Date of Hearing: March 21, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Jesse Gabriel, Chair
AB 302 (Ward) – As Introduced January 26, 2023

As Proposed to be Amended

SUBJECT: Department of Technology: high-risk automated decision systems: inventory

SYNOPSIS

This bill will provide the Administration and Legislature with a much needed inventory and analysis of all of the critical automated decision systems (ADS) in state departments being used or proposed for use to replace human decision making that helps determine access to housing, healthcare, unemployment insurance, safety-net programs and length of incarceration, to name a few.

Given the growing research demonstrating that biases may be built into automated decision systems that are being used to make critical decisions affecting people's lives, and the state's ongoing commitment to protecting civil rights and providing support and assistance equally to all Californians, requiring an inventory of the computerized decision-making systems used by the state is a critical first step in ensuring that Californians are not being harmed by flawed data or flawed systems.

This bill is sponsored by the Greenlining Institute. There is no registered opposition at this time.

SUMMARY: Requires the California Department of Technology (CDT) to conduct an inventory of all high-risk automated decision systems being used in state agencies. Specifically, **this bill**:

1) Requires DOT to conduct, on or before September 1, 2024, a comprehensive inventory of all high-risk ADS that have been proposed for use, development, or procurement by, or are being used, developed, or procured by all state agencies.

2) Requires the inventory to include a description of categories of data and personal information the automated system uses to make its decisions, the results of any research assessing the efficacy of the system, and any measures in place to mitigate the risks, including the risk of inaccurate, unfairly discriminatory, or biased decisions.

3) Defines "automated decision system" to mean a computational process derived from machine learning, statistical modeling, data analytics, or artificial intelligence that issues simplified output, including a score, classification, or recommendation, that is used to assist or replace human discretionary decision-making and materially impacts people.

4) Clarifies that the term "automated decision system" does not include a junk email filter, firewall, antivirus software, calculator, database, data set, or other compilation of data.

5) Defines "high-risk automated decision system" to mean an automated decision system that is used to assist or replace human discretionary decisions that have a legal or similarly

significant effect, including decisions that impact access to or approval for, housing or accommodations, education, employment, credit, health care, and criminal justice.

6) Requires that on or before January 1, 2025, and annually thereafter, that CDT submit a report to the Assembly Committee on Privacy and Consumer Protections Committee and the Senate Committee on Governmental Organization.

EXISTING LAW:

1) Provides, pursuant to the Unruh Civil Rights Act, that all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civ. Code § 51.)

2) Provides that no person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. (Gov. Code §§ 11135 et. seq.)

3) Establishes CDT within the Government Operations Agency, and generally tasks the department with the approval and oversight of information technology (IT) projects, and with improving the governance and implementation of IT by standardizing reporting relationships, roles, and responsibilities for setting IT priorities. (Gov. Code §§ 11545, et seq.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS:

1) **Purpose of bill.** This bill would require the California Department of Technology (CDT), within the Government Operations Agency, to conduct a comprehensive inventory of all high-risk automated decision systems (ADS) being used by state agencies and submit a report to the Legislature by January 1, 2025, and annually thereafter. The inventory is intended to help state agencies identify and minimize the risk of adverse and discriminatory impacts resulting from their design and implementation of ADS.

2) **Author's statement.** According to the author:

> California is leading the way in adopting Automated Decision Systems (ADS) across state agencies to modernize and deliver services more efficiently. State agencies are using ADS in various ways, including to detect fraud in unemployment and tax filings, speed up document processing at the Department of Motor Vehicles, and help make better decisions in welfare services and healthcare reimbursements and California's climate investments.
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> When used properly, these systems can benefit Californians. However, if these systems are not designed and implemented correctly, they can create unfairly biased or inaccurate results

that harm Californians and reduce trust in these systems. These results can disproportionately harm low-income families and communities of color given the number of government services and programs that impact them.

AB 302 would ensure that Californians have transparency into the government's use of high-risk ADS and provide state agencies with the information to analyze their use of high-risk ADS. By requiring the CDT to establish guidelines identifying ADS that have a high-risk of adverse impacts and conduct an inventory of those high-risk ADS, this bill will help state agencies identify and minimize the risk of adverse and discriminatory impacts that result from their design and implementation of ADS.

3) **Use of algorithms by government**. Over the last 50 years, monumental advances in computer and information science, along with the rise of "big data," have facilitated new milestones in artificial intelligence and machine learning. As computers and the software controlling them become more sophisticated, the types of decisions that machines are capable of making can become both more complex and more consequential. If designed and operated conscientiously, ADS can considerably expedite decision-making to dramatically improve the efficiency of services, and may mitigate the influence of biases that otherwise interfere with objective human decision-making.

The promise of ADS for reliably managing decision-making with respect to large datasets makes the adoption of ADS by government entities particularly enticing. Governments at all levels are increasingly using artificial intelligence and ADS in the criminal justice system, public benefit decision making, fighting climate change, regulatory enforcement, healthcare, and education, to name a few. Because government agencies are typically tasked with making highly consequential decisions in a manner that is reliable, reproducible, efficient, and scalable to large populations, if designed and used properly, ADS have the potential to become an indispensable tool for supporting many public functions.

According to a list compiled by the AI Now Institute, for the New York City Automation Decision Systems Task Force (https://ainowinstitute.org/nycadschart.pdf), the following are some examples of the ways in which governments are currently using ADS:

- ***Child Risk and Safety Assessments*** are used by child welfare agencies to evaluate potential child neglect and abuse cases for risk of child death/injury. Data often comes from multiple sources, including a jurisdiction's department of human services and the police.
- ***Inmate Housing Classification*** is a system that analyzes a variety of criminal justice data and outcomes to determine the conditions of confinement, eligibility for programming, and overall housing arrangements of people who are incarcerated in a jail or prison. (The California Department of Corrections and Rehabilitation currently uses COMPAS, discussed in the next section, for this purpose.)
- ***School Assignment Algorithm*** is used to assign students to schools for K-12. NYC uses this type of system to match eighth-graders to high schools based on preference, test scores, portfolios, and other requirements.
- ***Student Risk Prevention Algorithm*** is used to predict students at risk of being arrested or in crisis by creating a model that uses families' zip codes, incomes, truancy numbers, race, and other indicators. The data used in these systems is often shared with law enforcement and other government agencies.

- ***Residential Face Authentication*** is a biometric scanning technology that is used in some residential buildings for entry of residents and guests. Its use may be limited to private residences, and where used it is replacing key fobs.
- ***Immigration Detention Risk Assessment*** is a computerized system that evaluates an individual's criminal history, work status, likelihood of fleeing, and other information to produce recommendation about whether the person should be detained or released prior to a removal hearing.
- ***Predictive Policing*** is algorithmic software that attempts to identify where a crime may occur in a given window of time in small geographic areas or identify individuals who may be a perpetrator or victim of a crime.

The value of ADS for decision-making depends on how they are developed and how they are used. It is incredibly difficult to assess and measure the nature and impact of algorithmic decision-making systems and research is increasingly showing the potential for biased and inaccurate decisions.

By requiring an inventory and analysis of all of the high-risk ADS used in state departments, this bill seeks to provide transparency in the use of ADS and begin the process of identifying and minimizing the risks associated with replacing human decision making with computer-driven decision making.

4) **Algorithmic Bias.** Depending on how the systems are designed and what types of datasets are used to train them for making the desired decisions, ADS can easily reflect or even exacerbate the same biases that plague human judgement. Particularly in the context of government, where public trust and accountability are paramount, this lack of transparency and potential for mechanizing human biases can be highly problematic.

A coalition of privacy and technology groups supporting this legislation note:

> Throughout California, automated systems are used to identify fraud, streamline document processing and to make decisions that control access to public resources and benefits. ADS have the potential to improve the delivery of government services, however, poorly designed systems can create unfair, biased and inaccurate results, causing disproportionate harm to low-income families and communities of color who are more likely to interact with government ADS. As California works to improve and modernize its government functions through the use of big data and automated systems, it must also lead in transparency around where these systems are used, what decisions they can support and how each agency is managing the risks associated with the use of these systems.

These concerns are not hypothetical. Several examples of government uses of ADS from throughout the country have resulted in devastatingly inequitable outcomes, particularly for already disadvantaged communities. For example, in the criminal legal system the widespread use of algorithmic risk assessments to determine the likelihood that someone will commit a crime if either released before their trial or as part of a parole consideration process has raised significant concerns. Almost 10 years ago, then-U.S. Attorney General Eric Holder warned that the use of risk assessment scores being used by the courts, rather than ensuring equal justice, may be exacerbating "unwarranted and unjust disparities that are already far too common." He then called on the United States Sentencing Commission to study the use of risk assessments. While the Sentencing Commission declined the request, journalists at ProPublica analyzed a risk

assessment tool created by Northpointe, Inc. called COMPAS that is widely used throughout the country, including in California's prison system. They found that the tool proved "remarkable unreliable" when forecasting violent crime and that there were significant racial disparities in the results. (Angwin, et al., *Machine Bias* (May 2016) ProPublica, *available at* https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.)

In another more recent example, a study released by the Stanford Institute for Economic and Policy Research (SIEPR) found that Black Americans are up to five times more likely to have their federal tax returns audited than taxpayers of all other races due to a flawed algorithm used by the Internal Revenue Service to decide which taxpayers get audited. The researchers in that study noted that even when algorithms are formally neutral with respect to protected characteristics like race, there is widespread concern that they can disproportionately burden vulnerable groups of people. (Elzayn, et al., *Measuring and Mitigating Racial Disparities in Tax Audits* (Jan. 30, 2023) SIEPR, *available at* https://drive.google.com/file/d/1kA7CG3cLq6eWmwBVgTDOIMhxuGZwRJ5O/view)

Examples from other states include a privately-built, error-prone Michigan unemployment ADS operating with minimal employee oversight that wrongly accused 40,000 people of fraud between 2013 and 2015, many of whom were forced to pay heavy fines, declare bankruptcy, or have their homes foreclosed upon. Upon appeal, less than 8% of those fraud charges were validated. (de la Garza, *States' Automated Systems Are Trapping Citizens in Bureaucratic Nightmares with Their Lives on the Line* (May 20, 2020) Time Magazine, *available at* https://time.com/5840609/algorithm-unemployment/.)

Finally, in 2016, the state of Arkansas implemented an algorithm to assign access to Medicaid benefits, only for an estimated 19% of Medicaid beneficiaries to see their benefits inappropriately cut, losing access to home care, nursing visits, and medical treatments. In a lawsuit filed by Arkansas Legal Aid, the courts ultimately found that those who were denied benefits could not effectively challenge the system, since there was no way of knowing what information factored into the algorithm's opaque decision-making process leading to that result. Fact-finding during the court case ultimately revealed that the algorithm featured several design flaws, miscodings, and incorrect calculations. (Lecher, *What happens when an algorithm cuts your healthcare* (Mar. 21, 2018) The Verge, *available at* https://www.theverge.com/2018/3/21/17144260/healthcare-medicaid-algorithm-arkansas-cerebral-palsy .)

5) **California's Commitment to Fighting Discrimination.** California has a long history of protecting the civil rights of its citizens. Along with the laws discussed above declaring that all people are free and equal in California regardless of sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, California continues to be at the forefront in passing laws and establishing government entities tasked with protecting its residents. For example, in 1959, California established the Fair Employment Practices Commission to implement state-wide protections against discrimination in the workplace. In 1980, the 1959 Fair Employment Practices Act and the 1963 Rumford Fair Housing Act were combined into the Fair Employment and Housing Act. At that time, the commission became the Department of Fair Employment and Housing, a department-level agency. In July of 2022, the department updated its name to the Civil Rights Department, more accurately reflecting the duties of the department,

which include enforcing laws prohibiting hate violence, human trafficking, discrimination in private businesses and government funded programs.

In addition to this department, in 2015, the Legislature passed and the Governor signed the Racial and Identity Profiling Act (RIPA) of 2015 (AB 953 (Weber, Chap. 466, Stats. 2015)) in order to prevent racial profiling by, among other things, clarifying and modernizing California's prohibition against profiling to better account for the ways in which profiling occurs. The bill established a uniform system for collecting and analyzing data on law enforcement-community interactions, and also established an advisory board that investigates profiling patterns and practices and provides recommendations on how to curb its harmful impact.

As a final example, the state Attorney General is tasked with enforcing federal and state civil rights laws, including ensuring reproductive rights, disability access rights, educational rights, immigrants' rights, children's rights, voting rights, and worker's rights, among other protections. The Civil Rights Enforcement Section is tasked with identifying civil rights violations to be remedied by the Attorney General. It also works closely with the public, state, federal and local government agencies, and civil rights and community organizations to identify potential civil rights initiatives. When civil rights violations are confirmed, the Civil Rights Enforcement Section will represent the Attorney General in his independent capacity as California's chief law officer in prosecuting those who have violated the law, and will seek remedies to prevent further violations of those laws.

Given this decades' long commitment to fighting discrimination, it would appear that this proposed legislation is a logical step toward ensuring that state agencies tasked with providing support and assistance equally to all Californians are not inadvertently increasing inequity by using flawed decision making tools.

6) **Author's Amendments.** Author's amendments to the bill, reflected in the analysis above, are set forth below.

SECTION 1. Section 11546.8 is added to the Government Code, to read:

11546.8. (a) For purposes of this section:

(1) ***(A)*** "Automated decision system" means a computational process derived from machine learning, statistical modeling, data analytics, or artificial intelligence that issues simplified output, including a score, classification, or recommendation, that is used to assist or replace human discretionary decisionmaking and materially impacts natural persons.

(B) "Automated decision system" does not include a junk email filter, firewall, antivirus software, calculator, database, data set, or other compilation of data.

7) **Related Legislation.** AB 13 (Chau, 2021) would have established the Automated Decision Systems Accountability Act of 2021. The Act would have required state agencies seeking to procure ADS for high-risk applications to consider, among other things, steps taken by a prospective contractor to identify and mitigate potential disparate impacts that could result from use of that ADS; required a prospective contractor for an ADS for a high-risk application to submit an ADS impact assessment containing specified information about the ADS; and required the contracting agency to submit to CDT a high-risk ADS accountability report containing

specified information regarding their proposed use of the ADS. That bill was gutted and amended for another purpose.

REGISTERED SUPPORT / OPPOSITION:

Support

Greenlining Institute (Sponsor)
Electronic Frontier Foundation
Electronic Privacy Information Center (EPIC)
Media Alliance
Oakland Privacy
Privacy Rights Clearinghouse
Secure Justice
Techequity Collaborative

Opposition
None on file.

Analysis Prepared by: Julie Salley / P. & C.P. / (916) 319-2200