on the one hand, and the potential interference with the exercise of the right to respect for private life through such use on the other hand."

Key themes

- Interplay between Article 8 ECHR and data protection principles
- Discrimination and bias as elements of privacy under Article 8 ECHR
- Lack of transparency has its own legal consequences
- Absence of information may prevent substantive arguments but gives rise to arguments regarding safeguards and procedures
- Interplay between *"in accordance with the law"* and *"necessary in a democratic society"* in legal analysis
- Need for independent prior risk assessments

- Relevant UK Legal Frameworks
  - Administrative Law and Human Rights
  - Data Protection Law
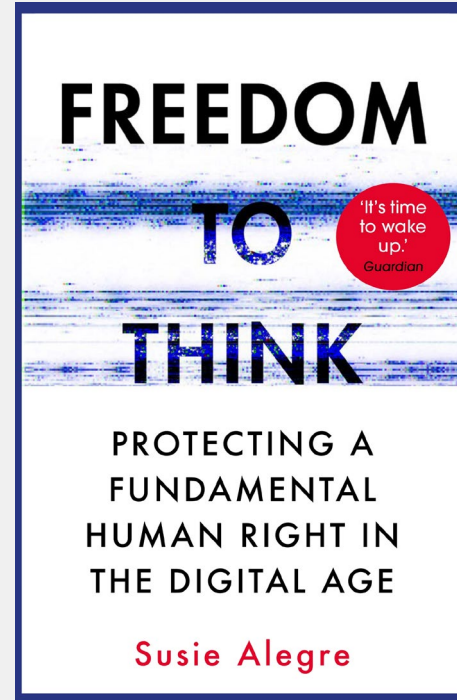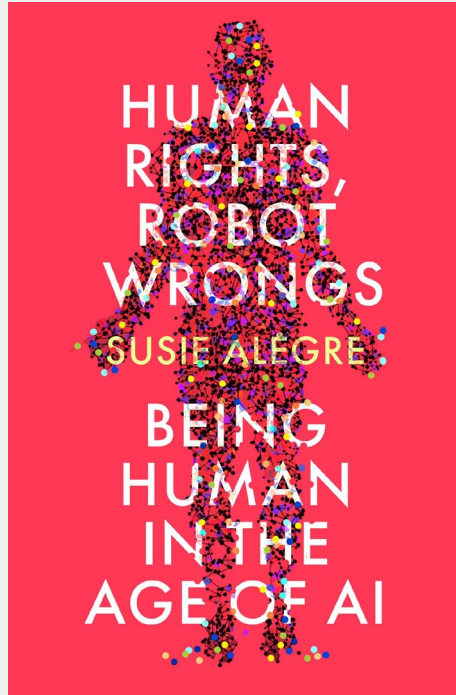 - Tort of Misuse of Private Information

Understanding What is Happening

- Data Subject Access Request
- Freedom of Information Request
- ICO Reports
- Media Coverage
- Civil Society
  - Privacy International
  - Algorithmwatch
  - Foxglove
  - Public Law Project
  - Big Brother Watch
  - Liberty
  - Reset
  - Digital Freedom Fund

Books

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