



Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

VIA ELECTRONIC MAIL & ONLINE SUBMISSION

February 12th, 2024

Brian Riddell
Chair of the Standing Committee on Social Policy
Legislative Assembly of Ontario
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Chair Riddell,

RE: Schedule 2 of Bill 149, the *Working for Workers Four Act, 2023*

This written submission is about Schedule 2 of Bill 149, the *Working for Workers Four Act, 2023*, which relates in part to the use of Artificial Intelligence Technologies (AITs) in the employee hiring process.

The bill would amend the *Employment Standards Act, 2000* (ESA) by introducing new obligations on employers in respect of job postings, particularly the following transparency requirement related to the use of artificial intelligence:

8.4 (1) Every employer who advertises a publicly advertised job posting and who uses artificial intelligence to screen, assess or select applicants for the position shall include in the posting a statement disclosing the use of the artificial intelligence.

The term *artificial intelligence* would be defined in regulation, and the transparency requirement would not apply to publicly advertised job postings that meet criteria also to be prescribed in regulation.

This new transparency provision is intended to inform prospective employees about how employers might use AITs in the hiring process. However, it would not protect employees from unfair hiring decisions enabled by those AITs or provide them with any recourse to challenge such decisions. Nor would this new provision protect employees from the use of AITs affecting any other aspect of their ongoing employment beyond the initial recruitment phase.

AITs are rapidly emerging and evolving. Not only can AITs (including those which incorporate generative AI)¹ be used to screen, assess, score, or otherwise automate decision-making during hiring processes, they can also be used to evaluate employees' on-the-job performance and make inferences and predictions about their future performance. This can include inferences and predictions about employees' productivity, stress, fatigue and attention levels, not to

¹ Some human resources companies have begun discussing how, as an example, generative AI technologies can be used to streamline candidate screening processes, such as by analyzing and evaluating large numbers of applicant materials to, then, identify or score professionals with relevant skills or qualifications. As examples, see: Oowin. (2023). "How Will ChatGPT Impact Recruiting?" Available at: <https://oorwin.com/blog/how-will-chatgpt-impact-recruiting.html>. Harbinger Group. (2023). "Generative AI in Recruitment: How to Future-Proof Hiring." Available at: <https://www.harbingergroup.com/blogs/generative-ai-in-recruitment-how-to-future-proof-hiring/>.



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mention their behaviour and emotional states.² In turn, these AI-enabled inferences and predictions can feed into employers' decisions about performance evaluation, compensation, promotional opportunities, and termination of employment, and have significant impacts on employees' well-being and economic livelihood. Yet, we know, through many well-documented examples, that AITs are fallible and can sometimes lead to inaccurate and discriminatory outcomes that could be harmful to Ontarians,³ fueling bias in the health system, racial discrimination in the AI models built,⁴ or even gender discrimination.⁵

While laudable, I am concerned that the transparency requirement in Bill 149 does not adequately protect employees' privacy rights from the potential adverse impacts of AITs. Merely telling employees (or prospective employees) that AI is being used in the hiring process is not enough. Employers should be transparent about their use of AI *throughout the entire employment relationship*, up to and including termination. Moreover, employers should not only be transparent about the fact that they are using AITs but should also have to explain the resulting outputs and be held accountable for ensuring that their use of AI is safe, privacy protective, transparent, accountable, and human rights-affirming. Employees and job applicants should have correlative rights, be able to request information about AIT outputs or decisions and have meaningful recourse when they believe their rights have been adversely affected.

In March 2022, I raised similar concerns about a previous Bill 88 (now law) that required certain employers (with 25 or more employees) to develop and make available a policy on their use of electronic monitoring technologies.⁶ Bill 149, like Bill 88, takes a very narrow and *ad hoc* approach to protecting employee privacy rights by introducing a limited transparency requirement.

I continue to urge the government to take a broader and more strategic and comprehensive approach to protecting the fuller panoply of privacy rights of Ontario workers and containing the serious risks associated with the rapidly evolving digital technologies being adopted and used in the workplace, including AITs.

² Seeing the potential harm of this activity, the European Parliament has proposed that the inference of individuals' emotions in the workplace be a prohibited practice under the EU's Artificial Intelligence Act. See: European Parliament. (2023). Amendment 226: Proposal for a regulation Article 5 – paragraph 1 – point d c (new). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html.

³ In an experiment to use AI detecting sepsis, the medical team discovered possible bias showing that Hispanic children had longer periods to be diagnosed with sepsis than white children. Source:

<https://www.npr.org/sections/health-shots/2023/06/06/1180314219/artificial-intelligence-racial-bias-health-care>

⁴ Dr. Joy Buolamwini, a researcher at the MIT Media Lab, tested the accuracy of facial recognition systems. The results showed error rate of only 0.8 percent for light-skinned men while 34.7 percent for dark-skinned women and confirmed the technology's flawed results, particularly with respect to visible minority groups. AITs which are used to assess facial imagery in the employment context, then, can result in erroneous readings to the detriment of affected employees. See: Larry Hardesty. (2018). "Study finds gender and skin-type bias in commercial artificial-intelligence systems," *MIT News*. Available at: <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212>.

⁵ Amazon's automated hiring tool discriminated against women. Source: <https://www.aclu.org/news/womens-rights/why-amazons-automated-hiring-tool-discriminated-against>

⁶ IPC. (2022). "Comments on Bill 88, the Working for Workers Act, 2022." Available at: <https://www.ipc.on.ca/wp-content/uploads/2022/03/2022-03-14-ltr-standing-committee-on-social-policy-re-schedule-2-of-bill-88-the-working-for-workers-act-2022.pdf>.

In the remainder of this submission, I elaborate on **two key recommendations**:

- I. Adopt a more comprehensive privacy protection regime that would cover a broader range of data protection rights, including for the employment sector, and would contain appropriate guardrails for protecting Ontarians from potentially harmful digital technologies, including AITs.
- II. Ensure the whole of the Ontario government adopt a common definition of AI technologies so that it is communicating with one voice about these technologies and how to use them in safe, privacy protective, transparent, accountable, and human rights affirming ways.

A more comprehensive approach to protecting Ontarians' privacy, including the employment sector

Ontarians' privacy rights would best be protected if the narrow transparency requirement in Bill 149 that relates only to disclosing the use of AITs in the hiring process were couched in a much broader law reform effort. Ontario should develop a more coherent and comprehensive privacy protection regime that fills significant regulatory gaps in Ontario, including the employment sector, and covers the deployment and use of all digital technologies, including AITs.

Basic privacy protections for Ontario's employment sector

My office has consistently called on the Ontario government to expand privacy protections for all Ontarians through a comprehensive privacy law. Minimally, such a privacy law must aim to fill significant regulatory gaps that currently exist, including in the employment sector.⁷

Today, only the relatively few employees working for federally regulated businesses operating in Ontario benefit from basic privacy protections under federal law.⁸ In contrast, provincially regulated employees in Ontario (representing approximately 7.5 million workers) have no statutory privacy protections at all. Unlike Quebec, British Columbia, and Alberta, which have long ago taken the necessary steps to cover this constitutional gap by adopting provincial privacy laws to protect their employees,⁹ Ontario, as Canada's largest province, has not. Given the increasing safety- and privacy-related harms and risks associated with the rapid emergence of digital technologies in the workplace, including electronic monitoring surveillance tools and AITs, all Ontario employees should benefit from strong statutory privacy rights and no Ontarian should be left behind.

⁷ Patricia Kosseim. (2022). "Op-Ed: Bill 88 needs to go further to protect the privacy rights of workers." Available at: <https://www.ipc.on.ca/newsrelease/op-ed-bill-88-needs-to-go-further-to-protect-the-privacy-rights-of-workers/>. Information and Privacy Commissioner of Ontario. (2023). "The Vision of a Modern and Effective Regulator: 2022 Annual Report – Policy Advice and Consultations." Available at: <https://annualreport.ipc.on.ca/content-policy-advice.html>.

⁸ Federally regulated employees are subject to the Personal Information Protection and Electronic Documents Act (PIPEDA). The Federal Bill C-27, also known as the Digital Charter Implementation Act, 2022, proposes to replace PIPEDA with even stronger and more robust privacy protections that include AI-specific protections. The bill passed second reading in the House of Commons and is currently being considered by the Standing Committee on Industry and Technology (Committee) as of February 6, 2024.

⁹ Alberta and British Columbia's private sector privacy laws (both called the *Personal Information Protection Act*) came into effect in January 2004, while Quebec's law (*Act Respecting the Protection of Personal Information in the Private Sector*) has been in effect since 1994. Sources: <https://oipc.ab.ca/legislation/pipa/>; <https://www.oipc.bc.ca/about/legislation/>; <https://www.cai.gouv.qc.ca/la-loi-sur-le-prive-a-30-ans/>

Periodic tweaks to the ESA, whether through Bill 149 or Bill 88 before it, are insufficient to match the potential harms arising from the increasing use of digital technologies in the workplace. A more comprehensive privacy-protective regime, grounded in a human rights approach, is needed to crystallize employees' privacy rights into a coherent body of rights and obligations. At a basic level, a privacy protection regime would limit employers' use of emerging technologies to reasonable and appropriate purposes. It would provide effective governance and oversight for ensuring that employers are held accountable for their use of these technologies, as well as any employment-related decisions based on their outputs.

A more comprehensive privacy-protective approach would also limit the collection, use, and disclosure of personal information to only that which is necessary for managing the employment relationship and require that its accuracy be reasonably maintained for that purpose. Such an approach would significantly expand upon the minimal transparency requirement of Bill 149 and require employers to take reasonable steps to protect information they hold from unauthorized access and disclosure, and unauthorized or inadvertent disposal or destruction. It would vest employees with a right to be informed about the use of AITs, a right to access and correct their own personal information and in some cases, reasonably object to the use of AITs affecting them.

Importantly, a more comprehensive regime would provide applicants or employees with the means of challenging an employer when they reasonably believe their privacy rights have been violated and provide them with meaningful recourse to seek redress.

Additional guardrails around the use of AITs

The accelerated adoption of artificial intelligence is raising significant concerns across all sectors, particularly (but not exclusively) in the employment sector. Recognizing this, the federal government has classified AITs intended to make decisions, recommendations or predictions for purposes relating to employment within its category of 'high impact' AITs in need of enhanced governance and regulatory oversight.¹⁰ Other jurisdictions around the world have also moved to regulate certain high impact or high-risk uses of AITs, including in the employment sector.^{11, 12}

I recommend that specific provisions dealing with the use of AITs be incorporated as part of a more comprehensive privacy law reform effort (described above). This may involve adopting an approach that recognizes the need for technologies to be designed to be safe, privacy protective, accountable, transparent, and human rights-affirming, using a similar risk-based approach as other jurisdictions.

¹⁰ "Screening systems impacting access to services or employment: These AI systems are intended to make decisions, recommendations, or predictions for purpose relating to access to services, such as credit, or employment. They carry the potential of producing discriminatory outcomes and economic harm, particularly for women and other historically marginalized groups." Source: <https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document#s6>

¹¹ In the European Union, the EU AI Act classifies employment, worker management, and access to self-employment as high risk AI systems that negatively affect safety or fundamental rights. Source: <https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence?Channel=Partner&Channel=Partner>.

¹² In the State of California, the California Privacy Protection Agency has proposed regulations on the automated decision-making technology in employment. Source: <https://cppa.ca.gov/announcements/2023/20231127.html>

Together with the Ontario Human Rights Commission,¹³ my federal, provincial and territorial colleagues,¹⁴ and my international counterparts,¹⁵ I have called for strong guardrails to be adopted around the development, adoption and use of AI technologies, including in the employment context.¹⁶ Developing robust and binding rules, backed up by effective enforcement, is needed to address current and emerging uses of AITs so that Ontarians can realize the benefits and opportunities associated with these technologies, while avoiding their potential harms.

Many of these recommended guardrails build upon, and further amplify, the basic rights and protections of a modern data protection regime described above. In addition, however, AITs introduce a different breed of concerns and higher associated risks. The federal government's proposed *Artificial Intelligence and Data Act* and the Quebec government's upcoming proposal on AI regulation¹⁷ recognize that AITs raise potential risks for people's privacy and safety and can sometimes result in adverse impacts on human rights, whether intended purposely or not.

To safeguard Ontarians from the potential harms raised by AITs, a series of additional guardrails should be included as part of a comprehensive privacy law regime. Some of these could include:

- restrictions on the data used to train, refine, or develop AITs to ensure the lawfulness of their provenance (including from publicly available sources) and to mitigate any potential harmful biases;
- enhanced requirements for accuracy and validity of information and inferences resulting from AITs, including the need for human oversight, monitoring, and intervention;
- capacity to fall back to human control when AITs produce unwanted or unexpected behaviours or in the case of malicious manipulations of the technologies;
- protections for the privacy interests of groups and communities beyond individual privacy rights;
- additional governance around the use of de-identified data;
- enhanced transparency requirements about when AITs are being used, particularly in the case of generative AI, and meaningful information for the public, affected persons and groups, as well as regulators to understand how these AITs were developed, how they operate, and how they are being used and monitored;

¹³ IPC and OHRC. (2023). "Joint statement by the Information and Privacy Commissioner of Ontario and the Ontario Human Rights Commission on the use of AI technologies." Available at: <https://www.ipc.on.ca/newsrelease/joint-statement-by-the-information-and-privacy-commissioner-of-ontario-and-the-ontario-human-rights-commission-on-the-use-of-ai-technologies/>.

¹⁴ Federal, Provincial, and Territorial Privacy Commissioners. (2023). "Principles for responsible, trustworthy and privacy-protective generative AI technologies." Available at: https://www.priv.gc.ca/en/privacy-topics/technology/artificial-intelligence/gd_principles_ai/.

¹⁵ IPC (Co-Sponsor) et al. (2023). "Resolution on Generative AI Systems." Global Privacy Assembly. Available at: <https://globalprivacyassembly.org/wp-content/uploads/2023/10/5.-Resolution-on-Generative-AI-Systems-101023.pdf>. IPC (Co-Sponsor) et al. (2020). "Resolution on Accountability in the Development and Use of Artificial Intelligence." Global Privacy Assembly. Available at: <https://globalprivacyassembly.org/wp-content/uploads/2020/11/GPA-Resolution-on-Accountability-in-the-Development-and-Use-of-AI-EN.pdf>.

¹⁶ IPC (Co-sponsor) et al. (2023). "Resolution on Artificial Intelligence and Employment." Global Privacy Assembly. Available at: <https://globalprivacyassembly.org/wp-content/uploads/2023/10/1.-Resolution-on-AI-and-employment-1.pdf>. Federal, Provincial, and Territorial Privacy Commissioner. (2023). "Protecting Employee Privacy in the Modern Workplace." Available at: https://www.priv.gc.ca/en/about-the-opc/what-we-do/provincial-and-territorial-collaboration/joint-resolutions-with-provinces-and-territories/res_231005_02/.

¹⁷ The Gazette (2023). "Quebec seeks to legislate AI, tasks non-profit council to provide input. Available at: <https://montrealgazette.com/business/local-business/quebec-announces-21-million-in-funding-for-mila-ai-institute>.

- the right of individuals to receive an explanation of how automated decisions were made about them, on what basis, and to be able to challenge those decisions;
- enhanced access and correction rights for individuals, to also include their right to access or correct information introduced for them, or generated about them;
- algorithmic impact assessments in addition to privacy impact assessments, with special attention to the impacts on vulnerable and historically disadvantaged persons and groups;
- ongoing evaluation and auditing to ensure continued safety and privacy protection as the AITs evolve over time; and
- clear prohibitions against certain AI uses and applications that can have significantly harmful impacts on individuals and groups (prescribed “no-go” zones).

The enforcement of these guardrails may require closer collaboration among regulators, with correlative authorities to share information between them so they may regulate overlapping areas with greater coherence and efficiency while avoiding unnecessary duplication. This includes information sharing between the IPC and other provincial oversight groups and regulators, such as the OHRC, and between the IPC and its federal, provincial, and territorial counterparts.

Consistent definition of artificial intelligence

We understand the Ontario Government is proposing, for the first time under Ontario law, to define *Artificial Intelligence* in regulations that would be associated with this bill. At the same time, it is actively developing a Trusted AI Framework (TAIF)¹⁸ that would apply to the deployment and use of AITs across the provincial government.

To ensure a cohesive governance regime around the development and use of AITs in the province, I recommend that any definition associated with artificial intelligence be clear, thorough, and consistent across these and any other legislative and policy efforts relevant to the governance of AITs. I also recommend that any definition of artificial intelligence be harmonized, to the extent possible, with federal and international legislative proposals to facilitate the development and deployment of AITs across sectors and borders.

Given the significance of this definition, I would further recommend that the government consult broadly on how to define this term by actively engaging diverse interested parties, particularly marginalized individuals or groups that historically have suffered from bias and discrimination.

Ensuring the adoption of a robust and consistent definition of artificial intelligence means that Ontarians, Ontario-based organizations using AI technologies, and those who interact with the Government of Ontario, will all have a common and consistent understanding of what artificial intelligence means in this province. This would avoid them having to navigate multiple definitions of the term depending on the ministry, program, or regulatory requirement they are engaging with.

¹⁸ Government of Ontario. (2023). “Ontario’s Trustworthy Artificial Intelligence (AI) Framework.” Last updated January 8, 2024. Available at: <https://www.ontario.ca/page/ontarios-trustworthy-artificial-intelligence-ai-framework>.

Conclusion

As is evident from this submission, the comprehensive privacy law reform I am recommending goes far beyond any possible tweaks or refinements to clause 8.4(1) that Bill 149 proposes to add to the ESA. While requiring employers to publicly disclose that they use AI in the hiring process is a step in the right direction, clause 8.4(1) of Bill 149 alone will not protect Ontario's workers from the use of artificial intelligence technologies in the workplace.

Absent urgently needed guardrails, Ontario's workers will not be sufficiently protected from the ever-present and real threats posed by unsafe or unfair applications of AITs in the workplace. I believe such guardrails would also benefit employers. Without them, employers will not know how to responsibly deploy AITs to reap their benefits in a safe, privacy protective, accountable, transparent, and human rights-affirming way. Far from adding to regulatory burden and slowing economic progress, clear guardrails can provide the certainty that employers need to alleviate their hesitancy and innovate with confidence.

Privacy rights in an age of digital technologies like electronic monitoring tools or AITs must be more firmly entrenched within a more comprehensive and coherent privacy regime that Ontario workers — and indeed, all Ontarians — need and deserve. I would encourage the government to embark upon a more thorough endeavour of law reform, and my office stands ready and willing to support that effort in any way we can.

In the spirit of openness and transparency, I will be posting this letter on my office's website.

Thank you for receiving my submission on Bill 149 and I would be pleased to appear before your committee to answer any questions that committee members may have.

Yours truly,

A handwritten signature in black ink, appearing to read 'Patricia Kosseim', with a stylized flourish underneath.

Patricia Kosseim

Information and Privacy Commissioner of Ontario

cc: Hon. David Piccini, Minister of Labour, Immigration, Training and Skills Development