

**Comments by the Centre for Information Policy Leadership  
on the International Conference of Data Protection and Privacy Commissioners  
Declaration on Ethics and Data Protection in Artificial Intelligence  
Adopted on 23 October 2018**

On 23 October 2018, the 40<sup>th</sup> International Conference of Data Protection and Privacy Commissioners (the International Conference) adopted a Declaration on Ethics and Data Protection in Artificial Intelligence (the Declaration)<sup>1</sup> and invited public comments on this document by 25 January 2019. The Centre for Information Policy Leadership (CIPL)<sup>2</sup> welcomes the opportunity to submit the comments below as input for the final Declaration.

CIPL is conducting extensive research on the interplay between AI and data protection through its project on “Delivering Sustainable AI Accountability in Practice”.<sup>3</sup> This project aims to provide a detailed understanding of the opportunities presented by AI, its challenges to data protection laws and practical ways to address these issues through best practices and organisational accountability. CIPL published its first report “Artificial Intelligence and Data Protection in Tension”<sup>4</sup> on 10 October 2018. This paper is referenced in this submission<sup>5</sup> to supplement CIPL’s comments below.

**Comments**

CIPL welcomes the Declaration and shares many of the views expressed by the International Conference. CIPL agrees that AI systems bring significant benefits for users and society and that the promise of AI will not be realised without great care and effort, including identifying and addressing important challenges, many of them listed in the Declaration. Furthermore, the Declaration rightly notes that trust and strong data protection and privacy safeguards are of utmost importance as these encourage data sharing and thereby promote innovation. Indeed, AI can also be used as a tool to enhance privacy protection. CIPL also agrees that there is a real need for an international approach to ensuring the protection of human rights as AI develops.

However, CIPL wishes to underline that certain current and future uses of AI offer the promise of great social benefit while creating challenges for many long-established data protection principles.<sup>6</sup> It is critical that any set of guidelines addressing data protection in the context of AI acknowledges such challenges and provides novel, flexible, risk-based and creative approaches to addressing relevant challenges — even if this means departing from current conventional interpretations of privacy principles. Moreover, while respect for privacy rights must be a key consideration in the development of AI, such rights are not absolute and must be

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<sup>1</sup> ICDPPC Declaration on Ethics and Data Protection in Artificial Intelligence, 23 October 2018, available at [https://icdppc.org/wp-content/uploads/2018/10/20180922\\_ICDPPC-40th\\_AI-Declaration\\_ADOPTED.pdf](https://icdppc.org/wp-content/uploads/2018/10/20180922_ICDPPC-40th_AI-Declaration_ADOPTED.pdf).

<sup>2</sup> CIPL is a global data privacy and cybersecurity think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and 70 member companies that are leaders in key sectors of the global economy. CIPL’s mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL’s work facilitates constructive engagement between business leaders, privacy and security professionals, regulators and policymakers around the world. For more information, please see CIPL’s website at <http://www.informationpolicycentre.com/>. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth.

<sup>3</sup> See CIPL Project on Artificial Intelligence and Data Protection: Delivering Sustainable AI Accountability in Practice, <https://www.informationpolicycentre.com/ai-project.html>.

<sup>4</sup> See CIPL white paper on “Delivering Sustainable AI Accountability in Practice: Artificial Intelligence and Data Protection in Tension”, 10 October 2018, available at [https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl\\_ai\\_first\\_report\\_-\\_artificial\\_intelligence\\_and\\_data\\_protection\\_in\\_te....pdf](https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_ai_first_report_-_artificial_intelligence_and_data_protection_in_te....pdf). This paper will be followed by a second report which will address

some of the critical tools that organisations are developing and implementing to promote accountability for their use of AI within existing legal and ethical frameworks. The report will also outline reasonable interpretations of existing principles and laws that regulators can employ to achieve efficient, effective privacy protection in the AI context.

<sup>5</sup> These comments do not address all aspects of the Declaration, but focus on the most critical topics in line with CIPL’s current project on AI. CIPL refers you to its recently released white paper on AI (see footnote 4) for a more elaborate discussion of the issues.

<sup>6</sup> *Supra* note 4 at page 12-16.

balanced against other human rights, such as those respecting life and health, and the benefits of the AI to individual users and society as a whole. With this in mind, CIPL suggest several modifications and clarifications to the principles proposed by the International Conference:

1. **Fairness principle:** CIPL agrees that AI technologies should be designed and developed by considering their impact on individuals, groups and society at large and in ways that do not obstruct or endanger human development. However, CIPL recommends elaborating on point 1(a) *“Considering individuals’ reasonable expectations by ensuring that the use of artificial intelligence systems remains consistent with their original purposes and that the data are used in a way that is not incompatible with the original purpose of their collection”* for the following reasons:
  - *Repurpose capabilities:* Part of the great promise of artificial intelligence systems is that data may be repurposed in unforeseen and beneficial ways. So long as the use of personal information is not implicated in an inappropriate way, repurposing should be welcome.
  - *Reasonable expectations:* No individual can reasonably foresee specific future developments in technology and data use capabilities. In this day and age, however, individuals do understand that their interactions with technology create digital data about themselves, which can be used in many different ways. Hence, the concept of “reasonable expectations”, which is evolutionary in nature, should be interpreted more broadly to include the quite reasonable possibility of such developments. The focus should be on balancing the risks to individuals from the specific use of personal data contained in AI systems against potential benefits, as already suggested by the reference to the impact of AI systems on the individual in point 1(b). CIPL recommends that this point be elaborated to specifically mention the consideration of risk and benefits of using AI systems. The risks of not using AI systems and thereby depriving individuals and society of great benefits should also be taken into account;
  - *Compatible purpose:* In the AI context, data analysis may potentially yield unforeseen and sometimes unpredictable results and new processing purposes. Additionally, the development of AI technologies currently requires large amounts of data. Providing the necessary volume and variety often requires using data from different sources, where data may have been originally collected for a different purpose. A diverse and representative data set is also one of the conditions to prevent biased results. To the extent that the concept (“not incompatible”) is retained in the Declaration, it should be clarified to refer to a use that can occur without undermining or negating the original purpose and/or is not in conflict with the original purpose.

**Recommendation:** Delete part of point 1(a) from the first principle and edit point 1(b) as follows:

- a. **Considering individuals’ reasonable expectations by ensuring that the data are used in a way that is not incompatible with the original purpose of their collection.**
- b. **Articulating a forward-looking understanding of reasonable expectations, taking into consideration that technologies, use cases and capabilities change over time and taking into account the risks as well as the benefits of artificial intelligence to individuals, groups and society.**

**In addition, clarify that compatibility refers to any new purpose that can occur without undermining or negating the original purpose or being in conflict with it.**

2. **Continued attention and vigilance and accountability principle:** CIPL fully supports organisational accountability as a governance model enabling trust in AI development and use. CIPL also agrees that continued attention and vigilance can be achieved through the development of collaborative standards, the sharing of best practices, investing in awareness raising, education, research, and training and through establishing demonstrable governance processes for all relevant actors. CIPL recommends the following qualifications for points 2(a) and 2(d) and the addition of point 2(e) in the second principle:

- *Incentivising accountability*: While the promotion of accountability of all relevant stakeholders is an important and already listed consideration, CIPL believes that, in addition, accountability (including heightened accountability that goes above and beyond what is required by law) should be specifically incentivised by data protection authorities through a range of measures described in CIPL’s white paper on that topic.<sup>7</sup>
- *Certifications, codes of conduct and similar accountability schemes*: CIPL believes that certifications, codes of conduct and other similar accountability schemes can play an important role in ensuring accountability of AI systems and should be promoted as an additional factor to consider in the second principle. A regulatory framework that fosters the development, testing and use of these accountability schemes in the marketplace would be beneficial.
- *Recourse mechanisms for individuals*: CIPL recommends highlighting end-user recourse mechanisms that allow individuals to correct information or otherwise submit specific concerns to the relevant organisational staff responsible for an AI system.

**Recommendation: Edit point 2(a) and 2(d) and add an additional point 2(e) as follows:**

- a. **promoting accountability of all relevant stakeholders to individuals, supervisory authorities and other relevant third parties, including through the audit, continuous monitoring and impact assessment of artificial intelligence systems where appropriate, and periodic review of oversight mechanisms, as well as by providing specific incentives for the implementation of organisational accountability.**
- d. **establishing demonstrable governance processes for all relevant actors, such as relying on trusted third parties, including in the context of certifications, codes of conduct and similar accountability schemes, or the setting up of independent ethics committees.**
- e. **establishing end-user recourse mechanisms that allow individuals to correct information or otherwise submit specific concerns to the relevant organisational staff responsible for an AI system.**

3. **Transparency and intelligibility principle**: CIPL cautions that transparency, in the context of AI, may need to be understood in new ways with respect to decisions made by complex AI algorithms, as further set forth below. This is partly attributed to the “black box” problem which, in the current state of the art, can make it practically impossible to explain why certain complex algorithms arrive at a specific result. While CIPL agrees with most of the suggestions for increasing transparency of AI systems contained in the third principle, CIPL recommends the following clarifications:
  - *Promoting transparency, intelligibility, and reachability*: CIPL agrees that taking into account the different levels of transparency and information required for each relevant audience is a key consideration in improving the transparency and intelligibility of AI systems. These principles are important not for their own sake, but for the purpose they serve, i.e. to ensure that individuals and society at large understand, accept and trust these new technology solutions and to respect their rights and allow for appropriate human control and direction. Therefore, it is important to promote meaningful, appropriate and relevant forms of transparency and intelligibility. CIPL thus further recommends that the granularity of information should be evaluated with this in mind and that it should not be beyond what is meaningful and proportionate to both the risk to the relevant audience and what it can understand. In addition, providing

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<sup>7</sup> See CIPL white paper on “Incentivising Accountability: How Data Protection Authorities and Law Makers Can Encourage Accountability”, 23 July 2018, available at [https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl\\_accountability\\_paper\\_2\\_-\\_incentivising\\_accountability\\_-\\_how\\_data\\_protection\\_authorities\\_and\\_law\\_makers\\_can\\_encourage\\_accountability.pdf](https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_accountability_paper_2_-_incentivising_accountability_-_how_data_protection_authorities_and_law_makers_can_encourage_accountability.pdf).

algorithmic transparency may not be appropriate or achievable and is likely to be of very little value in almost every context. Transparency would be better understood as the provision of clarity with respect to:

- How AI systems are developed and by whom;
  - The features of the data sets used to train AI systems;
  - How AI systems and data sets are involved in decision-making affecting individuals;
  - The level of human review involved; and
  - Efforts to make important decisions by AI systems explainable in terms understandable by the affected groups.
- *Information on the purpose and effects of AI systems:* Given that AI applications will frequently result in the discovery of unknown future beneficial uses of data, the relevance of the expectation of the individual should be limited to the use of personal data and should be understood broadly to include a reasonable expectation that AI systems will prove useful in new and unexpected ways.
  - *Compensatory measures for a lack of transparency:* It is not always possible or useful to provide complete transparency to individuals for certain AI applications. In some cases, the technology will be too complex and the user of the technology may not have the means to provide complete information to the individual. The principles should include other options that deliver meaningful information and empowerment of the individual. This could include human review of AI decisions, redress mechanisms, feedback tools and specific solutions for more sophisticated audiences, i.e. regulators. Additionally, employing security measures, such as pseudonymisation and anonymisation, where appropriate and feasible, can help compensate for any obstacles to providing full transparency to individuals.

**Recommendation:** Edit point 3(b), 3(c), 3(d) and 3(e) and add an additional point 3(f) as follows:

- b. promoting meaningful transparency, intelligibility and reachability, for instance through the development of innovative ways of communication, taking into account, and proportionate to the risk to the individual involved, the different levels of transparency and information required for each relevant audience. When considering the relevant audience, regard should be had to the fact that algorithmic transparency is likely to be of very little value in almost every context, and may not be appropriate, achievable or meaningful with respect to individuals. The provision of clarity with respect to how AI systems are developed and by whom, the features of the data sets used to train AI systems, how AI systems and data sets are involved in decision-making affecting individuals, the level of human review involved and efforts to make important decisions reached by AI systems explainable to affected groups may be more suitable and feasible.**
- c. making organisations' practices more transparent, notably by promoting efforts towards explainability and auditability of systems, while ensuring meaningfulness of the information provided.**
- d. reinforcing the right to informational self-determination, notably by ensuring that individuals are informed appropriately when they are interacting directly with an artificial intelligence system or when they provide personal data to be processed by such systems.**
- e. providing adequate information, where possible and appropriate, on the purpose and expected effects of artificial intelligence systems in order to verify alignment with the expectations of individuals with respect to their own personal data and enable overall human control on such systems.**
- f. acknowledging situations where transparency for specific AI applications should be understood to include implementing other accountability measures such as human review of AI decisions where appropriate, redress mechanisms, feedback tools and/or appropriate transparency to regulators suitable to cases of investigation, complaints or enforcement, including more detailed and technical transparency, rather than disclosure of opaque algorithms. Other compensatory measures for obstacles to providing full transparency could include certain security measures, such as anonymisation and pseudonymisation.**

4. **Responsible design and development principle:** CIPL agrees that there is a need for assessing and documenting the expected impacts of an AI application on individuals and society, both at the beginning of a project and for relevant developments throughout its lifecycle. Equally, there is a need for identifying specific requirements for ethical and fair use of AI systems and for respecting human rights, taking into account existing privacy, data protection and human rights frameworks. These measures contribute to the responsible development and design of AI applications. CIPL also welcomes the notion of proportionality with regard to implementing technical and organisational measures and procedures to ensure that the privacy and personal data of individuals are respected. CIPL recommends, however, both in this principle and more generally throughout the Declaration, that specific reference be made to the notion of risk and the risk-based approach to data protection, taking into account the proportionality between the benefits of AI use and the risk of harm to individuals. The Declaration achieves this to a degree when it refers to the “impact” of AI systems to individuals but CIPL believes that references to considerations of benefits and risk should be made more explicit. Thus, CIPL recommends clarifying point 4(b) and 4(c) as follows:

**Recommendation:** Edit point 4(b) and 4(c) as follows:

- b. assessing and documenting the likelihood and level of the benefits and risk and the expected impacts on individuals and society at the beginning of an artificial intelligence project and for relevant developments during its entire life cycle.**
- c. identifying specific requirements for ethical and fair use of the systems and for respecting human rights as part of the development and operations of any artificial intelligence system, taking into account existing privacy, data protection and human rights frameworks.**

5. **Individual empowerment principle:** CIPL agrees that the promotion of individual rights is an important factor but stresses that some rights may be safeguarded in new ways in the AI context. In addition, CIPL believes that such “empowerment” should be proportional to the benefits and risk to individuals. CIPL recommends the following modifications to the fifth principle:

- *Respecting data protection and privacy rights:* CIPL welcomes the inclusion of “where applicable” in point 5(a) in reference to respecting data protection and privacy rights as this indicates that not all rights are absolute and applicable in every AI context. CIPL recommends point 5(a) be slightly modified to further make clear that the exercise of some individual rights should be understood in new ways in specific AI contexts so as to avoid diminishing the benefits of certain AI applications to individuals. For example, in AI contexts where the risk of retaining the data to individuals is low but the deletion of data would prejudice the accuracy of the AI algorithm for others, the exercise of the right to erasure may be better understood as an undesirable ability to block additional uses for AI applications.

**Recommendation:** Edit point 5 and point 5(a) as follows:

**5. Empowerment of every individual should be promoted through the proportional and risk-based implementation of data protection and other rights, and the exercise of individuals’ rights and the creation of opportunities for public engagement should be encouraged, in particular by:**

- a. respecting data protection and privacy rights, including where applicable and appropriate the right to information, the right to access, the right to edit data, the right to object to processing and the right to erasure or through other rights and promoting those rights through education and awareness campaigns.**

6. **Reducing or mitigating unlawful biases or discriminations principle:** CIPL agrees that respecting international human rights and non-discrimination instruments, investing in research around identifying and mitigating bias, ensuring personal data used in automated decision-making is up to date and elaborating specific guidance and principles to address bias and discrimination are all

helpful ways to ensure the detection and minimisation of bias in AI applications and processes. To further achieve this goal, CIPL recommends the inclusion of a fifth factor in the sixth principle:

- *Facilitating access to and sharing of good quality data sets, including sensitive or protected data:* AI has the potential to help avoid many of the irrational biases that affect human decision-making. AI technologists have also confirmed that in order to avoid bias and discriminatory impacts of AI, algorithms must be tested by reference to sensitive categories of data, such as gender, race and health. Denying access to or preventing the retention of such sensitive data makes it more difficult to detect and remedy bias and may even have the opposite effect of producing biased outcomes without an ability to explain why the AI application is arriving at such discriminatory conclusions. Of course, where sensitive data is processed, appropriate protections, such as masking, security measures, including pseudonymisation, and accountability safeguards will be of increased importance.

**Recommendation:** Add an additional point 6(e) as follows:

- e. **facilitating access to and sharing of good quality data sets, including sensitive, special category or protected data, and its inclusion in AI applications to identify and guard against bias, subject to relevant data security and accountability measures.**

### Conclusion

CIPL is grateful for the opportunity to provide comments on the 40<sup>th</sup> ICDPPC Declaration on Ethics and Data Protection in Artificial Intelligence. We look forward to providing further input to the permanent working group as more work is conducted on developing common governance principles on artificial intelligence.

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