

# Forum on Automated Decision-Making in the Civil and Administrative Justice System



## Background Information for Attendees

December 10, 2019 — Toronto



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

The Law Commission of Ontario is funded by:



and supported by the Faculties of Law at:

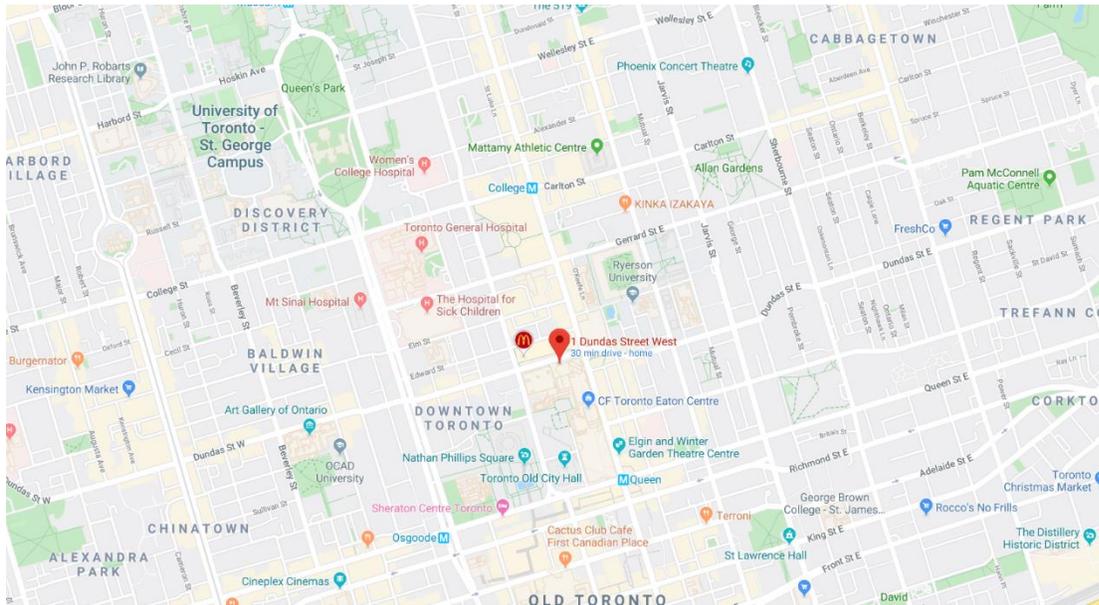
**Lakehead University, Queen's University, University of Ottawa (Common & Civil Law Sections), University of Toronto, University of Windsor, and Western University.**

It receives additional support from **York University.**

## Location and Contact Info

The forum will take place at Osgoode Professional Development, located in downtown Toronto at Yonge-Dundas Square:

Osgoode Professional Development  
1 Dundas Street West  
26<sup>th</sup> Floor, Room A  
Toronto, ON M5G 1Z3



### Transit

Dundas Subway Station – Yonge/University Line 1

Underground paid parking available at Atrium on Bay. The parking entrance is located on Edward St. Exit Atrium on Bay onto Dundas Street. Osgoode Professional Development is located directly across the street from Atrium on Bay.

### Contacts

If issues arise on the day of the consultation, contact the following:  
Maricela Morales, Project Coordinator  
via email: [MVillaltaMorales@lco-cdo.org](mailto:MVillaltaMorales@lco-cdo.org)  
via text: 416-998-3727

### Breakfast & Registration

Beginning at 8:30 AM

### Proceedings

Commence at 9:00 AM sharp

**Tuesday, December 10, 2019**  
**9:30 AM – 3:30 PM**  
**Osgoode Professional Development**  
**1 Dundas Street West, Toronto**

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**AGENDA**

**8:30**            **Registration & Light Breakfast**

**9:00**            **Welcome & Opening Remarks**

**Presenters**     Nye Thomas, Executive Director, Law Commission of Ontario  
Susie Lindsay, Counsel, Law Commission of Ontario

**9:15**            **Panel 1:            Learning from Experience: Cases Studies in AI and Civil Justice**

**Moderator**     Susie Lindsay, Counsel, LCO

**Panelists**       Kevin De Liban, Economic Justice Practice Group Leader, Legal Aid of  
Arkansas

Martha Owen, Partner, Deats, Durst, Owen & Levy, P.L.L.C. (Texas)

Christiaan van Veen, Director, Digital Welfare State and Human Rights  
Project at the Center for Human Rights and Global Justice, NYU School  
of Law

**10:15**           **Break**

**10:30**           **Panel 2:            Administrative Law and AI**

**Moderator**     Ryan Fritsch, Counsel, LCO

**Panelists**       Raj Anand, Partner, WeirFoulds; former Chief Commissioner of the  
Ontario Human Rights Commission

Professor Jennifer Raso, University of Alberta, Faculty of Law

<b>11:10</b>	<b>Panel 3:</b>	<b>Regulating AI in Civil Justice</b>
	<b>Moderator</b>	Nye Thomas, Executive Director, LCO
	<b>Panelists</b>	Nele Achten, PhD Candidate, Berkman Klein Center for Internet and Society, Harvard University
		Benoit Deshaies, Senior Advisor, Artificial Intelligence, Office of the Chief Information Officer, Treasury Board of Canada Secretariat, Government of Canada
		Amy Bihari, Senior Data Advisor, Ontario Digital Service, Government of Ontario
		Professor Julia Stoyanovich, Department of Computer Science, New York University; Member -- New York City Automated Decision Systems Task Force
<b>12:20</b>	<b>Lunch</b>	
<b>1:00</b>	<b>Workshop 1:</b>	<b>Understanding Due Process and AI in Administrative Decision-Making</b>
<b>2:00</b>	<b>Break</b>	
<b>2:15</b>	<b>Workshop 2:</b>	<b>Regulating AI in Administrative Decision-Making</b>
<b>3:15</b>	<b>Closing Remarks and Next Steps</b>	
<b>3:30</b>	<b>Conclusion</b>	

# Forum on Automated Decision-Making in the Civil and Administrative Justice System

## Introduction

Welcome to the Law Commission of Ontario's Forum on Automated Decision-Making in the Civil and Administrative Justice System.

This event is bringing together lawyers, developers, policymakers, academics and community advocates for an informal and collaborative discussion of the issues and implications of artificial intelligence (AI) and automated decision-making (ADM) in Ontario's civil and administrative justice system.

The forum is organized around three major and related issues:

- How to ensure due process/procedural fairness in the use of these systems;
- How to address issues of bias and discrimination; and,
- What is the most effective way to regulate these systems.

We also hope to learn important lessons about the development, deployment and regulation of these systems in the United States, Canada and elsewhere.

This event follows and builds upon a March 2019 LCO [forum](#) considering AI and algorithms in the Canadian criminal justice system.<sup>1</sup> Both projects consider the impact of AI and automated decision-making on access to justice, human rights, and due process.

This event is funded in part by the Law Foundation of Ontario through its Law and Technology Grant.

## About The LCO

The [Law Commission of Ontario](#) (LCO) is Ontario's leading law reform agency. The LCO's mandate is to advance law reform, promote access to justice, and stimulate public debate. The LCO provides independent, evidence-based, multi-disciplinary and authoritative advice on some of Ontario's most complex and far-reaching legal policy issues.

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<sup>1</sup> Topics discussed at the March event included predictive policing, the use of automated decision-making tools to assist in bail, sentencing and parole, experiences and lessons from the US, and regulatory options respecting human rights, dispute resolution, and due process. The March event was co-sponsored by [The Citizen Lab](#), the [International Human Rights program at the University of Toronto](#) and the [Criminal Lawyers Association](#). The LCO's report on AI in the Criminal Justice System will be released in January 2020.

This forum is part of a major new LCO initiative addressing Digital Rights. The LCO's past and ongoing work in this area includes the following projects or events:

- [Automated Decision-Making in the Criminal Justice System](#);
- Consumer Protection in Digital Marketplace with the Centre for Law, Technology and Society, Faculty of Law, University of Ottawa;
- [AI, Automated Decision-Making: Impact on Access to Justice and Legal Aid](#);
- [AI for Lawyers: A Primer on Artificial Intelligence In Ontario's Justice System](#) with Element AI and Osgoode Hall Law School;
- [Roundtable on Digital Rights and Digital Society](#) with the Mozilla Foundation; and,
- Big Data in the Justice System with Legal Aid Ontario.

The LCO's Digital Rights project is interdisciplinary, collaborative and informed by extensive consultations with a broad range of key informants and stakeholders from across Canada and internationally.

## What is AI and Automated Decision-Making?

What are algorithms, automated decision-making, and AI?

The AI Now Institute, an American interdisciplinary research center dedicated to understanding the social implications of artificial intelligence, defines algorithms and automated decision-making as follows:

*An Algorithm is generally regarded as the mathematical logic behind any type of system that performs tasks or makes decisions. For example, how Facebook sorts what posts a user sees in their Facebook feed is an "algorithm." The logic used in a software program to assign criminal defendants a public safety risk score is also an "algorithm." "Algorithms" do not have to be based in software on computers. However, in the case of many types of risk assessments used in courts or human services agencies, the "algorithm" can be represented by a piece of paper that outlines the steps a human should take to evaluate a particular case.<sup>2</sup>*

AI Now defines artificial intelligence and machine learning in these terms:

*Artificial Intelligence (AI) has many definitions, and can include a wide range of methods and tools, including machine learning, facial recognition, and natural language processing. But more importantly, AI should be understood as more than just technical approaches. It is also developed out of the dominant social practices of engineers and computer scientists who design the systems, and the industrial infrastructure and companies that run those systems. Thus, a*

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<sup>2</sup> AI Now, [Algorithmic Accountability Policy Toolkit](#), pg. 2.

*more complete definition of AI includes technical approaches, social practices and industrial power.*

*In current use, machine learning (ML) is the field most commonly associated with the current explosion of AI. Machine learning is a set of techniques and algorithms that can be used to “train” a computer program to automatically recognize patterns in a set of data. Many different tools fall under the umbrella of “machine learning.”<sup>3</sup>*

For the purpose of this application, the LCO will use the phrase “automated decision-making” to describe this broad range of technologies.

## The Impact of AI and ADM In the Civil and Administrative Justice Systems

The impact of AI and automated decision-making (ADM) in the civil and administrative justice system is as not as widely-publicized as in criminal law, but equally important.

In the U.S. and Europe, for example, AI and ADM are being used widely in civil and administrative government decision-making. AI Now recently prepared a [survey](#) of automated decision-making technology by New York City and other American governments. This survey provides an interesting and important illustration of the potential range of the uses of this technology in the areas of government benefits, public health, education, housing, child welfare, immigration, and numerous criminal justice applications.<sup>4</sup> This survey is included in the background information for this event. Importantly, this is an early list of potential applications.

What’s notable about these examples is that they are the areas of greatest concern to access to justice advocates: “poverty law”, human rights law, child welfare law, criminal law, and refugee/immigration law.

To date, it appears Canadian governments have taken a more deliberate approach to introducing AI and ADM systems. The most notable example in Canada is a system developed by Immigration, Refugees and Citizenship Canada (IRCC) that automates decision-making to assess a “portion of the temporary residence business process by training a model capable of recognizing key factors at play in decision making on visitor visa e-Applications.”<sup>5</sup> This system automatically triages applications and “recommends” applications that should be approved at this step or further reviewed.

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<sup>3</sup> *Ibid.*

<sup>4</sup> For examples in Europe see *Automating Society – Taking Stock of Automated Decision-Making in the EU*, Algorithm Watch [https://algorithmwatch.org/wp-content/uploads/2019/01/Automating\\_Society\\_Report\\_2019.pdf](https://algorithmwatch.org/wp-content/uploads/2019/01/Automating_Society_Report_2019.pdf)

<sup>5</sup> IRCC, “Augmented Decision-Making @ IRCC”, Presentation to the Symposium on Algorithmic Government (April 24, 2019), online: <https://www.canada.ca/content/dam/ircc/documents/pdf/english/services/ai-agenda/cantin-eng.pdf> (IRCC Presentation).

## Why Is This Important?

The LCO believes that AI and automated decision-making systems represent a new frontier for access to justice. These technologies present significant challenges – and opportunities – to traditional models of human rights, legal regulation, dispute resolution, and due process. It is incumbent on policy-makers, advocates, and justice system leaders to understand the impact of this technology and to act thoughtfully.

Even before the advent of automated decision-making, access to justice in these areas is frequently criticized for being too complex, expensive, inaccessible, or biased against low-income, racialized or other vulnerable individuals and communities. Early experience with automated decision-making in these contexts appears to be mixed. On the one hand, automated decision-making has notable potential to improve access to justice and reduce discrimination. For example, these systems can be used to reduce costs, and promote speed, efficiency and consistency in decision-making. Unfortunately, experience also demonstrates the potential for these technologies to be opaque, inexplicable, and discriminatory.

The “digital rights,” legal, and technology communities are increasingly focused on questions regarding the transparency, accountability and impact of these systems. More specifically, questions are being asked about how to ensure these systems are disclosed, how to ensure these systems conform with human rights laws and principles, and how to ensure an effective remedy in the event of a rights violation. These are difficult and complex issues, particularly in light of rapidly changing technology. The law reform options for addressing these issues are neither interchangeable nor trivial. Each option has benefits/drawbacks and the choices are consequential. Critically, there does not appear to be a comprehensive legal framework in Ontario to guide the use of these technologies or their intersection with foundational rights related to due process, administrative fairness, human rights, and justice system transparency.

## What Issues Are The LCO Looking At?

As noted above, the forum is organized around three major, related issues:

- How to ensure due process/procedural fairness in the use of these systems;
- How to address issues of bias and discrimination; and,
- What is the most effective way to regulate these systems.

### **Due Process/Procedural Fairness**

Government decisions that affect an individual’s rights, interests or privileges require procedural fairness.<sup>6</sup> However, the LCO has found that many examples of early AI deployment lack due process or

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<sup>6</sup> *Baker v. Canada (Ministry of Citizen & Immigration)*, [1999] 2 SCR 817 para. 20

procedural fairness. Examples of AI systems failing judicial scrutiny are almost uniformly on due process grounds.

For governments considering (or having already implemented) AI and automated decision-making, the complexities that arise in this area suggest that there is considerable work to be done. Due process is required but how do we achieve it and what does it look like?<sup>7</sup>

The values underlying due process/procedural fairness generally require that government decisions affecting a party be made with:

- Notice
- Participation (in the form of a hearing, written submissions)
- Fairness
- Impartiality
- Openness
- Reasons Provided; and
- Rights of Appeal

The requirements of procedural fairness are “eminently variable” and heavily context specific.<sup>8</sup> They are applied fluidly depending on the nature and significance of the decision, the expectations of the parties involved, and the specific statutory scheme and procedure of the administrative body at issue.<sup>9</sup>

Providing individuals with appropriate due process/procedural fairness rights will likely result in AI and automated systems that are fairer, more efficient, more accountable and more likely to survive court challenges.

Issues of privacy, human rights, legal regulation, dispute resolution and data management are related and interwoven with due process/procedural fairness issues. These issues are being considered by academics, governments, NGOs, and legal professionals across the world.<sup>10</sup>

The LCO does not wish to replicate these discussions. Our goal, rather, is to analyze and consider specific legal rules that protect and uphold due process/procedural fairness in civil and administrative decision-making by Canadian governments, including the Government of Ontario.

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<sup>7</sup> For discussion on administrative law and automated decision-making see Danielle Citron, *Technological Due Process* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1012360](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012360); and *Regulating by Robot: Administrative Decision Making in the Machine Learning Era*, by Cary Coglianese and David Lehr [https://scholarship.law.upenn.edu/faculty\\_scholarship/1734/](https://scholarship.law.upenn.edu/faculty_scholarship/1734/)

<sup>8</sup> See *Baker*, Supra at para 21; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 79

<sup>9</sup> *Baker*, Supra at paras 18-28 and

<sup>10</sup> See *Responsible AI: A Global Policy Framework*, First Edition, 2019 ITECH Law Association, Charles Morgan, Editor; *AI Algorithms & Justice*, the Berkman Klein Center; <https://cyber.harvard.edu/projects/ai-algorithms-and-justice>; Conference on Social Protection by Artificial Intelligence <https://freedom-to-tinker.com/2019/05/29/conference-on-social-protection-by-artificial-intelligence-decoding-human-rights-in-a-digital-age/>

## Bias/Discrimination

The issue of bias and discrimination in AI and algorithms is described succinctly by Professor Sandra Mayson in a recent article titled *Bias In, Bias Out*:

*The age of algorithms is upon us. Automated prediction programs now make decisions that affect every aspect of our lives. Soon such programs will drive our cars, but for now they shape advertising, credit lending, hiring, policing—just about any governmental or commercial activity that has some predictive component. There is reason for this shift. Algorithmic prediction is profoundly more efficient, and often more accurate, than is human judgment. It eliminates the irrational biases that skew so much of our decision-making. But it has become abundantly clear that machines too can discriminate. Algorithmic prediction has the potential to perpetuate or amplify social inequality, all while maintaining the veneer of high-tech objectivity.<sup>11</sup>*

Importantly, this issue goes beyond the question of biased, historical data. Policymakers must also consider fundamental issues regarding if or how legal rules can be adapted to protect human rights and prevent discrimination by these systems. In the US, many community advocates believe the discrimination issue is insurmountable. Others support the use of AI and ADM technology if it reduces, or reveals, bias and discrimination already existing in justice system decision-making. A further complication is the fact that there is no single, statistical measure of racial equality.

## Regulation

As a law reform agency, the LCO is particularly concerned with regulatory models and options.

The Government of Canada's *Directive on Automated Decision-Making* (the Directive)<sup>12</sup> and *Algorithmic Impact Assessment* (AIA)<sup>13</sup> are important, concrete initiatives designed to address due process/procedural fairness in AI and automated decision-making. The Directive, for example, highlights concerns for procedural fairness and provides some guidance as to what this means or how it might be operationalized.<sup>14</sup> More specifically, Immigration, Refugees and Citizenship Canada (IRCC) is developing a "Playbook" to guide the IRCC in "how to ensure responsible use of automation, advanced analytics and artificial intelligence in service of administrative decision-making."<sup>15</sup> There does not appear to be an

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<sup>11</sup> Mayson, Sandra Gabriel, *Bias In, Bias Out*, 128 Yale Law Journal 2218 (2019) at 2221. Available at SSRN: <https://ssrn.com/abstract=3257004>.

<sup>12</sup> Government of Canada, Treasury Board Secretariat, *Directive on Automated Decision-Making*, available online: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>.

<sup>13</sup> Government of Canada, Treasury Board Secretariat, *Algorithmic Impact Assessment*, currently published as Beta v.0.7, available through <https://www.canada.ca/en/government/system/digital-government/modern-emerging-technologies/responsible-use-ai/algorithmic-impact-assessment.html>.

<sup>14</sup> See, for example, The Directive, directive 4.2.1 which states "Decisions made by federal government departments are data-driven, responsible, and complies with procedural fairness and due process requirements." Additional directives refer to notice of the use of ADM systems posted on websites (6.2.1), an explanation provided following a decision (6.2.3), and testing and monitoring for unintended biases and unintentional outcomes (6.3.1).

<sup>15</sup> <https://www.canada.ca/content/dam/ircc/documents/pdf/english/services/ai-agenda/laferriere-eng.pdf>

equivalent framework at the provincial level. In Ontario, related initiatives appear to be contemplated as part of the [Ontario Digital Strategy](#).

The New York City Automated Decision Systems Task Force is an important American example of regulatory initiative.<sup>16</sup> The Task Force's recent report, which is included in the background materials, offers guidance on what it describes as automated decision systems "management" including building capacity, broadening public discussions, and formalizing management functions.

It is important to note, however, that rules regarding procedural fairness or bias are unlikely to be addressed in any single regulation, statute or policy document. The legal regulation of these systems is likely to include the common law, human rights codes, various statutes and the *Charter of Rights*. Regulatory initiatives are also likely to include:

- Ethical design standards, with leading examples drawn from the Toronto Declaration on Machine Learning<sup>17</sup> and the work of the IEEE<sup>18</sup>;
- Dedicated national or provincial regulations or statutes, such as the Canadian federal Directive and AIA or the US *Algorithmic Accountability Act*<sup>19</sup>; and,
- Context specific due process regulatory instruments, legislation or practice directions, such as the IRCC Playbook, or models such as California State Bill 10 which mandates bail risk assessment instruments and incorporates some procedural protections<sup>20</sup>

A further issue regarding regulation is the question of *who* gets to participate in the development of these systems and accompanying law reform.<sup>21</sup>

## What Are the Outcomes?

The forum will have three major outcomes:

First, the LCO will produce and widely distribute an event report and supporting materials. The LCO is committed to public education about these important issues.

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<sup>16</sup> See generally, <https://www1.nyc.gov/site/adstaskforce/index.page>

<sup>17</sup> See AccessNow, *The Toronto Declaration: Protecting the rights to equality and non-discrimination in machine learning systems* (May 2018), online: <https://www.accessnow.org/the-toronto-declaration-protecting-the-rights-to-equality-and-non-discrimination-in-machine-learning-systems/>.

<sup>18</sup> IEEE, *Ethically Aligned Design* (1<sup>st</sup> Edition, 2019), online: <https://standards.ieee.org/industry-connections/ec/autonomous-systems.html>.

<sup>19</sup> <https://www.congress.gov/bill/116th-congress/house-bill/2231/all-info>.

<sup>20</sup> See California Courts, SB 10: Pretrial Release and Detention (2018), online: <https://www.courts.ca.gov/pretrial.htm>. This regime has been subject to some criticism for a lack of statutory due process protections: <https://www.eff.org/deeplinks/2018/11/if-pre-trial-risk-assessment-tool-does-not-satisfy-these-criteria-it-needs-stay>.

<sup>21</sup> See the Law Commission of Ontario, *LCO / Mozilla Foundation Roundtable Report on Digital Rights and Digital Society* (May 2018), online: <https://www.lco-cdo.org/wp-content/uploads/2018/08/LCO-Mozilla-Roundtable-Final-Report-EN.pdf>.

Second, the forum will support law reform initiatives at the LCO and elsewhere. Discussions and lessons from the forum will inform the LCO's analysis and recommendations on the regulation of AI and automated decision-making in Ontario's justice system.

Third, the forum will help the LCO and others establish an agenda for future policy and legal research.

## Background Materials

The LCO has attached a package of background materials for forum attendees. The LCO will also circulate the forum presentations after the event. The materials included in the background package include:

### Case Studies

- AI Now Institute, [Automated Decision Systems Examples of Government Use Cases](#)

### Government Policies

- Government of Canada, Treasury Board Secretariat, [Directive on Automated Decision-Making](#)
- Government of Canada, Treasury Board Secretariat, [Algorithmic Impact Assessment](#)

### Reports

- [New York City Automated Decision Systems Task Force Report](#)
- [City of New York Office of the Mayor Executive Order Establishing an Algorithms Management and Policy Officer](#)

### Articles

- Use of AI systems to determine an individual's eligibility for Medicaid benefits.
  - [Arkansas](#)
  - [Idaho](#)
- Use of AI systems to provide a risk and safety assessment on potential child abuse/neglect to determine if further investigation is required.
  - [Alleghany, Pennsylvania](#)
  - [Chicago](#)

### Academic Papers

- Danielle Citron, [Technological Due Process](#)
- Jennifer Raso, [Displacement as Regulation: New Regulatory Technologies and Front-Line Decision-Making in Ontario Works](#)

### Additional Reading Materials

- LCO Reading List – AI and ADM in the Civil and Administrative Justice System

## How Will the Day be Organized?

The forum is intended to be participatory. Each attendee is invited because of their specialized expertise and should come prepared to think and share opinions.

We will start the day with a series of panel presentations that discuss the following issues:

- Examples of AI in administrative decision making;
- Legal issues that arise from use of AI and ADM in government decision making;
- Regulatory efforts in this area.

After lunch, attendees will break into smaller groups for two workshops, including:

- What steps governments should take when considering whether and how to introduce AI and ADM systems; and,
- What regulations may be necessary to ensure the issues raised in the first session are addressed.

The forum will be conducted under the Chatham House Rule. The rule states that “participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” The Chatham House Rule provides a way for speakers to openly discuss their views in private while allowing the topic and nature of the debate to be made public and contribute to a broader conversation. As a result, when participants are discussing or reporting on the forum, it is inappropriate to identify either the identity or affiliation of any speaker without their explicit consent. The organizers will respect this rule in all their reports, briefings, or other communications discussing this forum.