SENATE BILL 5356

State of Washington   **68th Legislature**   **2023 Regular Session**

By Senator Hasegawa

1   AN ACT Relating to establishing guidelines for government
2 procurement and use of automated decision systems in order to protect
3 consumers, improve transparency, and create more market
4 predictability; adding a new section to chapter 49.60 RCW; adding a
5 new chapter to Title 43 RCW; and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7   NEW SECTION. **Sec. 1.** The legislature finds that:
8   (1) Washington is a technology leader on a national and global
9 level and holds a distinctive position in creating frameworks around
10 technology that enhance innovation while protecting consumers and
11 promoting fairness, accountability, and transparency for all
12 Washingtonians.
13   (2) Automated decision systems are rapidly being adopted to make
14 or assist in core decisions in a variety of government and business
15 functions, including criminal justice, health care, education,
16 employment, public benefits, insurance, and commerce.
17   (3) These automated decision systems are currently unregulated,
18 may be deployed without public notice, and vendors selling the
19 systems may require restrictive contractual provisions that undermine
20 government transparency and accountability.

(4) The average Washington resident is unlikely to understand
processes used by these automated decision systems, yet these systems
are increasingly used to make core government and business decisions
impacting the civil rights and liberties of Washingtonians, raising
significant concerns around due process, fairness, accountability,
and transparency.

(5) A growing body of research shows that reliance on automated
decision systems without adequate transparency, oversight, or
safeguards can undermine market predictability, harm consumers, and
deny historically disadvantaged or vulnerable groups the full measure
of their civil rights and liberties.

(6) Research has shown that even the most innocent looking
management tools often incorporate and compound the assumptions of
institutional racism and other unfounded stereotypes. It is a matter
of good governance to ensure that agencies consider whether the
technologies they use improperly advantage or disadvantage Washington
residents.

(7) In order to enhance innovation and ensure the use of these
systems in ways that benefit Washington residents, the legislature
intends to ensure the fair, transparent, and accountable use of
automated decision systems.

NEW SECTION. **Sec. 2.** The definitions in this section apply
throughout this chapter unless the context clearly requires
otherwise.

(1) "Agency" or "public agency" means any state executive office,
agency, department, board, commission, committee, educational
institution, or other state agency created by or pursuant to statute,
other than courts and the legislature.

(2) "Algorithm" means a computerized procedure consisting of a
set of steps to accomplish a determined task.

(3) "Algorithmic accountability report" means the report with
content enumerated in section 5(4) of this act.

(4) "Algorithmic accountability review board" means the
algorithmic accountability review board established under section 6
of this act.

(5)(a) "Automated decision system" means any algorithm, including
one incorporating machine learning or other artificial intelligence
techniques, that uses data-based analysis or calculations to make or
support government decisions, judgments, or conclusions that cause a

Washington resident or business to be treated differently than another Washington resident or business or results in statistically significant disparities with other classes of persons or businesses in the nature or amount of governmental interaction with that individual or business including, without limitation, benefits, protections, procurement processes, required payments, penalties, regulations, or timing, application, or process requirements.

(b) "Automated decision system" does not include tools that do not make or support governmental decisions, judgments, or conclusions that cause a Washington resident or business to be treated differently than another Washington resident or business in the nature or amount of government interaction with that individual or business including, without limitation, internal governmental computer server or electrical usage optimization, antivirus programs, and internal governmental space optimization programs.

(6) "Automated final decision system" means an automated decision system that makes final decisions, judgments, or conclusions without human intervention.

(7) "Automated support decision system" means an automated decision system that provides information to inform the final decision, judgment, or conclusion of a human decision maker.

(8) "Automation bias" means the tendency for humans to overestimate the accuracy of decision support and decision-making systems and ignore contradictory information made without automation.

(9) "Identified or identifiable natural persons" means a human being who can be readily identified, directly or indirectly.

(10) "Office" means the office of the state chief information officer established under RCW 43.105.205.

(11) "People" includes a natural person, corporation, limited liability company, limited liability partnership, partnership, or public or private organization or entity of any character, except where otherwise restricted.

(12) "Use" means to operate an automated decision system or to contract with a third party to operate an automated decision system to automate, aid, or replace any decision-making process that would otherwise be made by an agency.

NEW SECTION. **Sec. 3.** By January 1, 2023, the office shall, in consultation with the office of equity:

1 (1) Adopt guidance for agencies regarding the development,
2 procurement, and use of automated decision systems by a public
3 agency. This guidance must incorporate the minimum standards and
4 procedures set forth in sections 4 and 5 of this act with respect to
5 automated decision systems. In adopting the guidance, the office must
6 consult with representatives of communities whose rights are
7 disproportionately impacted by automated decision systems as
8 demonstrated by current studies; and

9 (2) Develop guidance for agencies to use when prioritizing
10 analysis of automated decision systems. The guidance must include a
11 prioritization framework or frameworks for identifying the order in
12 which to examine existing and proposed automated decision systems.
13 This prioritization framework may include criteria such as whether
14 the system: Creates significant effects on identified or identifiable
15 natural persons; affects many people; involves a high risk of error
16 or bias; has been developed without transparency of the information
17 used to develop the algorithm; or has not been independently tested
18 for bias or inaccuracy. The prioritization framework must include
19 identification of significantly high-risk systems according to the
20 established criteria.

21 NEW SECTION. **Sec. 4.** Subject to the staged review provisions of
22 this chapter and the responsibility of agencies to establish
23 priorities and timelines for compliance, the legislature finds that
24 the following minimum standards should apply to a public agency's
25 development, procurement, or use of an automated decision system:
26 (1) Agencies and the office, in consultation with the office of
27 equity, should adopt interim and then long-term prioritization
28 frameworks for allocating resources to address existing and future
29 automated decision systems and to address any deficiencies found in
30 compliance with this section. The prioritization frameworks should be
31 used in determining the level of resources to be devoted first to
32 examining existing and proposed systems and then to meeting the other
33 requirements of this section.
34 (2) As a part of the procurement process, agencies should assess
35 new automated decision systems procured by them. The assessment
36 should include evaluation of the potential impacts of the automated
37 decision system on: (a) The risk to rights and freedoms to an
38 identified or identifiable natural person; (b) the existence or risk

of bias or inaccuracy in the results of the system; and (c) whether the workings of the system are transparent to the public.

(3) Automated decision systems currently in use by the state that produce legal effects on identified or identifiable natural persons should be assessed according to the prioritization framework. The assessment should include the existence or risk of bias or inaccuracy in the results and how transparent the system use and impacts are to the public.

(4) Agencies should provide transparency of use, procurement, and development of automated decision systems, including monitoring or testing for accuracy and bias, that produce legal effects on identified or identifiable natural persons.

(5) Ongoing monitoring or auditing should be performed on automated decision systems that have legal effects on identified or identifiable natural persons to ensure they do not have differential effects on subpopulations that result over time; or discriminate against an individual, or treat an individual less favorably than another, in whole or in part, on the basis of one or more factors enumerated in RCW 49.60.010.

(6) Agencies should provide training of state employees who develop, procure, operate, or use automated decision systems as to the risk of automation bias.

(7) A public agency that develops, procures, or uses an automated decision system must follow any conditions set forth in the relevant algorithmic accountability report.

(8) Subject to the staged implementation as outlined in this chapter, a public agency must, at a minimum:

(a) Give clear notice in plain language to the people impacted by the automated decision system of the following:

(i) The fact that the system is in use;

(ii) The system's name, vendor, and version;

(iii) What decision or decisions it will be used to make or support;

(iv) Whether it is an automated final decision system or automated support decision system and whether and through what process a human verifies or confirms decisions made by the automated decision system;

(v) What policies and guidelines apply to its deployment; and

(vi) How people may contest any decision made involving the automated decision system as required pursuant to this section;

(b) Ensure that with respect to newly acquired automated decision systems and, to the maximum extent practicable with respect to existing automated decision systems, the system and the data used to develop the system are made freely available by the vendor before, during, and after deployment for agency or independent third-party testing, auditing, or research to understand its impacts, including potential bias, inaccuracy, or disparate impacts, provided that the vendor may specify that an independent third party examining proprietary trade secrets shall reveal only the outcome of the examination, and not the content of the trade secrets;

(c) Ensure that any decision made or informed by the automated decision system is subject to appeal, immediate suspension if a legal right, duty, or privilege is impacted by the decision, and potential reversal by a human decision maker through a timely process not to exceed 20 days, and clearly described and accessible to people impacted by the decision; and

(d) Ensure the agency can explain the basis for its decision to any impacted people in terms understandable to a layperson including, without limitation, by requiring the vendor to create such an explanation.

(9) A procurement contract for an automated decision system entered into by a public agency after the effective date of this section must ensure that the minimum standards set forth in this section are able to be effectuated without impairment, including requiring the vendor to waive any legal claims that may impair these minimum standards. Such a contract may not contain nondisclosure or other provisions that prohibit or impair these minimum standards.

NEW SECTION. **Sec. 5.** The intent of this section is to structure the way in which public agencies examine their existing and proposed automated decision systems and to identify for the legislature, the governor, and the public instances in which such examination is either incomplete or reveals that the applicable automated decision system fails to meet the minimum requirements of section 4 of this act. Subject to such intent:

(1) Agencies already using an automated decision system as of the effective date of this section must provide a list of automated decision systems in use to the algorithmic accountability review board by January 1, 2024, and use the prioritization framework established under section 3 of this act or adopt and implement an

1 interim prioritization framework to identify the order in which to
2 complete an algorithmic accountability report on each existing
3 automated decision system by January 1, 2026. For the purpose of this
4 subsection:

5 (a) The algorithmic accountability report must, at minimum,
6 include clear and understandable statements based on information
7 already available to the agency.

8 (b) The algorithmic accountability report must accurately report
9 only the actual direct knowledge contained in the files. For example,
10 if the files contain a statement from the vendor that the system has
11 been examined for bias but there is no report available for
12 examination, the agency may not report that the system has been
13 examined for bias and must instead report that the vendor states that
14 the system has been examined for bias.

15 (c) Agencies may include information not already contained in
16 their files. For example, a bias report conducted by a third party
17 may be included.

18 (d) The list of systems and prioritization frameworks must be
19 available to the public and may include criteria such as whether the
20 system: Creates significant effects on identified or identifiable
21 natural persons; affects many people; involves a high risk of error
22 or bias; has been developed without transparency of the information
23 used to develop the algorithm; or has not been independently tested
24 for bias or inaccuracy.

25 (e) For systems that involve high risk pursuant to the
26 prioritization framework, the algorithmic accountability report must
27 include an evaluation of accuracy and bias by a qualified independent
28 third party, and if such a report does not currently exist it must
29 nevertheless be prepared and included to meet the timelines for
30 submission of an algorithmic accountability report on such system.

31 (f) If an agency does not complete an algorithmic accountability
32 report for each automated decision system already in use by January
33 1, 2026, then, unless the agency has been evaluating their systems in
34 good faith based on the established prioritization framework and is
35 granted an extension by the algorithmic accountability review board,
36 the agency must cease use of the unevaluated automated decision
37 system until such time as an extension is granted or the algorithmic
38 accountability report is provided.

1   (g) Any request for extension of the deadline must include a
2   timeline for when each algorithmic accountability report will be
3   provided by the agency.

4   (h) The algorithmic accountability review board shall grant an
5   extension for the continued use of a system if the agency has
6   established a reasonable timeline for completion of the algorithmic
7   accountability report and there is no apparent likelihood of bias
8   regarding the system.

9   (i) The algorithmic accountability review board must report
10   annually on agency compliance with this subsection and any extensions
11   granted under this subsection. The report must be made available to
12   the public.

13   (2) A public agency intending to newly develop or procure an
14   automated decision system for use between the effective date of this
15   section and January 1, 2026, must as a condition of use of such
16   system, at least one month prior to procurement of, or if internally
17   developed, implementation of such a system produce and file with the
18   office an algorithmic accountability report for that system as
19   described in subsection (4) of this section. In addition to using
20   information already available to an agency, the agency shall conduct
21   reasonable investigatory due diligence including, but not limited to,
22   inquiring with a system provider as to whether studies have been
23   conducted and requesting copies of any studies. For systems that
24   involve high risk pursuant to the prioritization framework, the
25   algorithmic accountability report must include an evaluation of
26   accuracy and bias by a qualified independent third party.

27   (3) An agency intending to develop or procure an automated
28   decision system for implementation after January 1, 2026, must, as a
29   condition of use of such automated decision system, submit an
30   algorithmic accountability report as described in subsection (4) of
31   this section and obtain a finding by the algorithmic accountability
32   review board pursuant to (d) of this subsection. In addition to using
33   information already available to an agency, the agency shall conduct
34   reasonable investigatory due diligence including, but not limited to,
35   inquiring of a system provider if studies have been conducted and
36   requesting copies of any studies. For systems that involve high risk
37   pursuant to the prioritization framework, the algorithmic
38   accountability report must include an evaluation of accuracy and bias
39   by a qualified independent third party.

(a) The office must post the algorithmic accountability reports on their public website and invite public comment on the algorithmic accountability report for a period of no less than 30 days.

(b) The algorithmic accountability review board may adopt scoring criteria for determining whether the agency's algorithmic accountability report reasonably shows that the automated decision system meets the minimum standards set forth in section 4 of this act.

(c) After receiving public comment, the algorithmic accountability review board must review the algorithmic accountability report and comments received to determine whether the agency's algorithmic accountability report fails to reasonably show that the automated decision system meets the minimum standards set forth in section 4 of this act.

(d) On the basis of its review of an algorithmic accountability report, the algorithmic accountability review board shall find that the algorithmic accountability report: (i) Reasonably demonstrates that the system meets the minimum standards set forth in section 4 of this act; or (ii) fails, by stated fact or by omission, to show that the system meets the minimum standards set forth in section 4 of the act.

(e) The report of a failure to meet the minimum standards of section 4 of this act must provide a reasonably detailed description from the algorithmic accountability review board of the reasons for the finding and may, but is not required to be, accompanied by a statement by the algorithmic accountability review board of what further information, or changes, or both may be necessary to the content of the algorithmic accountability report or operation of the automated decision system that could result in a finding that the agency's algorithmic accountability report reasonably shows that the automated decision system meets the minimum standards of section 4 of this act.

(f) Following a finding that the agency's algorithmic accountability report fails to show that an automated decision system meets the minimum standards of section 4 of this act, the applicable agency shall be entitled to revise the information provided, the system, or the procedures for use of the system and to submit a revised algorithmic accountability report to the algorithmic accountability review board for review.

(g) All findings and reports of the algorithmic accountability
review board regarding whether a system meets the minimum
requirements of section 4 of this act shall be posted on the office's
website, and a copy of any reports finding a failure to meet the
minimum requirements of section 4 of this act shall be independently
transmitted to the legislature and the governor.

        (4) Each algorithmic accountability report must include clear and
understandable statements of the following:

        (a) The automated decision system's name, vendor, and version;

        (b) A description of the automated decision system's general
capabilities, including reasonably foreseeable capabilities outside
the scope of the agency's proposed use and whether the automated
decision system is used or may be used to deploy or trigger any
weapon;

        (c) A description of the purpose and proposed use of the
automated decision system, including:

        (i) What decision or decisions the system will be used to make or
support;

        (ii) Whether it is an automated final decision system or
automated support decision system; and

        (iii) Its intended benefits, including any data or research
demonstrating those benefits and whether and where such data or
research may be viewed by the public;

        (d)(i) The type or types of data inputs that the technology uses;
(ii) how that data is generated, collected, and processed; and (iii)
the type or types of data the system is reasonably likely to
generate;

        (e) Whether there was an examination of potential inaccuracies or
bias, or both created during the automated decision system's
development, design, or implementation as a result of the nature of
the data used to inform the system or the system design. If such an
examination was performed, a description of the individual or entity
who performed the examination, the nature of the examination with
sufficient specificity to allow evaluation of its validity, and the
results including any steps taken to address the potential
inaccuracies or bias, or both must also be included in the report;

        (f) Whether implementation of the system has produced known
erroneous results. If erroneous results were produced, a description
of those errors, including the results of any audits conducted to
check for erroneous results, together with any steps taken to address

the reasons for the erroneous results must also be included in the report;

(g) Whether and how people affected by a system decision can review and challenge the basis for that system decision, and a description of the results of any such challenges;

(h) A description of any public or community engagement held, whether people and communities affected by the system were consulted, what actions were taken in response to public and community input, and any future public or community engagement plans in connection with the design or use of the automated decision system;

(i) Whether the decision algorithm is available for examination by the agency or the public, or both, and to what extent;

(j) A description of how the agency plans to comply with each requirement set forth in section 4 of this act;

(k) Whether the automated decision system makes decisions affecting the constitutional or legal rights, duties, or privileges of any Washington resident;

(l) Whether the system's decisions intentionally differentially affect members of protected classes, such as by selecting persons with disabilities for certain benefits;

(m) Whether any of the decision criteria are mandated by statute and, if so, which criteria and by what statutes;

(n) Whether there exists a clear use and data management policy, including specific protocols for the following:

(i) How and when the automated decision system will be deployed or used and by whom including, but not limited to: The factors that will be used to determine where, when, and how the technology is deployed; and other relevant information, such as whether the technology will be operated continuously or used only under specific circumstances. If the automated decision system will be operated or used by another entity on the agency's behalf, the algorithmic accountability report must explicitly include a description of the other entity's access and any applicable protocols;

(ii) Any additional rules that will govern use of the automated decision system and what processes will be required prior to each use of the automated decision system;

(iii) How automated decision system data will be securely stored and accessed, and whether an agency intends to share access to the automated decision system or the data from that automated decision system with any other entity, and why; and

1   (iv) How the agency will ensure that all personnel who operate
2   the automated decision system or access its data are properly trained
3   and able to ensure compliance with the use and data management policy
4   prior to the use of the automated decision system; and
5   (o) A description of the fiscal impact of the automated decision
6   system, including:
7   (i) Initial acquisition costs;
8   (ii) A reasonable estimate of ongoing operating costs such as
9   maintenance, licensing, personnel, legal compliance, use auditing,
10   data retention, and security costs;
11   (iii) A reasonable estimate of cost savings that would be
12   achieved through the use of the technology; and
13   (iv) Any current or currently identified potential sources of
14   funding, including any subsidies, incentives, or free products being
15   offered by vendors or governmental entities.

16   NEW SECTION. **Sec. 6.**   (1) The algorithmic accountability review
17   board is created within the office.
18   (2) The board shall represent diverse stakeholders and consist of
19   the following voting members:
20   (a) The director of the office who shall serve as chair of the
21   board;
22   (b) Six members appointed by the governor, two of whom shall be
23   representatives of state agencies or institutions; two of whom shall
24   be representatives of consumer protection organizations; and two of
25   whom shall be representatives of civil rights organizations or
26   advocacy organizations that represent individuals or protected
27   classes of historically marginalized communities including, but not
28   limited to, African American, Hispanic American, Native American, and
29   Asian American communities, religious minorities, and protest and
30   activist groups. Of the state agency representatives, at least one of
31   the representatives must have direct experience using automated
32   decision systems overseen by the board;
33   (c) Two members shall represent the house of representatives and
34   shall be selected by the speaker of the house of representatives with
35   one representative chosen from each major caucus of the house of
36   representatives;
37   (d) Two members shall represent the senate and shall be appointed
38   by the president of the senate with one representative chosen from
39   each major caucus of the senate.

(3) Of the initial members appointed by the governor, three must
be appointed for a one-year term, and two must be appointed for a
two-year term. Thereafter members must be appointed for three-year
terms.

(4) Initial appointments to the board must be made by January 1,
2023.

(5) Vacancies shall be filled in the same manner that the
original appointments were made for the remainder of the member's
term.

(6) Members of the board shall be reimbursed for travel expenses
as provided in RCW 43.03.050 and 43.03.060.

(7) The office shall provide staff support to the board.

NEW SECTION. **Sec. 7.** (1) Beginning December 1, 2023, and
updated not less than quarterly, the office shall make publicly
available on its website an inventory of all algorithmic
accountability reports on automated decision systems that have been
proposed for or are being used, developed, or procured by public
agencies.

(2) Beginning January 1, 2024, the office shall make publicly
available on its website metrics on all approvals, conditional
approvals, or denials of agency algorithmic accountability reports to
develop or procure automated decision systems for use by agencies,
including written explanations of each decision.

(3) For automated decision systems implemented prior to January
1, 2026:

(a) The algorithmic accountability review board shall conduct
selective audits of the applicable algorithmic accountability reports
and shall make appropriate findings with regard to whether the
agency's algorithmic accountability report reasonably shows that the
automated decision system audited meets the minimum standards of
section 4 of this act. The selective audits conducted must also
contain the elements described in subsection (6) of this section. In
selecting which systems to audit, the algorithmic accountability
review board may take into account:

(i) The number of persons affected by the automated decision
system, including systems in use by multiple jurisdictions;

(ii) The apparent likelihood that the system creates unintended,
erroneous, or discriminatory results;

1   (iii) The severity of the effects of an unintended, erroneous, or
2 discriminatory decision on the affected people; and
3   (iv) Other criteria as the algorithmic accountability review
4 board deems appropriate to a selective audit.
5   (b) The office shall establish guidelines by January 1, 2024, for
6 the number or percentage of algorithmic accountability reports to be
7 audited by the algorithmic accountability review board pursuant to
8 (a) of this subsection.
9   (4)(a) Beginning January 1, 2026, the algorithmic accountability
10 review board shall conduct an annual review of agency audits and
11 compile the information into a report that includes the following:
12   (i) Whether each agency that uses, develops, or procures an
13 automated decision system has complied with the terms of its approved
14 algorithmic accountability report;
15   (ii) Descriptions of any known or reasonably suspected violations
16 of any algorithmic accountability report policies;
17   (iii) Any systematic issues, such as bias and disproportionate
18 impacts on marginalized or vulnerable communities, raised by use of
19 automated decision systems; and
20   (iv) Recommendations, if any, relating to revisions to this
21 chapter or to specific algorithmic accountability reports.
22   (b) The first annual report on agency audits must be made
23 publicly available on the office's website by March 1, 2025, and
24 annually thereafter on or before March 1st.
25   (5) Beginning January 1, 2025, each agency using an automated
26 decision system must publish on its website annual metrics regarding
27 the number of requests for human review of a decision rendered by the
28 automated decision system it received and the outcome of the human
29 review.
30   (6) Beginning January 1, 2026, agencies shall conduct an annual
31 audit on automated decision systems that have legal effects on people
32 to ensure that they do not have differential effects on
33 subpopulations that result over time and report to the algorithmic
34 accountability review board any findings. The report must include, at
35 minimum:
36   (a) Whether the automated decision system has complied with the
37 terms of its approved algorithmic accountability report;
38   (b) Descriptions of any known or reasonably suspected violations
39 of any report policies;

1   (c) Any systematic issues, such as bias and disproportionate
2 impacts on marginalized or vulnerable communities, raised by use of
3 automated decision systems; and
4   (d) Recommendations, if any, relating to revisions to the
5 automated decision system algorithmic accountability report.

6   NEW SECTION. **Sec. 8.** Any person who is injured by a material
7 violation of this chapter may institute proceedings against the
8 public agency deploying the automated decision system in a court of
9 competent jurisdiction for injunctive or declaratory relief, or both,
10 to compel compliance with this chapter and all relief available in
11 law or equity with respect to section 9 of this act, and in either
12 event if successful shall be entitled to recover their reasonable
13 attorneys' fees and costs.

14   NEW SECTION. **Sec. 9.** A new section is added to chapter 49.60
15 RCW to read as follows:
16   Except to the extent an automated decision system utilizes a
17 criterion specifically mandated by state or federal law or
18 regulation, it is an unfair practice under this section for any
19 automated decision system to discriminate against an individual, or
20 to treat an individual less favorably than another, in whole or in
21 part, on the basis of one or more factors enumerated in RCW
22 49.60.010. For the purposes of this section, "automated decision
23 system" has the same meaning as defined in section 2 of this act.

24   NEW SECTION. **Sec. 10.** Sections 1 through 8 of this act
25 constitute a new chapter in Title 43 RCW.

26   NEW SECTION. **Sec. 11.** This act is necessary for the immediate
27 preservation of the public peace, health, or safety, or support of
28 the state government and its existing public institutions, and takes
29 effect immediately.

--- **END** ---