Response to ICO's paper "Guidance on the AI auditing framework: Draft guidance for consultation".

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- We are specialist discrimination barristers operating in the AI field. Our work in the AI arena can be accessed at www.ai-lawhub.com.

- We have used the term "Draft Guidance" to refer to the ICO paper in our comments below.

Erroneous conflation of "algorithmic unfairness" within the concept of "discrimination" within UK law

1. The Draft Guidance (implicitly) defines the notion of "discrimination" in a way which is incompatible with the meaning of discrimination within the Equality Act 2010.

2. Whilst the Draft Guidance expressly refers to the Equality Act 2010 at page 53, it does not set out its definitions of discrimination (direct discrimination[1], indirect discrimination[2], harassment[3], failure to make reasonable adjustments[4], unfavourable treatment arising from disability[5] and victimisation[6]). This omission this had led the Draft Guidance into dangerous territory in that under the heading "What are the technical approaches to mitigate discrimination risk in ML models?" on page 55, the Draft Guidance proposes various methods of mitigating discrimination which are *not recognised in the UK*.

3. Specifically, the concept of "algorithmic fairness" at page 55 in the Draft Guidance is entirely at odds with the meaning of discrimination within the UK and should not be conflated. This means that the Draft Guidance wrongly gives the impression to business that acting in a way which is "algorithmically fair", as measured against one of the three metrics ("anti-classification", "outcome / error parity" and "equal calibration"), may or will lead to compliance with the Equality Act 2010. This is wrong because, by way of example, it is always direct sex discrimination contrary to section 13 of the Equality Act 2010 to treat a woman less favourably than a comparable man because of gender regardless of whether "mitigation" steps have been taken such as removing in so far as possible protected

[1] Section 13.
[2] Section 19.
[3] Section 26.
[4] Section 20/21.
[5] Section 15.
[6] Section 27.

characteristics ("anti-classification") or whether equal numbers of positive or negative outcomes are given to different groups ("outcome / error parity") or if the model equally calibrates between members of a different protected groups ("equal calibration"). It follows that the analysis at pages 55 to 56 must be removed or, at the very least, modified.

4. Moreover, we are concerned that one proposed method of "mitigating discrimination" namely the "anti-classification" approach of removing all data concerning protected characteristics may lead to businesses acting contrary to the Equality Act 2010. That is, the Equality Act 2010 places, in many important respects, a positive duty on employers to treat people with certain protected characteristics differently (i.e. disabled persons, women on maternity leave, pregnant women) and sometimes an employer must positively act so as to alleviate the disadvantages created for certain protected groups (e.g. ensuring that part time working practices do not create certain difficulties for women who still mostly perform part time work). An approach which creates "blindness" to protected characteristics, therefore, has the potential to led to breaches of the Equality Act 2010.

Erroneous conflation of "algorithmic unfairness" within the concept of "discrimination" within European law

5. It should also be stressed that the definition of discrimination within the Equality Act 2010 is derived from the case law of the CJEU. Whilst, in a post Brexit world it has perhaps become unfashionable to consider European law, a good deal of businesses operating in the UK will also operate in some or all of Europe. These businesses will have a common approach towards AI systems rather than a UK-centric approached. In short, Europe will become a standard setter in much the same way as the GDPR has internally. Accordingly, unless business is to be stifled through uncertainty, the ICO and other UK based regulators (to which, see below) should ensure that guidance is appropriate in both an EU and UK legal framework.

Insufficient guidance for employers, employees, workers and their advisors

6. We believe that AI systems are being used by employers in the UK in a whole variety of ways from Facial Recognition Technology (FRT) in recruitment through to monitoring employee movements and activities.

7. The use of AI systems creates particular challenges for employment law in that these technologies will impact on the Equality Act 2010 (the principle of non-discrimination), article 8 (the right to privacy), the GDPR (for example, Article 22), contract law (for example, the implied term of trust and confidence) and statutory rights which affect the workplace (for example, health and safety legislation).

Practical guidance is therefore required in relation to how business is to navigate these various legal frameworks in a way which is lawful when operating AI systems. Statutory guidance is frequently produced in the employment field and a practical document focusing on AI is urgently required.

8. Further, beyond practical guidance, clarity is also required in relation to basic legal concepts and this could be incorporated within a statutory guide. For example, the extent to which employers can rely on the "statutory defence" within the Equality Act 2010 if they purchase discriminatory technology is currently clear.

9. Due to the cross-regulatory nature of AI, we believe strongly that the ICO should be working alongside other regulators such as the CDEI and the EHRC to create statutory guidance which explains how employment law applies to the new world of AI.

10. Moreover, it is important to recognise that many AI systems will apply in an employment context *and* a broader goods, facilities and services setting. For example, FRT will be used by both employers and service providers alike. Employers and the providers of goods, facilities and services are all subject to the Equality Act 2010 in broadly the same way. Accordingly, statutory guidance which brings together in a coherent way the employment field and the broader context is needed urgently.

11. Finally, we are aware that there are many "competing" ethics guidelines being created in the UK at present. Employers, the workforce and their advisors urgently need to be informed of how ethical norms around AI should be incorporated into the workplace. Statutory guidance would again meet this need.

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