



Law Commission Consultation on 14th Programme of Law Reform

Consultation Response

July 2021

For further information contact

Stephanie Needleman, Senior Lawyer
sneedleman@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 02077626415
email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.
2. This paper sets out JUSTICE's response to the Law Commission's Consultation on its 14th programme of law reform. It provides JUSTICE's views on the ideas for the programme of work that have been put forward by the Law Commission which are relevant to JUSTICE's own work.
3. Like the Law Commission, JUSTICE carries out specialist law reform projects. We apply similar criteria to those used by the Law Commission in determining what projects to undertake. Our work focuses on ensuring that key institutions, frameworks and process and procedures in the justice system are fair, accessible, and efficient. We examine the potential of technology and innovation in delivering justice and consider its impact on the system. We also explore and confront the ways in which the justice system adversely treats and impacts upon different individuals and groups. We look at pressing systemic issues, work on an independent cross-party basis and aim to build consensus for reform. Whilst we consistently urge for improved resourcing for the justice system, we pursue projects and make recommendations that stand a reasonable chance of implementation in the existing financial climate.
4. In summary, JUSTICE's views on the projects suggested by the Law Commission which are relevant to our areas of work are as follows:
 - a) **A review of the legal framework governing the role of automation in public decision making.** This is a pressing issue that will only continue to become more so as the use of automation by public bodies increases. There are clear gaps in the current legal framework and whilst there are a number of others already looking at issues in this space, in our view there would be value in the Law Commission taking a holistic look at this issue.

- b) **A review of the principles of information sharing between public bodies.** JUSTICE's work, particularly in the context of housing, benefits and mental health in the criminal justice system has shown that information sharing is important to improving initial public body decision making and reforming dispute resolution and redress mechanisms. In order to positively harness technological developments, it is crucial that data sharing across public bodies can be done in a way that is efficient but maintains the trust and confidence of those whose data is being shared. We therefore strongly support this proposed project.
- c) **Family law.** JUSTICE is currently considering access to justice in private children proceedings¹ and we would strongly advocate for the Law Commission to consider work on the adequacy of current provisions in the Family Courts for children to participate effectively in proceedings which concern them. However, we suggest this should form part of a broader project auditing and evaluating child participation and compliance with Article 12 of the UN Convention on the Rights of the Child across the justice system.
- d) **Justice in the digital age.** JUSTICE agrees that there is a need to review the use of technology in courts and tribunals during the pandemic in order to draw lessons from this experience and inform the future use of digital technology in the justice system. However, we draw the Law Commission's attention work that is already being carried out by others and query whether there is sufficient need for the Law Commission to undertake such a review.
- e) **Review of Appeal Powers in the Criminal Courts.** JUSTICE has published a number of reports regarding miscarriages of justice.² We therefore welcome the Law Commission's proposal to examine this area, which we consider to be well-overdue. We intend to undertake our own efforts to build on the Westminster Commission's work and make the case for policy reform. We would therefore be delighted to support the Law Commission's work in this area. In our view, the review should also include consideration of cases on

¹ Information on our Working Party, *Improving Access to Justice for Separating Families*, is available here: <https://justice.org.uk/our-work/civil-justice-system/current-work-civil-justice-system/improving-access-to-justice-for-separating-families/>

² See, for example, *Compensation for Wrongful Imprisonment* (1982), *Miscarriage of Justice* (1989), *Remedying Miscarriages of Justice* (1994), *Righting Miscarriages of Justice?: Ten years of the Criminal Cases Review Commission* (2008); and *Supporting Exonerates: ensuring accessible, continuing and consistent support* (2018).

appeal from the High Court which are “criminal cause[s] or matter[s]”,³ and over which the Court of Appeal currently has no jurisdiction.

f) **Technological advances and procedural efficiency in the criminal court.**

JUSTICE welcomes the use of technology to facilitate more efficient administration of justice, so long as it is done in a way which protects and promotes the rights of those involved. In particular, we would like to draw the Law Commission’s attention to one area we consider in need of urgent reform: namely the use of police officers using body-worn cameras.

g) **The UK statute book.** The clarity and coherence of substantive law is important to ensuring access to justice for lay courts and tribunal users, particularly in light of legal aid cuts. JUSTICE there welcomes any effort to improve the coherency of substantive law in the UK.

Automated decision-making

5. JUSTICE has been conducting some initial scoping work for a possible project related to the use of automated decision making (“ADM”) in the public sector. We also considered the issue of automation in the specific context of the benefits system in our recent working party report *Reforming Benefits Decision-Making*.⁴ During the course of this work we have identified a number of issues related to the use of ADM by public bodies, which are summarised below. We therefore agree that a review of the legal framework governing the role of automation in public decision making is necessary in order to identify whether it can adequately address these issues and what further developments may be required. As technology develops the use of ADM generally, as well as Artificial Intelligence (“AI”), will continue to increase across the public sector. It is therefore important to identify issues with, and gaps in, the current legal framework governing the use of ADM in the public sector and resolve these as soon possible.
6. The rising use of ADM by public bodies raises issues both in respect of how decisions are made in the first instance and also potential barriers for those seeking to challenge automated decisions. A lack of transparency regarding the use of ADM impacts both of these stages. There is nothing inherently wrong with automation, however without

³ Within the meaning of section 1 Administration of Justice Act 1960 (“AJA 1960”).

⁴ JUSTICE, [Reforming Benefits Decision-Making](#) (July, 2021)

greater transparency regarding the development and use of automation it is impossible to assess its impact and to hold public bodies to account.

7. There are clear gaps in the current legal framework in this regard. Whilst the UK General Data Protection Regulation provides for enhanced information and other requirements in respect of automated decision making, these only apply to solely automated decisions. Many public bodies rely on some form of automation as part of their decision-making processes but do not rely on fully automated decisions. For example, whilst the Department for Work and Pensions (DWP) stresses it does not make any automated decisions, the Universal Credit system is essentially a major automation project⁵ and the DWP spends £8 million a year on an 'Intelligent Automation Garage'.⁶ There is little information available in the public domain regarding what the Intelligent Automation is Garage is doing and what other ADM DWP is using. Even where it is clear that ADM is being used as part of the decision making process, there is a lack of transparency about the methodology and constraints in computer programming and ADM processes, making it difficult to challenge the approach.⁷
8. Freedom of Information Act requests to understand the use of ADM may also have limited success due to reliance on exemptions such as 'commercial interests'⁸ where the AI or computer programmes are made by private companies.
9. Automated systems can also contain inbuilt discrimination within their programming or due to the data sets used to 'train' the algorithm. Whilst the Equality Act 2010 ("EA") prohibits direct and indirect discrimination and can be used as a tool to challenge the discriminatory impacts of automated systems, it would in our view be beneficial to examine the limits of the EA in the automation context and to consider how legal frameworks could best prevent the discrimination occurring in the first place.

⁵ P. Alston, '[Statement on Visit to the United Kingdom by Professor Phillip Alston, United National Special Rapporteur on extreme poverty and human rights](#)' (November 2018), p.9

⁶ R. Booth, '[Benefits system automation could plunge claimants deeper into poverty](#)', *The Guardian*, (14 October 2019)

⁷ This was an issue in *SSWP v Johnson* [2020] EWCA Civ 7781 where the DWP acknowledged the issue regarding assessment periods and payment on a fluctuating day of the month but argued that the UC system could not be changed to deal with it. However, since losing the case, the DWP has stated that it is releasing functionality which would automatically detect such cases.

⁸ Information is exempt from disclosure under the Freedom of Information Act if it constitutes a trade secret, or if its disclosure is, or would likely, prejudice the commercial interests of any person (FOIA, s.43).

10. In addition, we would encourage a Law Commission project looking at automation in public decision making to include an examination of existing routes of redress and whether they are sufficient to enable individuals to obtain effective redress in relation to fully or partially automated decisions.
11. The use of ADM/ AI also raises a number of evidential issues for making legal challenges. In particular, algorithms are opaque – some are only understandable to those with the requisite computer programming skills. More complex machine learning / AI programmes which reprogramme themselves may result in even their programmers being unable to understand the logic behind decisions. Obtaining and understanding the data that has been used to train the AI requires expert assistance, which may not be available on the funds or timescale available. There may even be issues of automation bias within the courts and tribunals system itself. There may also be issues of legal responsibility – although public bodies will remain responsible in law for the use of ADM / AI they may seek to argue that the error is ‘out of their hands’.⁹
12. There are already a number of organisations who are working in this space. A good deal of attention has been given to transparency issues and there has been some investigation on the use of administrative and equality law to challenge automated decisions.¹⁰ Some organisations have or are conducting work on the use of ADM in specific contexts including law enforcement and criminal justice,¹¹ welfare,¹² and immigration.¹³ However, nonetheless, JUSTICE believes that there is value in the Law Commission undertaking a project that takes a holistic view of the current legal framework governing the use of ADM to identify gaps and make recommendations for reforms required to fill these.

⁹ See for example *SSWP v Johnson* [2020] EWCA Civ 7781.

¹⁰ See for example, [Data Justice Lab](#); J. Cobbe Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making, *Legal Studies*, 39 (4); [AI Law Hub](#). The Government has also released an [Ethics, Transparency and Accountability Framework for Automated Decision-Making](#) (May 2021)

¹¹ See for example, [Liberty](#) and [Big Brother Watch](#).

¹² See for example, [Privacy International](#) and [MedConfidential](#).

¹³ See for example, [Privacy International](#) and [Public Law Project](#).

Data sharing and information law

13. We agree with the Law Commission's proposal to investigate the law and principles governing data-sharing between public bodies. Through our work in the context of housing disputes and benefits, we have identified a number of instances where better data sharing between public bodies would be beneficial, improving decision making and dispute resolution processes. We agree that there is a current reluctance to enable this due to actual and/or perceived obstacles. The Law Commission is well placed to take a holistic view of data sharing across the public sector and ensure that the framework for doing so both enables data to be shared when it is in the public interest to do so, whilst ensuring that personal information is not misused, and individuals' privacy is maintained.

Government decision making

14. A good example of the benefits of better data sharing between public bodies is in the context of health and disability assessments. These are assessments that benefits claimants undergo to establish eligibility for certain benefits or components of Universal Credit. It is unclear whether it is the claimant's obligation to provide additional medical information (for example from their GP) to the assessor /DWP or whether it is the assessor's / DWP's obligation to obtain it. Either way, assessors and claimants have both reported difficulties in obtaining such information. Better data sharing between the DWP and NHS, with appropriate consent and data protection in place would obviate the need for claimants to provide additional medical evidence and make the processes of obtaining it quicker and simpler.¹⁴

Dispute resolution

15. Across all sectors dispute resolution is guided by and relies upon data being provided from a range of sources. This includes information from claimants, defendants, legal advisors and in some cases, external agencies.¹⁵ Facilitating better data sharing would help streamline dispute resolution processes and prevent individuals from having to 're-

¹⁴ JUSTICE, [Reforming Benefits Decision Making](#) (July 2021), paras 2.19 – 2.26.

¹⁵ Within the social housing context, the Housing Ombudsman may share information with the Social Care Ombudsman where a dispute identifies issues relevant to both jurisdictions. The Ministry of Justice portal for Road Traffic Accidents provides for medical information to be provided along with information on financial loss and information from insurance companies.

key' information they have already provided. For example, in the benefits context appellants to the First-tier Tribunal (Social Security and Child Support) have to re-enter information that they have already provided to DWP (often a number of times). It would make appealing a benefits decision much simpler and easier for claimants if, once they chose to appeal, the appeal form was pre-populated with this information and evidence already provided to DWP automatically uploaded to HMCTS's systems.¹⁶

16. Better data sharing would also facilitate the introduction of new dispute resolution models that promote access to justice. For example, in its report *Solving Housing Disputes*, JUSTICE recommended the establishment of a Housing Disputes Service ("HDS") a new single framework for housing dispute resolution. It would be a holistic and investigative model looking to resolve all the relevant issues within a housing relationship. It would include not just the landlord and tenants, but input from regulators and local authorities where relevant. Effective information sharing between the HDS and relevant public bodies will be crucial to its success.¹⁷
17. As an alternative to the HDS, the report recommended the expansion of the Ministry of Housing, Communities and Local Government's proposal for a Housing Complaints Resolution Service to establish a "one-stop shop" for the initiation of all housing disputes, whether court, tribunal, redress scheme or tenancy deposit scheme, run jointly by HMCTS and MHCLG. It is envisaged that it would have automatic triaging and signposting of disputes to the appropriate forum, which would similarly rely on effective data sharing between public bodies.¹⁸
18. In the course of JUSTICE's criminal work, we have highlighted the need for a multi-agency approach. In particular, our work on *Mental Health and Fair Trials* recommended the introduction of "street triage" schemes wherever possible to identify whether a suspect is vulnerable, and help officers decide whether a suspect should be further investigated, arrested or offered a voluntary interview. Such schemes rely on the police and NHS commissioners working together and are all characterised by effective information sharing between the two bodies. Likewise, JUSTICE has advocated for

¹⁶ JUSTICE, [Reforming Benefits Decision Making](#) (July 2021), paras 3.35-3.37.

¹⁷ JUSTICE, [Solving Housing Disputes](#) (2020), chapter 2.

¹⁸ JUSTICE, [Solving Housing Disputes](#) (2020), paras 4.13 – 4.15.

better and more consistent use of liaison and diversion services. These also rely on data sharing between health care professionals and the police.¹⁹

Feedback mechanisms

19. Collecting and sharing data on the outcomes of disputes and redress processes with policy makers and regulators is also important in order to ensure continuing improvements are made to policies and decision making. In *Solving Housing Disputes*, JUSTICE suggested that data on disputes and redress from the HDS should be fed back to regulators to influence policy and create a continuing cycle of enforcement, regulatory provision and improvement of housing standards. In *Reforming Benefits Decision-Making* JUSTICE identified a need for better data collection and analysis of the reasons for successful appeals to the First-tier Tribunal (Social Security and Child Support) in order to inform and improve initial decision making by the Department for Work and Pensions. Such information collection and sharing is of vital importance and in our view it would be helpful for any Law Commission project on data sharing between public bodies to include an examination of how information on case outcomes can be better collected and shared between courts and tribunals and policy makers.

Family Law and the Voice of the Child

20. JUSTICE is currently considering access to justice in private children proceedings²⁰ and we would strongly advocate for the Law Commission to consider work on the adequacy of current provisions, in the Family Courts and in other courts and tribunals, for children to participate effectively in proceedings which concern them.
21. Whilst around 84,000 children were subject to private law children proceedings in England and Wales in 2019,²¹ the number who are given the opportunity to participate in those proceedings is unknown. Only 7% have separate representation whilst a further 35% have a welfare report written by Cafcass – the Children and Family Court Advisory

¹⁹ JUSTICE, [Mental Health and Fair Trial](#) (2017)

²⁰ Information on our current Working Party is available at: [Improving Access to Justice for Separating Families](#) (2021-ongoing).

²¹ Proceedings which concern the upbringing of a child but do not involve the local authority as a party. These are typically made under section 8 of the Children Act 1989 and concern dispute between adults with caring responsibilities for the child about where the child should live, who they have contact with, where they go to school, and other discrete questions.

and Support Service – which will usually involve the child being met by a family court adviser and their wishes and feelings relayed to the court through the report.²² For the remaining 58% of children we do not know how many of their voices are heard indirectly through other means (a letter to the judge, a report through a social worker already working with the family) or at all. This contrasts with public law proceedings²³ in which all children are separately represented.

22. Article 12 of the UN Convention on the Rights of the Child (“UNCRC”) establishes the right of every child to be heard in proceedings which affect them. JUSTICE does not underestimate the difficulties with complying with Article 12 in these cases, for example not wanting to burden a child with adult decisions nor drag them into a dispute. However, JUSTICE’s own consultations with children and our wider review of the academic literature in this area provide a clear picture that many children, whilst not wanting to be the decision-maker, do want to be consulted and provided with information about the process and the outcome, including how their voices were heard and their wishes taken into account.
23. JUSTICE is holding a cross-sector roundtable on the matter in September, to which JUSTICE would be happy to invite the Law Commission. Furthermore, we suggest that it would be beneficial for the Law Commission, perhaps in conjunction with the Children’s Commissioner, to undertake a broader piece of work auditing and evaluating child participation and compliance with Article 12 of the UNCRC, not just in family law proceedings but across the justice system. JUSTICE has also identified issues with compliance with Article 12 in the context of school exclusions, where children are unable to take on their own appeal and must rely on their parents or carers to do so on their behalf.²⁴ Issues also exist more broadly with respect to giving a voice to ethnic minority children in the youth justice system and ensuring that professionals understand their background and needs. As such, we have made a number of recommendations to remedy this, including for example through access to translators where there is a language barrier, increased training for professionals who work with children, and other innovative methods.²⁵

²² Cafcass, [Annual Report and Accounts](#), 2018-19.

²³ When the local authority is seeking a care or a supervision order for a child, under s. 31 of the Children Act 1989.

²⁴ JUSTICE, [Challenging School Exclusions](#) (2019).

²⁵ JUSTICE, [Tackling Racial Injustice: Children and the Youth Justice System](#) (2021).

24. We are aware that the UK will submit its sixth and seventh periodic reports on the UNCRC by January 2022. The Law Commission could pick up on any issues identified by the Committee on the Rights of the Child following the periodic reporting, investigate these in more detail and propose changes that would address them. With Scotland having recently incorporated the UNCRC into its domestic legislation, we think the work would be timely.

Justice in the digital age

25. The use of technology in the justice system has the potential to improve access to justice and effective participation but must be done in a way that is inclusive, preserves the right to a fair trial and increases access to justice. Crucially it must also provide meaningful assistance and alternatives for those who are digitally excluded. JUSTICE therefore agrees that there is a need to review the use of technology in courts and tribunals during the pandemic in order to draw lessons from this experience and inform the future use of digital technology in courts and tribunals.
26. The role that technology can play in promoting participation and inclusion is a consideration across all of JUSTICE's recent reports. For example, *Delivering Justice in the Age of Austerity*, looked at how technology can be used to deliver legal information, advice and assistance.²⁶ In *What is a Court*, JUSTICE endorsed the use of technology to settle certain disputes online and the creation of new digital justice spaces.²⁷ In *Preventing Digital Exclusion*, JUSTICE considered obstacles individuals face in participating in online justice and ways in which those could be overcome or minimised.²⁸ *Understanding Courts*, looked at how to improve participation of court users in their own proceedings, including how to ensure that the digitisation of court processes places the lay user at its centre.²⁹ More recently, sector specific reports on immigration and asylum appeals,³⁰ housing disputes³¹ and benefits,³² have all identified jurisdiction specific reforms relating to the use of technology in dispute resolution processes.

²⁶ JUSTICE, [Delivering Justice in the Age of Austerity](#) (2015).

²⁷ JUSTICE, [What is a Court?](#) (2016).

²⁸ JUSTICE, [Preventing Digital Exclusion](#) (2018).

²⁹ JUSTICE, [Understanding Courts](#) (2019)

³⁰ JUSTICE, [Immigration and Asylum Appeals - a Fresh Look](#) (2018).

³¹ JUSTICE, [Solving Housing Disputes](#) (2020).

³² JUSTICE, [Reforming Benefits Decision-Making](#) (July, 2021).

27. If the Law Commission does take on this project, we urge it to consider the recommendations of these reports when formulating suggestions for reform.
28. However, JUSTICE also draws the Commission's attention to research already being undertaken by others in this area. For example, Dr Natalie Byrom of the Legal Education Foundation and Sarah Beardon of UCL's Centre for Access to Justice's report on the impact of remote hearings within the tribunal service during the coronavirus pandemic.³³ The report set out several recommendations for the use of digital hearings and tribunals going forward. Professor Linda Mulcahy and Dr Emma Rowden also carried out evaluations of JUSTICE's mock virtual jury trial pilots.³⁴ The Nuffield Family Justice Observatory have conducted three public consultations on remote hearings in April 2020, September 2020 and June 2021, each receiving thousands of responses from professionals and families. HMCTS is also conducting their own evaluations: during the early stages of the pandemic, HMCTS conducted an implementation review of remote hearings to develop and improve key audio-video processes that were put in place. JUSTICE understands that HMCTS is also conducting a further in-depth evaluation of the use of remote hearings during the pandemic, which will focus on user experiences and perceptions.
29. JUSTICE welcomes HMCTS's evaluation, and the focus being given to user experience. We hope that this will include looking at issues of user vulnerability and needs and what adjustments can be made to digital proceedings in order to address these. However, in addition to user experience it is also important that any evaluation also includes data on outcomes of different hearing types.
30. Given the already ongoing work in this area, and to ensure that work is not duplicated, the Law Commission might want to consider whether the review proposed by the Commission is being sufficiently addressed, and/or whether other organisations and bodies already carrying out research and evaluation in relation to digital hearings, are better placed to undertake the review envisaged by the Commission.

Computer generated evidence

³³ Byrom, N. and Beardon, S, [Understanding the impact of COVID-19 on tribunals: The experience of tribunal judges](#) (June 2021).

³⁴ <https://justice.org.uk/our-work/justice-covid-19-response/>

31. The Law Commission also suggests looking at computer-generated evidence and the presumptions around its reliability in light of the findings of the Royal Mail sub-post offices Horizon IT litigation. Issues around automation bias and assumptions / presumptions regarding the accuracy of computer-generated evidence can have a significant impact on individuals and is something that should be investigated. In addition to the sub-post office scandal, this issue also arises in the context of automated decision making in the public sector. For example, in administration of welfare benefits there have been issues regarding the accuracy of information on individuals' earnings provided from HMRC's Real Time Information system to DWP.³⁵ In our view issues relating to computer generated evidence and automation should be included in any project that the Law Commission takes forward in relation to the use of automated decision making in the public sector.

Review of appeal powers in the criminal courts

32. The Criminal Cases Review Commission and Court of Appeal have received considerable criticism about how they carry out their roles in investigating and correcting some of the UK's most shocking miscarriages of justice. Over the last five years, only 6.7% of conviction appeal applications received by the Court were overturned. As for the Commission, its referral rate for conviction cases is even lower, averaging between 2-3%, and falling to as low as 0.7% in recent years. This means a number of potentially innocent individuals remain in prison, with little hope of adequate procedural recourse. Moreover, the delays in successfully overturning a conviction mean that even those who are acquitted have likely served many more years than they should have. Their respective statutory frameworks and functions therefore require urgent redress to ensure no individual is denied justice.

33. JUSTICE has published a number of reports regarding miscarriages of justice.³⁶ We therefore welcome the Law Commission's proposal to examine this area, which we consider to be well-overdue. As identified, the recommendations of the Westminster

³⁵ See for example, *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 7781.

³⁶ See, for example, *Compensation for Wrongful Imprisonment* (1982), *Miscarriage of Justice* (1989), *Remedying Miscarriages of Justice* (1994), *Righting Miscarriages of Justice?: Ten years of the Criminal Cases Review Commission* (2008); and *Supporting Exonerates: ensuring accessible, continuing and consistent support* (2018).

Commission into Miscarriages of Justice would act as a good starting point for the Law Commission's work.³⁷ This is an area in which JUSTICE takes great interest, and we intend to undertake our own efforts to build on the Westminster Commission's work and make the case for policy reform. We would therefore be delighted to support the Law Commission's work in this area and would follow your review with great interest if this area is selected.

34. In our view, a review of appeal powers should include consideration of a discrete type of case that has fallen into a lacuna: cases on appeal from the High Court which are "criminal cause[s] or matter[s]".³⁸ The Court of Appeal has no jurisdiction in these cases³⁹ (neither Criminal nor Civil Division), resulting in unusually restrictive access to appeal for claimants for whom the High Court is the court of first instance on judicial review.⁴⁰ These cases have only one appeal avenue with a high threshold – they can appeal to the Supreme Court if they are certified as raising a point of law of general public importance.⁴¹ However the Supreme Court cannot certify them as such; only the High Court which heard the case can do so.⁴² This means that for these "criminal" judicial reviews, the first instance judge(s)⁴³ in the High Court are the only ones to hear the case *and* the only ones to consider whether the case can be appealed. This is more restrictive than any other access to appeal of a first instance decision of which JUSTICE is aware.
35. In February 2020, the Supreme Court recognised the problem, adopting a very narrow interpretation of the phrase "a criminal cause or matter" (which in that case meant a judicial review of a parole decision was deemed *not* to be a criminal matter, disapproving the contrary interpretation in case law), and observing:

³⁷ Westminster Commission on Miscarriages of Justice, [In the Interest of Justice: an inquiry into the Criminal Cases Review Commission](#) (5 March 2021).

³⁸ Within the meaning of section 1 Administration of Justice Act 1960 ("AJA 1960").

³⁹ Section 18 Senior Courts Act 1981 ("SCA 1981").

⁴⁰ For example, a judicial review of a decision of the DPP not to prosecute, brought by a complainant. See *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (QB).

⁴¹ s.1 AJA 1960.

⁴² *Ibid*, see subsection 2.

⁴³ Two judges may, and often do, hear the case sitting as a Divisional Court.

... an overly expansive interpretation [...] would have the effect of reducing to an unacceptable degree parties' access to justice at appellate level, leaving pockets of unchallengeable, potentially erroneous first instance decisions.⁴⁴

36. JUSTICE would invite the Law Commission to consider these “pockets of unchallengeable, potentially erroneous first instance decisions” and the ongoing legitimacy of this unusually restrictive route of appeal for a small number of cases.⁴⁵ JUSTICE is concerned that, through an absence of Parliamentary scrutiny⁴⁶ and a “tangled” history of interpretation,⁴⁷ unequal access to appeal has emerged which cannot be justified. Whilst the Supreme Court in *McGuinness* restricted the test to its narrowest iteration in case law⁴⁸, it still leaves some first instance judicial reviews unchallengeable. As the law currently stands, a claimant judicially reviewing a decision of the DPP not to prosecute and a claimant judicially reviewing a decision of Parole Board are in extremely different positions. Whilst both seek to hold public bodies within the criminal justice system to account, and neither is more insulated from judicial error than the other, the latter can appeal to the Court of Appeal and the former cannot. JUSTICE is not only concerned by this disparity, but further observes that it leads to discriminatory treatment of those in the former group, i.e. complainants who wish to challenge the DPP’s failure to prosecute, particularly in relation to systematically under-prosecuted crimes.⁴⁹

Technological Advances and Procedural Efficiency in the Criminal Courts

⁴⁴ *In the matter of an application by Deborah McGuinness for Judicial Review (Northern Ireland) In the matter of an application by Deborah McGuinness for Judicial Review (No 2) (Northern Ireland) [2020] UKSC 6*, para 68. The litigation concerns the use of the phrase “criminal cause or matter” in s.18 SCA 1981, and its use in section 41(1) of the Judicature (Northern Ireland) Act 1978, the parallel provision to s.1 AJA 1961 for Northern Ireland.

⁴⁵ Through the combined effect of s.1 AJA 1960 and s.18 SCA 1981.

⁴⁶ JUSTICE notes that the different appeal route for High Court matters which were “a criminal cause or matter” was initially created in 1873, and there has been little change to the wording of the legislation since then, despite significant changes in the judicial review function of the High Court and the development of victims’ rights of review. Tellingly, s.1 AJA 1960 refers only to the parties within such cases as being the defendant or prosecutor, indicating that victim standing in such cases was not envisioned by the legislators.

⁴⁷ *R (Guardian News and Media Ltd.) v City of Westminster Magistrates Court* [2011] 1 WLR 3253.

⁴⁸ Do the underlying proceedings place an individual in jeopardy of criminal proceedings or punishment? See *McGuinness* (paras 43-49 and 93).

⁴⁹ For a fuller articulation of the discrimination point under Article 14 ECHR, see [JUSTICE’s submissions to the Supreme Court in relation to an application for permission to appeal to the Supreme Court in R\(Monica\) v DPP](#) (21 February 2020).

37. In a context of criminal justice agencies' limited financial resources, JUSTICE welcomes the use of technology to facilitate more efficient processes that can help ensure more timely justice. We were pleased to discuss some of these issues with you in more detail at a meeting on 4 February 2021. In particular, we would like to draw the Law Commission's attention to one area we consider in need of urgent reform; namely the use of police officers using body-worn cameras.
38. The Law Commission notes that “[t]he project could therefore examine whether pre-recorded evidence in chief should be more widely used, including recording of witness statements by police officers using body-worn cameras.”⁵⁰ JUSTICE would encourage the Law Commission to go further, and examine the rules and regulations (or lack thereof) that presently exist with respect to the use of body worn video cameras.
39. In February 2021, JUSTICE published its report, *Tackling Racial Injustice: Children and the Youth Justice System*.⁵¹ In the report, we noted the importance of body worn video cameras in providing objective evidence of an incident involving a member of the public during a police action.⁵² Unfortunately, we understand that the recording of incidents is often inconsistent, with allegations of police officers not turning on their cameras during whole or part of an incident. Moreover, there are no clear rules on when an officer should begin recording. Current guidance states that “a decision to record or not to record an incident rests with the user”, but that it is recommended that they should “record incidents whenever they invoke police power”.⁵³
40. JUSTICE recommended, *inter alia*, that the police should be required to turn on their body worn video cameras prior to an officer leaving their car, or, when on foot, where they have a suspicion that their coercive powers might be exercised, or prior to direct contact with members of the public. In order to ensure that the cameras do not run out of battery, it should be made possible to charge the cameras in police vehicles. Where

⁵⁰ <https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#ElectronicMaterial>

⁵¹ JUSTICE, [Tackling Racial Injustice: Children and the Youth Justice](#), (February, 2021)

⁵² For example, the Met have suspended Community Scrutiny Panels (CSPs) from reviewing body-worn video footage since January 2020. This is highly concerning given the large volumes of stops and searches that the Metropolitan Police conduct. See, Independent Office for Police Conduct, [‘Review identifies eleven opportunities for the Met to improve on stop and search’](#), October 2020. The Independent Office for Police Conduct’s review into the Metropolitan Police’s use of stop and search found a ‘failure to use body-worn video from the outset of contact’. While we understand that some CSPs are not given body-worn video footage for data protection reasons, we consider these concerns can be addressed. For example, footage can be uploaded onto a web platform, with a unique code provided to the CSP to access the footage and review it, following which access can be restricted.

⁵³ See College of Policing, [‘Body-Worn Video’](#), 2014, p.23.

this has not taken place, or if the camera is switched off mid-incident, the reasons should be recorded and provided to the community scrutiny panel for review.⁵⁴

41. It is clear that body worn video can act as an important safeguard for members of the public, not least ethnic minorities, when police invoke their powers. We would therefore encourage the Law Commission to undertake a review of this important issue.

The UK statute book

42. JUSTICE welcomes all efforts to improve the coherency of substantive law in the UK and has previously considered this issue in the context of lay persons and litigants in person. In its 2019 report *Understanding Courts*, JUSTICE found that the complexity of the substantive law creates a fundamental obstacle to the effective participation of lay persons in the legal process. Statute law is available online, through www.legislation.gov.uk, but it is hard to follow, often disaggregated and not up to date. We draw the Law Commission's attention to the comments made by the Cabinet Office Good Law initiative: "*The digital age has made it easier for people to find the law of the land, but once they have found it, they may be baffled.*"⁵⁵
43. 'Good law principles', established through the Good Law Initiative are now incorporated into the Office of Parliamentary Counsel legislative drafting practice: aiming to ensure that law is necessary, clear, coherent, effective and accessible. Despite these aims, almost all legislation is still inaccessible for most members of the public and lawyers continue to use professional legal databases to verify the law. Given that Acts of Parliament are not drafted to be a comprehensive code on a particular topic, legal databases play an important role in pulling together different pieces of legislation to rationalise substantive law that is otherwise fragmented. However, such databases are expensive, subscription based and inaccessible to lay users.

⁵⁴ Community scrutiny panels are made up of members of the public that meet regularly each year to scrutinise the police's use of stop and search powers. CSPs also have the ability to hold the police to account for their use of stop and search, for example, by reviewing incidents of stop and search after they have happened, giving each stop a rating.

⁵⁵ R. Heaton, '[When Laws Become Too Complex](#)' (2013). Devolved legislatures are also endeavouring to make jurisdiction-specific laws more clear and accessible. For example, the Welsh Government accepted proposals put forward by the Welsh Law Commission in 2018 to consolidate and drastically simplify planning law in Wales. In Scotland, new legislation was introduced in 2021 to codify, consolidate and modernise defamation law.

44. JUSTICE recommends that the Law Commission expands the scope of its proposed review of the UK statute book to focus on making the law more coherent and accessible for all users. It acknowledges the work already undertaken by the Law Commission in this area: the creation of a single “Sentencing Code”⁵⁶ designed for the public, the judiciary and practitioners and the redrafting of the immigration rules⁵⁷ to improve legal certainty and transparency. JUSTICE considers these projects, along with the work of the Good Law Initiative and the reforms proposed by the House of Lords Constitution Committee in 2017 would be a good starting point from which to develop this area.⁵⁸

JUSTICE
2 August 2021

⁵⁶ The Law Commission, [The Sentencing Code: Volume 1](#) (2018).

⁵⁷ The Law Commission, [Simplification of the Immigration Rules](#) (2020).

⁵⁸ House of Lords Select Committee on the Constitution, [The Legislative Process: preparing Legislation for Parliament](#) (2017).