



**Legal and regulatory frameworks governing the use of automated decision making and assisted decision making by public sector bodies**  
Summary briefing paper

## EXECUTIVE SUMMARY

This summary paper has been prepared by The Legal Education Foundation (“TLEF”) in advance of a technical legal workshop: “Reforming the law around the use of automated and assisted decision making by public bodies”. It presents TLEF’s views of the key findings and questions emerging from a detailed briefing paper: “*Legal and Regulatory Frameworks Governing the Use of Automated Decision Making and Assisted Decision Making by Public Sector Bodies*” prepared by leading academic experts Professor Lilian Edwards, Professor Rebecca Williams and Reuben Binns (“the authors”). The full paper is available [here](#).

The authors find that Automated Decision Making (“ADM”) and Assisted Decision Making (“ASDM”) systems are widely used across the public sector. As their use becomes more ubiquitous, the limitations of these systems and the harms that can arise from their deployment are increasingly well recognised.

Four key sources of law together comprise the legal frameworks governing the use of ADM and ASDM systems by public sector bodies: (i) Data Protection law; (ii.) Equality law; (iii.) The common law of judicial review; and (iv.) contract law. Overall, the authors argue that these frameworks are complex, piecemeal and insufficient to secure transparency. Existing law mitigates against the early identification and rectification of issues at the design stage- before harm occurs. The legal frameworks governing whether an ADM or ASDM system can or should be used are insufficient to guide good practice. There is an urgent need to clarify the processes through which public authorities can justify their use of ADM/ASDM systems on data protection, equality and public law grounds.

The authors identify an urgent need to develop administrative law so that it is capable of acting as a guide to public authorities when they are developing, selecting and deploying ADM/ASDM systems. The authors highlight concerns that existing constraints on the deployment of ADM/ASDM systems in relation to sensitive personal data are insufficiently adapted to developments in machine learning. There is a need to reform the law to keep pace with developments in this rapidly evolving field.

The authors identify critical issues with the existing rights available to challenge decisions made by ADM/ASDM systems. Rights that are provided under Data Protection law are inadequate in the context of the state as a monopoly provider of services. Article 22 of the General Data Protection Regulation is not currently fit for purpose and requires substantial amendment or reinterpretation by case law. Existing transparency rights are fettered by intellectual property rights and require urgent review and concerted action. To properly address widespread concerns about bias in ADM/ASDM systems, there is a need to develop an active right to shape both how inferences are made by ADM/ASDM and what those inferences are. The authors highlight an urgent need for the common law of judicial review to develop a clear and certain account of what is relevant in the context of particular decisions arrived at via ADM/ASDM.

The report identifies a number of ideas and further questions which might fruitfully be explored at the workshop. These include:

1. What is the potential of an expanded role for Data Protection Impact Assessments as a tool for (i.) “upstreaming” the governance of ADM/ASDM systems and; (ii.) promoting greater transparency?

2. How sufficient are existing equalities and human rights frameworks in the context of challenging discrimination by ADM/ASDM systems? Can the common law of judicial review, particularly the grounds of rationality/proportionality identified by the authors, be useful in controlling and optimising the use of ADM systems by public bodies?
3. How adequate are the existing remedies available after a successful challenge is made to ADM/ASDM? What further remedies might be needed?
4. International approaches to governing ADM/ASDM have focussed on developing new legal frameworks. Is a new legal framework for ADM/ASDM needed in England and Wales? What are the alternatives? What principles should guide any new framework?
5. What is the role for existing regulators in tackling the challenges posed by the deployment of ADM/ASDM systems in the public sector? What additional powers might regulators need? Is a new regulator needed?

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## BACKGROUND

The Legal Education Foundation (“TLEF”) is an independent charitable foundation established in 2012. TLEF awards up to £6m per year in grants to organisations that support people to understand and use the law as a tool for positive change. Under our Fairer Systems programme we support organisations who work to improve transparency, accountability and the protection of rights. Since 2018, we have developed a focus on the public and human rights law implications of the increasing use of automated and assisted decision-making technologies (“ADM/ASDM”) by public bodies. We have funded organisations working in the access to justice space<sup>1</sup> to develop work to understand and respond to the challenges presented by the rapid expansion in the use of these tools in areas such as welfare benefits and immigration. We have also funded experts in equality law to examine the issues raised by<sup>2</sup> particular uses of automated and assisted decision making in the public sector.

To complement our existing work, and as part of our strategy for 2020-25 we are keen to identify positive regulatory and legislative solutions that would:

- i.) ensure that automated and assisted decision making is deployed appropriately and lawfully from the outset across the public sector and
- ii.) strengthen options for seeking redress where this is required.

The Law Commission of England and Wales, a statutory independent body with a remit to make systematic recommendations to Parliament to ensure that the law is fair, modern and simple, have recently [launched a consultation for their 14<sup>th</sup> Programme of law reform](#). The responses to this consultation will shape the work of the Commission over the next few years and determine the areas of law considered for reform. Commissioners have expressed an interest in developing projects around emerging technology and the use of AI in decision making. As part of the consultation they have [proposed a project](#) exploring whether a legal framework should be developed to support the increase in automation of public decision-making. In order to support the Law Commission’s consultation, The Legal Education Foundation commissioned leading academic experts Professor Lilian Edwards, Professor Rebecca Williams and Reuben Binns to produce a technical legal briefing paper summarising the gaps in the existing legal frameworks governing the use of automated and assisted decision making technologies by public bodies.

This summary presents TLEF’s views of the key findings from that briefing paper. The full paper is available [here](#). The sections of the briefing paper from which key findings are derived are referenced throughout.

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<sup>1</sup> Such as Public Law Project, Immigration Law Practitioners Association, Open Rights Group and Child Poverty Action Group

<sup>2</sup> See counsel’s opinion commissioned by TLEF to explore the human rights and public law implications of: (i.) the use of automatic checks within the EU Settled Status application process and (ii.) the risk based verification process utilised by Local Authorities in relation to Housing Benefit and Council Tax Benefit applications:

<https://www.thelegaleducationfoundation.org/articles/government-automated-decision-making-may-breach-equality-laws-leading-barristers-warn>

## INTRODUCTION

The authors find that Automated Decision Making (“ADM”) systems and Assisted Decision Making (“ASDM”) systems are widely used to support decision making across the public sector (see section 1). They identify a number of widely recognised risks and limitations concerning their use, which, if unaddressed, can damage trust in public sector bodies and result in costly litigation (see section 1 and Appendix A). The authors identify four key sources of law governing the use of ADM/ASDM systems by public sector bodies (see section 2). These are:

- i.) Data Protection (“DP”) law (see section 3);
- ii.) Equality law including the Public Sector Equality Duty (“PSED”) (Section 4.1)
- iii.) The common law of judicial review (Section 4.2) and
- iv.) Contract law - between public body and system developers, or between service provider and service user (Section 4.4).

The authors identify four key sets of legal questions (section 2) which arise in the context of the design and deployment of ADM/ASDM by public bodies. These are:

- i.) Can/should an ADM system be undertaken at all? Should some types of automated decision making in particular domains simply be unlawful?
- ii.) If ADM is lawful, what are the constraints on its development and deployment in a particular circumstance?
- iii.) What rights do users have to challenge decisions reached using an ADM system, and when, and how?
- iv.) What remedies might be available after such a challenge?

The authors’ review of current legal frameworks reveals **critical gaps in relation to the ability of existing laws to provide satisfactory solutions to these questions**. In the context of the increasing ubiquity of ADM/ASDM systems across the public sector, and rapid advances in the technologies upon which these systems are based, the authors identify an urgent need to develop and reform existing law. In developing and reforming existing legal frameworks, the authors suggest reviewing international approaches to regulating AI and developing and expanding the common law of judicial review. Key findings and next steps are outlined below.

## KEY FINDINGS

### 1. How are ADM/ASDM systems being used across the public sector and what are the key risks generated by their use?

#### 1.1 ADM and ASDM systems are used widely across the public sector

The authors identify a number of existing examples of the way in which ADM/ASDM technologies are being deployed across the public sector to assist human decision making or make decisions automatically (see Section 1). Examples include:

- Risk scoring individuals for prioritising interventions in social care.<sup>3</sup>
- Assessing risk in child welfare contexts.<sup>4</sup>
- Predicting the outcomes of potential inspections based on historic data, in order to better target resources for in-depth inspections. This approach is taken by Ofsted in relation to school inspections<sup>5</sup> and the Department for Transport/Drivers and Vehicle Standards Agency in relation to MOT test centres.<sup>6</sup>
- Using natural language processing (based on machine learning) for classifying documents into categories, or classifying feedback from users of government services.<sup>7</sup>

Many ADM systems are built in-house by digital teams working within central government departments or local authorities, often using training data drawn from within existing government services. However, ADM is also typically integrated through various degrees of outsourcing, including to private sector organisations and reliance on paid and open source software tooling. Outsourcing can create additional problems in relation to the transparency, explainability and accuracy of ADM/ASDM systems (see Appendix A)

#### 1.2 The limitations and potential harms that can arise from the use of ADM/ASDM systems are increasingly well recognised

There are a number of issues and risks which should be considered and mitigated for when developing and deploying ADM and ASDM systems (see Appendix A). These include:

- Error
- Discrimination and equality issues
- Robustness, generalisation and feedback loops
- Limits to prediction
- Individual level accuracy
- Unobserved labels
- Opacity, transparency, explainability
- Correlation vs causation

<sup>3</sup> Dencik, Lina, et al. "Data Scores as Governance: Investigating uses of citizen scoring in public services." *Cardiff: Data Justice Lab* (2018).

<sup>4</sup> Ibid

<sup>5</sup> [Risk assessment methodology: good and outstanding maintained schools and academies](#)

<sup>6</sup> [How the Department for Transport used AI to improve MOT testing](#)

<sup>7</sup> [Natural Language Processing in government - Data in government](#)

- Automation bias, rigidity and over delegation

The implications of failing to address these issues can be profound, and damage trust in public sector bodies.

## 2. How adequate are existing legal frameworks governing the use of ADM/ASDM systems across the public sector?

### 2.1 Existing legal frameworks are complex, piecemeal and insufficient to secure transparency

The authors highlight a number of critical deficiencies with the existing legal frameworks governing the use of ADM/ASDM systems in the public sector. Taken as a whole, they argue that the legal regime is complex, piecemeal and overly backward-looking (Section 5.4). The complexity of current legal frameworks makes it difficult for public sector bodies to identify when the use of ADM/ASDM may be more or less appropriate. Further to this, existing law mitigates against the early identification and rectification of issues at the design and development/procurement stage. Data Protection Impact Assessments are a potentially useful tool in this area<sup>8</sup> however, requirements of publication and meaningful user consultation still do not exist in law, though are often expressed in guidelines.

### 2.2 International proposals for new legal frameworks and governance suggest approaches to addressing these issues

The authors outline key developments in regulation and governance models which may be fruitfully applied to ADM systems in England and Wales (see section 5). Of note is the EU Commission's 'EU AI Regulation' which the Commission describes as "the first ever legal framework on AI"<sup>9</sup>. The authors highlight key points of consideration from the AI Regulation for public sector ADM systems: the provision of a definition of AI; the expansion of the definition of "data" beyond personal data and additional obligations for those producing 'high risk' AI systems- which the authors note are likely to be partly or wholly run by the public sector. Importantly, the AI Regulation discusses the AI systems which should not be developed- the authors note that this is the first major piece of proposed EU legislation to do this.

In addition, the EU's proposed Digital Services Act and the introduction of impact assessments are highlighted as other models of governance which are being actively developed internationally (see sections 5.2 and 5.3). In the UK, The Ada Lovelace Institute are partners in an international programme to review the 'first wave' of algorithmic accountability<sup>10</sup> policies. The authors also explore the potential for the role of Data Protection Impact Assessments to be expanded and clarified, through making them mandatory to complete, open to publication and requiring certain types of user consultation (section 3.6.1).

In summary, the authors contend that these new proposals have a common aim of focusing the governance of ADM systems at the product development stage prior to deployment. This contrasts starkly with the *ex post* approach of judicial review. These approaches could support public authorities in justifying their use of ADM

<sup>8</sup> See: Harris, S. (2020). Data Protection Impact Assessments as rule of law governance mechanisms. *Data & Policy*, 2, E2. doi:10.1017/dap.2020.3

<sup>9</sup> See Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) Brussels, 21.4.2021

COM(2021) 206 final <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence-artificial-intelligence> .

<sup>10</sup> <https://www.adalovelaceinstitute.org/project/algorithmic-accountability-public-sector/>

in data protection, equality and public law; and support claimants in understanding the appropriate processes through which they may challenge decisions.

### **3. How clear is the existing law governing whether and when ADM/ASDM can be used at all?**

#### **3.1 The legal frameworks governing whether an ADM or ASDM system can or should be used by public sector bodies are insufficiently clear**

To commission or deploy an ADM system at all, a public authority must be able to point to a specific legal basis for doing so (per GDPR Art 22(b)). Data subjects have the right not to be subject to a *decision based solely on automated processing*, including profiling, which produces *legal effects* concerning them or *similarly significantly affects* them unless it has a legal basis. (Section 3.4) In practice the authors find that there is insufficient clarity in the processes through which public authorities can justify their use of ADM/ASDM systems on data protection, equality and public law grounds.

Further to this the common law of judicial review requires that once a public authority has jurisdiction to take a decision it must go on to make that decision (Section 4.2.2.2). The courts have developed rules which prevent public authorities, themselves the delegates of power from Parliament, further delegating those powers beyond what is strictly necessary for the purposes of efficiency.<sup>11</sup> This suggests that it will be difficult for decision-makers to justify relying completely on algorithms, except by enacting legislation.<sup>12</sup>

In addition, the public authority is required to consider whether the deployment of an ADM/ASDM system is reasonable or proportionate (see Section 4.2.1.1). The authors contend that assessing proportionality will necessitate an examination of the benefits of the ADM system against its impacts and potential disadvantages, such as lack of transparency, or its potentially detrimental effect on particular groups of people. In terms of assessing reasonableness, the authors contend that there are hard choices to make between systems which are sufficiently accurate overall but perhaps have high false negative rates (what data scientists would call high precision, low recall), or which are sensitive enough to detect the target cases but also have a high level of false positives (low precision, high recall). The authors assert that, at present, administrative law has neither the technical expertise nor a developed enough account of what makes a decision reasonable in principle to be able to provide the necessary answers, guidance and protection.

### **4. How clear and adequate are the legal constraints placed on the development, selection and deployment of ADM/ASDM systems in the public sector context?**

#### **4.1 Administrative Law requires further urgent development to act as an effective guide to the lawful development and deployment of ADM/ASDM systems**

The authors identify two areas of administrative law capable of acting as a guide to the development and deployment of ADM/ASDM by public bodies:

- i.) established rules on procedural fairness (section 4.2.1.2) and

<sup>11</sup> *Carltona v Commissioners of Works* [1943] 2 All ER 560; R (*CCWMP*) v *Birmingham Justices* [2002] EWHC 1087; R v *Adams* [2020] UKSC 19.

<sup>12</sup> Such as, for example, Social Security Act 1998 S 2, or Child Support Act 1991 S 50A.

ii.) restrictions placed by law on the delegation of decision making by public bodies (section 4.2.1.3).

In relation to (i.), the authors argue that it is clear that the rules of procedural fairness in administrative law apply to the choice of decision-making procedure.<sup>13</sup> As such, it is likely that courts in future will be called upon to review the choice of one particular form of ADM as opposed to another. The authors highlight the urgent need for courts to develop both the technical expertise to understand the distinctions between different systems and a justifiable set of principles for deciding which system is most appropriate in which case. They also argue that this will almost certainly entail a need to move away from the courts' current general sense that the more court-like a procedure looks, the more fair it is,<sup>14</sup> since this approach is insufficiently nuanced to harness the potential benefits of ADM systems whilst ensuring their fair use. The authors conclude that there is a considerable amount of work to be done if the courts are to be able to answer these questions effectively, and that work will involve the development of a greater technical understanding.

In relation to (ii.) the authors argue that the difficulty of determining which decisions can be delegated is heightened in the context of the adoption of ADM/ASDM systems particularly where these systems are procured from private companies. While it might be straightforward to establish that the main decision tree in a rules-based system, or the key features on which a Machine Learning system is trained should be decided by the public authority commissioning the system; it is all too possible that what are thought of as more minor, implementational or engineering questions further down the line in fact turn out to have a significant impact on the operation of the system. In this instance, there would be a loss of accountability if those decisions are taken by technicians in a private company supplying the system. For instance, without specific instruction, a data scientist might assume that different kinds of errors (e.g. false positives and false negatives) are equally problematic; or they might assume that there is no harm in aggregating two labels into one (e.g. aggregating 'Catholic' and 'Protestant' into 'Christian' for the purposes of discrimination analysis, which may or may not be warranted depending on the national context). The authors conclude that it is important for the administrative rules relating to delegation to be alert to this danger and capable of understanding and detecting how and when it arises in order to prevent this loss of accountability.

#### 4.2 Constraints on the development and deployment of ADM/ASDM in relation to sensitive personal data are insufficiently adapted to machine learning

Legal frameworks place particular constraints on the development and deployment of ADM/ASDM systems that process Sensitive Personal Data<sup>15</sup>. However, the authors find that it is not always clear when Sensitive Personal Data ("SPD") can lawfully be processed or created by public sector ADM systems (including SPD "revealed" or inferred in the context of machine learning systems), and what safeguards should be put in place

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<sup>13</sup> See, for example the specification that a tribunal must be independent and impartial, under Article 6, rather than simply justifiable in its own right as a political decision-making method. (*R. v. Amber Valley DC, ex parte Jackson* [1985] 1 WLR 298, [1984] 3 All ER 501; *Ex p Kirkstall Valley* [1996] 3 All ER 304).

<sup>14</sup> See *Explaining Decisions made with AI* <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/explaining-decisions-made-with-ai/> n32.

<sup>15</sup> The UK GDPR defines special category data as: (i.) personal data revealing racial or ethnic origin; (ii.) personal data revealing political opinions; (iii.) personal data revealing religious or philosophical beliefs; (iv.) personal data revealing trade union membership; (v.) genetic data; (vi.) biometric data (where used for identification purposes); (vii.) data concerning health; (viii.) data concerning a person's sex life; and (ix.) data concerning a person's sexual orientation. This does not include personal data about criminal allegations, proceedings or convictions, as separate rules apply.

if this occurs (see Section 3.3). The authors argue that almost any machine learning system may take ordinary personal data as inputs but “reveal” SPD by virtue of algorithmic induction or prediction (for example, a health system that used diet or occupation data to predict health conditions, or a welfare system that used postcode and salary to partially output risk predictions concerning children in a household). The categorisation of a potential inference as SPD depends, according to the ICO, on how certain that inference is, and whether the system deliberately intended to draw an inference relating to one of the special categories<sup>16</sup>.

In addition to cases where the inference *itself* may be SPD, there may also be cases in which a machine learning model indirectly infers SPD via a proxy as an intermediate step to performing some other kind of non-SPD inference. For instance, a CV filtering tool which has been trained on historic data reflecting sexist hiring decisions might indirectly infer gender from an applicant’s education institution or word choices, and use that to make a prediction about their likely success if hired. The authors contend that this would still constitute processing of SPD, even if it is inadvertent, and there is a lack of clarity regarding appropriate safeguards and mitigations in this case.

## 5. How adequate are existing user rights to challenge decisions made by ADM/ASDM systems?

The authors identify significant issues with the adequacy of existing user rights to challenge decisions made by ADM/ASDM systems in the public sector. These issues include:

- i.) the specific challenges created by the context of the state as a monopoly provider of services (section 3.4),
- ii.) issues created by the the inadequacy of existing mechanisms for promoting transparency in relation to the use of ADM/ASDM systems (sections 3.5, 4.2);
- iii.) issues generated by the procurement of systems or components of systems from private companies (section 4.4),
- iv.) the unhelpful distinction between “solely automated” decisions and those involving automation, which does not reflect the reality of the way in which ADM/ASDM systems are typically deployed (section 3.4.1);
- v.) lack of conceptual clarity and under-developed case law in relation to Article 22 of the GDPR (section 3.4)
- vi.) inadequate legal responses for dealing with bias (sections 3.6, 3.4.2.1).

### 5.1 Existing user rights under GDPR are inadequate in the context of the state as a monopoly provider of services

The authors note that although the GDPR does give users active rights to, for example, erase their data, or object to profiling using their data, these rights are largely useless in the public sector context where users have to engage to get the services they want, and the state is a monopoly provider. Because of the above, much emphasis has been placed on the right in article 22 of the GDPR to object to decisions made solely by automated processing (“solely automated decisions” or SADs), with a view to obtaining safeguards such as having the decision taken by a human. However it is very unclear what the scope of GDPR art 22 is.

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<sup>16</sup> ICO [Special category data](#)

## 5.2 Article 22 of the GDPR is not currently fit for purpose and requires substantial amendment or reinterpretation by case law

Art 22 of the GDPR states that data subjects have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or similarly significantly affects them unless it has a legal basis. Each of the elements here is subject to much contestation (section 3.4). European Court of Justice (CJEU) and UK case law on art 22 are to date non-existent so uncertainty persists. The authors argue that even recent national EU case law providing guidance on ADMs in art 22 as well as the information rights in GDPR arts 13-15 is partial and unhelpful. Development of case law in the UK would help in reducing uncertainty in this area, as ICO and EDPB guidance, though useful, remains simply that.

Failing this however the authors assert that more detailed statutory definitions of the terms contained in article 22 might help, as might sector-specific codes. Particular uncertainty relates to the concepts of a “decision” (section 3.4.1.3), “solely automated” (section 3.4.1.1) and “significant effects” (section 3.4.1.2). It is likely that many if not most public sector ADM systems may be easily excluded from the scope of art 22, whether deliberately or accidentally, thus minimising its perceived protections. These uncertainties about scope may mean that art 22 without substantial amendment or reinterpretation by case law is “beyond saving” in relation to ADM. Even where art 22 is in scope, it is unclear if art 22 gives users a “right to an explanation” as to how the system affects them.

## 5.3 Existing transparency rights are fettered by intellectual property rights and require urgent review

The authors caution that exceptions to Data Protection transparency rights in the form of the protection of trade secrets and intellectual property may prove increasingly problematic in the light of a landscape of at least partially procured systems from private vendors. Whilst Recital 63 of the GDPR counsels that this should not justify “a refusal to provide all information to the data subject”, it says nothing about transparency to the public operator. Thus provision in procurement frameworks for access to data (user and training set) as well as logic (models, algorithms, rules) is likely to be crucial. The authors note that, in the UK this has not yet emerged as a major problem at least in disputed cases, partly because major systems have tended to be built in house<sup>17</sup>. However in the US it is a well-known issue<sup>18</sup>.

The authors note that while users have the right to be informed of the existence of automated decision making, there is no general requirement in the law to publish the existence of public sector ADMs and the lack of such a register is a first hurdle to regulator or civil society oversight of such systems. The authors suggest that public registers of AI systems, as contemplated by the proposed EU AI Regulation<sup>19</sup> may offer a partial solution to issues of transparency (section 5.1).

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<sup>17</sup> Interestingly however the UK government has protected the source code of UK AI products from access by Japanese authorities under the UK-Japan Comprehensive Economic Partnership Agreement (CEPA) : see <https://questions-statements.parliament.uk/written-questions/detail/2020-11-12/114874> . See also from Sweden, Christensen, Kristina LU *Exhibiting transparency without opening the 'Black Box' - Balancing act between Data Protection and Trade Secrets Rights in Solely Automated Decision-Making AI system in Healthcare* (2020) JAEM03 20201 at <https://lup.lub.lu.se/student-papers/search/publication/9019754> .

<sup>18</sup> Diakopoulos, Nicholas. 2014. *Algorithmic Accountability Reporting: On the Investigation of Black Boxes*. Columbia Journalism School: Tow Center for Digital Journalism.

<sup>19</sup> Albeit limited to “high risk” AI

#### 5.4 To properly address bias, there is a need to develop an active right to shape both *how* inferences are made by ADM/ASDM and *what* those inferences are

The authors highlight the absence of an active right to shape *how* inferences are made by Machine Learning automated systems, and *what* they are. Development of a right of this kind is essential to addressing issues of bias in ADM/ASDM. Wachter et al have argued that individuals are thus in practice granted little control and oversight over how their personal data is used to draw inferences about them and have suggested a “right to reasonable inferences” at least in certain scenarios. This right would require ex ante justifications to be given by the data controller to establish whether an inference is reasonable. This disclosure would address (1) why certain data form a normatively acceptable basis from which to draw inferences; (2) why these inferences are relevant and normatively acceptable for the chosen processing purpose or type of automated decision; and (3) whether the data and methods used to draw the inferences are accurate and statistically reliable<sup>20</sup>.

#### 5.5 There is an urgent need for the common law of judicial review to develop a clear and certain account of what is relevant in the context of particular decisions arrived at via ADM/ASDM

The common law of judicial review requires that the decision maker must: (i.) take into account the right considerations and only the right considerations (relevance) and (ii.) make a decision which is reasonable or proportionate (as appropriate). The authors argue that, with further development, these grounds could be used to address key technical issues arising from ADM including: (i.) the metrics to be used in choosing and assessing systems; (ii.) differences between testing and deployment, (iii.) discrimination and equality issues in data; (iv.) population level results applied at individual level and (v.) unobserved labels (section 4.2). The authors contend that the ground of relevance, requiring as it does decision-makers to take into account relevant considerations,<sup>21</sup> leave to one side irrelevant considerations<sup>22</sup> and avoid acting for improper purposes<sup>23</sup> has the potential to be highly applicable to the review of ADM, especially in the context of concerns around ‘bias’.

The authors identify two stages where the ground of relevance is likely to apply. One is where a human decision-maker has to establish how much relevance to accord to the result of a determination by an ADM system, and second when the ADM system itself has taken various factors into account in producing a determination, either to give to a human or to execute on its own. To respond to these scenarios, the authors argue that the law needs a successful, clear and certain account of what is relevant and what is not in different circumstances. The authors highlight that at present, the law requires significant further development to facilitate this. For example, it is sometimes possible for decision-makers to take into account financial cost as a relevant factor in making a decision,<sup>24</sup> while at other times that is impermissible.<sup>25</sup> But the distinction between these cases and the answers given in them is by no means sharp or clear. The authors caution that, if the law is currently unable to deal with a relatively familiar factor such as economic cost, it is to be expected that it will face even more challenges as it deals with ADM.

<sup>20</sup> Wachter, Sandra and Mittelstadt, Brent, A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI (October 5, 2018). Columbia Business Law Review, 2019(2)

<sup>21</sup> *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759.

<sup>22</sup> *R v Rochdale MBC ex p Cromer Ring Mill* [1982] 3 All RR 761.

<sup>23</sup> *R v Westminster Corporation v LNWR* [1905] AC 426.

<sup>24</sup> *Ex p Barry* [1997] AC 584.

<sup>25</sup> *Tandy* [1998] AC 714.

The authors argue that relevance also needs to address whether it is permissible to apply predictions of aggregate impact to individual cases. To do this, it will be necessary for the courts to take a clear view on when such statistical predictions are relevant and when they are not. There may be no alternative, in the making of large cross-population policy decisions such as those relating to drugs and vaccines, to the use of aggregate data, and it may be that while such data is the best available there is no alternative to using it even in an individual case. But it should also be noted that cases both in Australia and the UK have revealed the shortcomings of applying such aggregates in individual contexts,<sup>26</sup> and in such cases the courts should be ready to find the aggregate statistics to be irrelevant. (4.2.2.2.4)

## FURTHER QUESTIONS AND NEXT STEPS

The report identifies a number of ideas and further questions which might fruitfully be explored at the workshop. These include:

1. What is the potential of an expanded role for Data Protection Impact Assessments as a tool for (i.) “upstreaming” the governance of ADM/ASDM systems and; (ii.) promoting greater transparency? (see section 3.6.1)
2. How sufficient are existing equalities and human rights frameworks in the context of challenging discrimination by ADM/ASDM’s? Can the common law of judicial review, particularly the grounds of rationality/proportionality identified by the authors, be useful in controlling and optimising the use of ADM systems by public bodies? (see section 4.2.2.5)
3. How adequate are the existing remedies available after a successful challenge is made to ADM/ASDM? What further remedies might be needed? (see section 3.4.2.1)
4. International approaches to governing ADM/ASDM have focussed on developing new legal frameworks (see section 5). Is a new legal framework for ADM/ASDM needed in England and Wales? What are the alternatives?
5. What is the role for existing regulators in tackling the challenges posed by the deployment of ADM/ASDM systems in the public sector? What additional powers might regulators need? Is a new regulator needed?

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<sup>26</sup> See the problems associated with the Australian Online Compliance Initiative’s ‘robo-debt’ system <https://auspublaw.org/2018/04/robo-debt-illegality/> and the decision in *Secretary of State for Work and Pensions v Johnson*, [2020] EWCA Civ 778, albeit on a different legal issue in the latter case.



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