

The Law Commission Consultation on their 14th Programme of Law Reform

The Legal Education Foundation Response

About The Legal Education Foundation

The Legal Education Foundation (“TLEF”) is a charitable trust that seeks to help people understand and use the law to bring about positive change. TLEF governors award grants to organisations working in the social justice legal sector to enable them to deliver work that advances our strategic objectives. The core of the Foundation’s strategy for 2020-25 is delivered through three programmes:

- **Stronger Sector** - This grants programme supports education, training and development aimed at addressing systemic gaps in skills in the social justice legal sector and to strengthen the capacity of individuals and organisations in the social justice field to deliver their important work effectively and sustainably
- **Fairer Systems** - This grants programme supports work to increase people’s capacity to understand the way laws are made and implemented. It has two linked areas of focus: the constitutional and legal implications of leaving the EU; and the growing use of automated decision-making by government.
- **Smarter Justice** – This programme seeks to build an enduring commitment to learning and evidence in the design and operation of the justice system.

Since 2018, under our Fairer Systems programme, 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 space¹ 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 by² 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.

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

² 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:

Consultation Response

Automated Decision Making (“ADM”) and Assisted Decision Making (“ASDM”) systems are widely used to support decision making across the public sector. When deployed appropriately and lawfully, the adoption of these technologies offers the potential to improve the speed and consistency of decision-making whilst generating significant savings for the taxpayer. However, recent experiences in immigration, policing, welfare and education have highlighted the risks and limitations associated with the use of ADM/ASDM systems. These risks, if unaddressed, can undermine rights, damage trust in public sector bodies and generate costly litigation. As such, it is important that positive regulatory and legislative solutions are in place to govern the use of these systems and provide swift and effective routes to redress.

In June 2021, The Legal Education Foundation convened a [technical legal workshop](#) and [commissioned research](#) which revealed both the inadequacy of existing law and the consequences of its deficiencies. Existing legal frameworks are complex, piecemeal and provide insufficient clarity about whether, when or how ADM/ASDM systems can lawfully be deployed by public bodies. This creates uncertainty and increases the risk that ADM/ASDM systems will be deployed inappropriately, with deleterious consequences for individuals, public bodies and the taxpayer. Mechanisms for seeking redress are both complex and expensive to access, and the actual redress available limited.

To develop effective solutions, The Law Commission should examine and learn from international approaches to regulating public sector use of ADM/ASDM systems. In identifying models of best practice on which to base the Law Commission’s approach, primacy should be given to those frameworks that can be demonstrated to:

- Address both ADM and ASDM systems
- Ensure that ADM/ASDM systems uphold existing equalities and human rights law
- Secure meaningful and effective transparency in relation to the use of ADM/ASDM systems e.g. via public registers
- Deliver certainty for public bodies, suppliers and individuals around the circumstances in which ADM and ASDM systems can be used;
- Support meaningful public engagement in determining appropriate uses of ADM/ASDM
- Focus governance at the design and deployment stage
- Are capable of managing and responding to contextual complexity
- Introduce independent external scrutiny to ensure the efficacy and accuracy of ADM/ASDM systems
- Ensure clear lines of accountability for decisions taken by ADM/ASDM systems, and secure legally enforceable rights to an explanation.
- Provide timely, appropriate, accessible and cost-effective routes to redress where this is required.

In general terms, what is the problem that requires reform?

Automated Decision Making (“ADM”) and Assisted Decision Making (“ASDM”) systems are widely used to support decision making across the public sector. When deployed appropriately and lawfully, the adoption of these technologies offers the potential to improve the speed and consistency of decision-making whilst generating significant savings for the taxpayer. However, recent experiences in [immigration](#), [policing](#), [welfare](#) and [education](#) have highlighted the risks and limitations associated with the use of ADM/ASDM systems.

These risks, if unaddressed, can undermine rights, damage trust in public sector bodies and generate costly litigation. As such, it is important that positive regulatory and legislative solutions are in place to govern the use of these systems and provide swift and effective routes to redress.

At present, the use of ADM and ASDM systems by public bodies is governed by a combination of legal frameworks including Data Protection law, the common law of Judicial Review, Equalities and Human Rights Law (including the Public Sector Equality Duty) and contract law. In June 2021, The Legal Education Foundation convened a [technical legal workshop](#) and [commissioned research](#) which revealed both the inadequacy of existing law and the consequences of its deficiencies. Existing legal frameworks are complex, piecemeal and provide insufficient clarity about whether, when or how ADM/ASDM systems can lawfully be deployed by public bodies. This creates uncertainty, and increases the risk that ADM/ASDM systems will be deployed inappropriately. Rights to challenge decisions made by ASDM systems in particular, are unhelpfully restricted by the concept of a “solely automated decision”, removing many decisions from the scope of challenge under data protection law. Many existing rights are predicated on the notion of consumer choice and do not take adequate account of the particular context of the state as a monopoly provider of essential services. Mechanisms for seeking redress are both complex and expensive to access, and the actual redress available limited. The use of privately procured ADM/ASDM systems across the public sector presents particular challenges for the common law of judicial review- ADM/ASDM may obscure the chain of organisational accountability and undermine the attribution of responsibility for key decisions made by public bodies. There is an urgent need to reform the existing law to focus regulation on the design and development of ADM/ASDM systems. Work is also needed to improve transparency around the use of ADM/ASDM systems, to develop clearer guidance to support public bodies and to strengthen, simplify and reduce the cost of mechanisms for seeking redress.

Can you give us an example of what happens in practice?

The indeterminacy created by existing legal frameworks has the following implications in practice:

- The absence of clarity makes it harder for public bodies to identify when the use of an ADM/ASDM system may be more or less appropriate and makes it harder for public bodies to adhere to their obligations under the law.
- Uncertainty also creates challenges for private sector suppliers of ADM and ASDM systems. Innovation is undermined when there is a lack of legal certainty about what can and can't be done. Businesses value legal clarity which decreases insurance costs and reputational risk.
- The lack of transparency regarding the design and deployment of ADM/ASDM systems by public bodies undermines trust and confidence in public bodies. Recent [ICO guidance](#) has emphasised the critical role of transparency in promoting trust: “the more insight individuals have on the AI model that makes decisions about them, the more confident they are likely to be in interacting with these systems and trusting [your]use of them”
- Weak governance undermines public trust in the use of ADM/ASDM systems by public bodies- nearly one quarter of respondents to [CDEI research](#) published in 2020 reported that existing rules are insufficient to ensure that technology is being used properly. Recent high profile controversies involving the use of ADM/ASDM systems have further undermined public confidence- [more than half \(53%\) of those surveyed by the Chartered Institute for IT](#) following the high profile

abandonment of the Ofqual A-level grading algorithm reported that they had no faith in algorithms deployed by any organisation to make decisions about them.

- Current legal frameworks mitigate against the early identification and rectification of issues at the design and development/procurement stage, focussing instead on providing remedies against unfair systems after they have been deployed. This has led to costly reversals in the use of ADM/ASDM following challenges in the courts e.g. the automated system used by [Universal Credit](#) and the successful challenge to the [Home Office](#) visa streaming tool.

To which areas of the law does the problem relate?

The problem relates to five areas of law:

- Freedom of Information law- an [explainer](#) published by the Ada Lovelace Institute revealed that the efficacy of FOI requests in contributing to transparency around ADM/ASDM systems is significantly limited by the exemption for commercially sensitive information- particularly in relation to the role of private vendors in developing and implementing ADM/ASDM systems
- Data Protection law
- Equality Law including the Public Sector Equality Duty
- The common law of judicial review, and
- Contract law - between public bodies and system developers, or between service provider and service user

Can you give us information about how the problem is approached in other legal systems?

The effective regulation of ADM/ASDM systems is a global challenge that is being approached by numerous governments and international bodies in a variety of ways. In March 2021, the Ada Lovelace Institute in partnership with AI Now and the Open Government Partnership launched the [first major global study](#) of the impact of AI accountability policies. The findings of this study will be published in summer 2021.

Recent examples of approaches to ADM/ASDM governance include:

- The [draft AI Regulation](#) published by the EU Commission and the work of the Council of Europe [Committee on Artificial Intelligence](#).
- The adoption by Amsterdam, Helsinki and Nantes of [registers of public sector ADM systems](#)
- The use of risk assessments such as Canada's [Algorithmic Impact Assessment](#)
- [Bills being introduced by state legislatures across the US](#)- these tend to focus on restricting government use and procurement of ADM systems.

Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

All.

What do you think needs to be done to resolve the problem?

To develop effective solutions, research should be conducted to examine and learn from international approaches to regulating public sector use of ADM/ASDM systems. In identifying models of best practice on which to base the Law Commission's approach, primacy should be given to those frameworks that can be demonstrated to:

- Address both ADM and ASDM systems
- Ensure that ADM/ASDM systems adhere to existing law including equalities and human rights frameworks
- Secure meaningful and effective transparency in relation to the use of ADM/ASDM systems e.g. via public registers
- Deliver certainty for public bodies, suppliers and individuals around the circumstances in which ADM and ASDM systems can be used;
- Support meaningful public engagement in determining appropriate uses of ADM/ASDM
- Focus governance at the design and deployment stage
- Introduce independent external scrutiny to ensure the efficacy and accuracy of ADM/ASDM systems
- Ensure clear lines of accountability for decisions taken by ADM/ASDM systems, and secure legally enforceable rights to an explanation.
- Provide timely, appropriate, accessible and cost-effective routes to meaningful redress where this is required. Importantly, the redress available should go beyond the ability to secure a new decision.

What is the scale of the problem?

Research suggests that ADM and ASDM systems are increasingly widely used by public bodies. An [investigation](#) by the Guardian published in 2019 showed that 1 in 3 councils (140 out of 408) were using ADM/ASDM systems to help make decisions about benefit claims and other welfare issues, including child protection and education. Across [central government](#), HMRC, the Ministry of Justice and the Department of Work and Pensions are the highest spenders on digital, data and algorithmic services. The government has also committed significant resources to expanding the use of ADM/ASDM through the [AI Sector Deal](#). However, the absence of a requirement for public bodies to proactively publish details of when and how they are using ADM/ASDM systems makes it difficult to accurately quantify the extent of their deployment. The nature of ADM/ASDM systems means that they tend to be deployed in contexts where decisions are being made at scale (e.g. the EU Settled Status Scheme, and in the context of welfare decision making). As such, where decisions made by these systems are inaccurate, this inaccuracy is likely to affect large numbers of individuals. There are a number of recent examples of ADM/ASDM systems being designed to deal with decisions at scale, challenged and subsequently abandoned at significant cost to the taxpayer e.g. the [Ofqual A-level grading algorithm](#).

What would be the positive benefits of reform?

Reform of the existing law would support the rule of law by addressing existing legal uncertainty and increasing transparency in relation to use of ADM/ASDM systems. Legal mechanisms mandating effective action to address bias at the design, development and procurement stage of ADM/ASDM systems could prevent harm and support the lawful deployment of these technologies. Simplifying and enhancing routes for complaint and

redress would improve access to justice and incentivise compliance- [research](#) conducted by the Centre for Data, Ethics and Innovation (“CDEI”) in 2020 revealed that 45% of respondents to a nationally representative survey did not know where to raise complaints when data driven technologies had caused them harm.

Reforming regulation of the use of ADM/ASDM systems across the public sector is vital to increase trust in both the use of these technologies and support their wider adoption. A report published by the [Committee on Standards in Public Life](#) found that the public require greater reassurance about the use of AI in the public sector. The Committee concluded that stronger regulation would provide that reassurance and support their use, stating: “*While standards and regulation are often seen as barriers to innovation, the Committee believes that implementing clear ethical standards around AI may accelerate rather than delay adoption, by building trust in new technologies among public officials and service users.*” This view is supported by empirical evidence- [longitudinal research](#) published by CDEI exploring public attitudes to the use of AI and data driven technologies in tackling COVID-19 revealed that the single largest predictor of supporting greater use of digital technology was an individual believing that ‘the right rules and regulations are in place’. Strong regulation would enable the public sector to benefit from the significant efficiency savings these technologies may confer: [research conducted by the Cardiff Data Justice Lab](#) into abandoned ADM/ASDM projects developed by local councils cited the experience of Sunderland council, who stopped using an ADM/ASDM system which was designed to help them make efficiency savings of £100m due to concerns about the efficacy of the system and public confidence in its use.

If this area of the law is reformed, can you identify what the costs or other negative impacts of reform might be?

The negative impacts generated by the status quo mitigate overwhelmingly in favour of reform. Effective governance of ADM/ASDM has the potential to confer considerable benefits (see above) and address significant harms. Strong governance and legal certainty has been demonstrated to support innovation and increase the potential for the state and individuals to benefit from advances in technology.

Does the problem adversely impact equality, diversity and inclusion by affecting certain groups in society, or particular areas of the country more than others? If so, what are those groups and areas?

The risk that ADM/ASDM systems can lead to decisions that adversely impact equality, diversity and inclusion is well recognised. Machine learning models deployed in many ADM/ASDM systems rely on past data- as such these models have the potential to entrench and exacerbate existing biases. In 2019, [Suresh and Guttag](#) published a paper setting out a framework which describes seven potential sources of bias that can be introduced throughout the machine learning cycle. Concerns about the role of ADM/ASDM systems in generating, perpetuating or exacerbating biases in decision making processes have prompted numerous reports and reviews from civil society organisations, parliamentary committees, and government advisory bodies (selected examples include, Big Brother Watch’s [review](#) of the Harm Risk Assessment Tool used by Durham Police to predict reoffending, the Science and Technology Select Committee’s report on the use of [Algorithms in Decision-Making](#) and the Centre for Data, Ethics and Innovation’s [review into bias in algorithmic decision making](#)). In 2020, the Committee on Standards in Public Life published its report into Artificial Intelligence

and Public Standards, stating: [“Data bias remains a serious concern. Further work is needed on measuring and mitigating the impact of bias to prevent discrimination via algorithm in public services.”](#) The [report](#) concluded that: *“AI systems could exacerbate biases against protected characteristics, such as race or sex, and make discriminatory outcomes against those characteristics more likely.”*

In 2019 The Legal Education Foundation commissioned discrimination law experts Robin Allen and Dee Masters of Cloisters Chambers to produce a [legal opinion](#) on the lawfulness of two examples of public sector ADM/ASDM. The Cloisters team were asked to consider two specific areas of government decision-making: its EU Settlement Scheme for European nationals who want to stay in the UK post-Brexit; and the use of ‘risk-based verification’ by some local authorities to detect fraudulent housing and council tax benefit claims. They concluded that these systems may systematically disadvantage women stating: “there is a very real possibility that the current use of governmental automated decision-making is breaching the existing equality law framework in the UK. What is more, it is hidden from sight due to the way in which the technology is being deployed.” They concluded that equality claims arising from the use of AI will become: “the next battle ground over coming decades”

The recent case of [R \(on the application of Bridges\) v Chief Constable of South Wales Police \(\[2020\] EWCA Civ 1058\)](#), is one of the few to test the application of equality law to algorithmic bias. In *Bridges* the court considered the use of facial recognition technology by South Wales police. The Court of Appeal found the use of this system to be unlawful, stating that the police force failed to adequately consider whether their trial could have a discriminatory impact, and specifically that they did not take reasonable steps to establish whether their facial recognition software contained biases related to race or sex. In doing so, the court found that they did not meet their obligations under the PSED.

Beyond protected characteristics, concerns have been raised about the impact of public sector ADM/ASDM systems on individuals on low incomes. In 2018 Philip Alston, United Nations special rapporteur on extreme poverty and human rights, issued a [statement](#) following his visit to the UK. In this statement, Alston remarked: *“Government is increasingly automating itself with the use of data and new technology tools, including AI. Evidence shows that the human rights of the poorest and most vulnerable are especially at risk in such contexts.”* In 2019 the CDEI published the [interim report](#) of their independent review into algorithmic decision making. The report stated that: *“Decision-making, algorithmic or otherwise, can of course also be biased against characteristics which may not be protected in law, but which may be considered unfair, such as socio-economic background. In addition, the use of algorithms increases the chances of discrimination against characteristics that are not obvious or visible. For example, an algorithm might be effective at identifying people who lack financial literacy and use this to set interest rates or repayment terms.”* In the public sector context, [evidence](#) has shown that certain people (e.g. those who are vulnerable, or on low incomes) are more likely to be overrepresented in data held by local authorities and this can then lead to biases in predictions and interventions. Left unaddressed, these issues create challenges to the government’s “levelling up” [agenda](#).

In your view, why is the independent, non-political, Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

Improving the regulation of the use of ADM/ASDM is not a party-political issue- as noted above several cross-party Parliamentary committees have examined the issue and recommended reform. The Law Commission has demonstrated particular expertise relevant to the reform of this area of law in its work on the regulation of [automated vehicles](#). There are already a number of legal frameworks in place governing the use of ADM/ASDM by public sector bodies- the task now is one of consolidation, simplification and improvement- a task which the Law Commission is ideally placed to conduct.

Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

N/A

Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently?

See above. While successive bodies and committees have considered this issue, much of the focus has been on ethics, rather than technical legal reform. The Law Commission could usefully draw on existing analysis to develop positive legal and regulatory solutions.