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Response to Ministry of Justice Consultation on Open Justice: the way forward – Call for Evidence

August 2023

Response of the Birmingham Law Society to the Ministry of Justice Consultation on Open Justice: the way forward – Call for Evidence

This response has been prepared by members of the Professional Regulation, Dispute Resolution, Criminal & Employment Committees of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Birmingham Law Society whose members contributing to this response are specialist lawyers practising in all aspects of litigation and are from all branches of the legal profession.

Questions on open justice

1/. Please explain what you think the principle of open justice means.

The open justice principle encompasses that justice must be seen to be done as well as in fact being done. Open justice involves transparency of the process, with an ability of participants or observers, such as the public, to be able to see what is happening or has happened, in respect of any court or tribunal matter.

2/. Please explain whether you feel independent judicial powers are made clear to the public and any other views you have on these powers.

We believe the public is aware of the independence of the judiciary and the requirement that it must uphold and administer the law free from external (e.g., political) interference. We believe the public will, on balance, be largely unaware of, or unfamiliar with, the extent of any particular judicial powers.

3/. What is your view on how open and transparent the justice system currently is?

There are some aspects of the justice system that can be described as open, for example the public's ability to attend and observe court and tribunal hearings and the publication of judgments online in, for example, the Employment Tribunal system.

However, for those not legally qualified or familiar with the legal system, it can appear more closed.

4/. How can we best continue to engage with the public and experts on the development and operation of open justice policy following the conclusion of this call for evidence?

By providing further opportunity to engage in the outcomes of this call for evidence; being able to understand and comment upon the proposed policies and focus areas before next steps are taken.

5/. Are there specific policy matters within open justice that we should prioritise engaging the public on?

The extent to which proceedings can be observed especially adopting technology.

Questions on listings

6/. Do you find it helpful for court and tribunal lists to be published online and what do you use this information for?

Yes. CourtServe is used prior to a hearing both for listing queries (to see which other cases the Judge has on their list and what the waiting times might be etc) and judicial queries (for example a particular Judge may have a certain way of dealing with cases so the practitioner can prepare accordingly).

7/. Do you think that there should be any restrictions on what information should be included in these published lists (for example, identifying all parties)?

No – unless there are anonymity orders in place.

8/. Please explain whether you feel the way reporting restrictions are currently listed could be improved.

We do not feel that the general public has any idea what they are or why they apply, which leads to suspicion. General but detailed guidance should be given whenever they are in place – which will assist public understanding.

9/. Are you planning to or are you actively developing new services or features based on access to the public court lists? If so, who are you providing it to and why are they interested in this data?

No.

10/. What services or features would you develop if media lists were made available (subject to appropriate licensing and any other agreements or arrangements deemed necessary by the Ministry of Justice) on the proviso that said services or features were for the sole use of accredited members of the media?

We cannot see any reason why the media should be treated differently to anyone else. The public listing is available to the media and to the legal advisers and to members of the public in the same way. There is no need for additional cost to be incurred.

11/. If media lists were available (subject to appropriate licensing and any other agreements or arrangements deemed necessary by the Ministry of Justice) for the use of third-party organisations to use and develop services or features as they see fit, how would you use this data, who would you provide it to, and why are they interested in this data?

We would be vehemently against selling public data for commercial use by third party companies if that is what is proposed. The publication of listings is a public service not to be sullied and misused in this way.

Questions on accessing courts and tribunals

12/. Are you aware that the FaCT service helps you find the correct contact details to individual courts and tribunals?

Yes

13/. Is there anything more that digital services such as FaCT could offer to help you access court and tribunals?

No

Questions on remote observation and livestreaming

14/. What are your overarching views of the benefits and risks of allowing for remote observation and livestreaming of open court proceedings and what could it be used for in future?

Benefits – Remote observation and livestreaming allows for a truly open justice system with increased transparency. Further remote observation allows for those with an interest in the case to observe the matter without having to travel to the court building.

Risks – with an increased audience there is also the increased risk to the safety of victims, witnesses and lawyers.

The use of remote observation and livestreaming should be determined on a case by case basis for cases of public importance or legal significance. Not every case will be suitable for livestreaming owing to the risks identified above.

15/. Do you think that all members of the public should be allowed to observe open court and tribunal hearings remotely?

Depending on the hearing, yes. In matters where there are risks to witnesses it should be considered whether it is appropriate for the matter to be live streamed.

16/. Do you think that the media should be able to attend all open court proceedings remotely?

Yes. There is little difference in their remote and physical attendance.

17/. Do you think that all open court hearings should allow for livestreaming and remote observation? Would you exclude any types of court hearings from livestreaming and remote observations?

The cost of allowing all open court hearings to be livestreamed and remotely observed would be extortionate. Each case should be decided on a case-by-case basis (perhaps a question that should be added to a directions questionnaire). Where appropriate judgments after trials should be livestreamed. We do not consider that it is appropriate to livestream applications, particularly in the civil courts.

18/. Would you impose restrictions on the reporting of court cases? If so, which cases and why?

No, we do not consider that the livestreaming of hearings should alter the current rules on reporting. If there is a reporting restriction in place then that will of course need to be observed.

19/. Do you think that there are any types of buildings that would be particularly useful to make a designated livestreaming premises?

No

20/. How could the process for gaining access to remotely observe a hearing be made easier for the public and media?

The current process seems fit for purpose. Those wishing to attend remotely should have to identify themselves to the court ahead of time, and in cases where only certain classes of person are entitled to attend those persons should identify their reason for attending.

Questions on broadcasting

21/. What do you think are the benefits to the public of broadcasting court proceedings?

The benefits are largely the same as allowing for remote observation; increased public participation and awareness and increased public education (and legal education). The live broadcasting will dispel myths of overly dramatized court proceedings. Increased transparency in the justice system will hopefully increase public confidence in the system.

22/. Please detail the types of court proceedings you think should be broadcast and why this would be beneficial for the public? Are there any types of proceedings which should not be broadcast?

Should be broadcast:

- Supreme Court hearings to ensure that the hearings of legal importance are accessible to the public.
- Sentencing in the criminal courts in matters of importance / public significance. Broadcasting reduces the risk of misunderstanding the reasoning behind the sentence.
- Some judgments in the civil courts of matters of public importance or interest, for example to name a few recent examples “phone hacking” cases and Vardy v Rooney. Such broadcasting would reduce the risk of sensationalist reporting, and misreporting of judge’s comments.

Should not be broadcast:

- Complete trials to avoid the “Americanisation” of the process and causing sensationalism.
- Any case involving a child.

23/. Do you think that there are any risks to broadcasting court proceedings?

1. Risk to the safety of those involved in the proceedings.
2. Risk of witnesses refusing to give evidence if know the matter is being broadcast.
3. Risk of influencing juries by public opinion; and
4. Risk of sensationalism.

24/. What is your view on the 1925 prohibition on photography and the 1981 prohibition on sound recording in court and whether they are still fit for purpose in the modern age? Are there other emerging technologies where we should consider our policy in relation to usage in court?

Both the prohibition on photography (section 41 Criminal Justice Act 1925) and the prohibition on sound recording (section 9 of the Contempt of Court Act 1981) remain fit for purpose.

Both of these prohibitions cover emerging technologies, however there is no direct reference to video recordings in either of these pieces of legislation which should be considered.

Questions on Single Justice Procedure

25/. What do you think the government could do to enhance transparency of the SJP?

It is difficult for us, as a society chiefly composed of lawyers practising in the courts, to comment in detail upon the SJP, because it takes place behind closed doors rather than in open court. Lawyers (save for legal advisers, none of whom are represented

on the BLS Criminal Law Committee), are not present to observe the procedure, neither are they generally involved at any stage in it. For this reason, we would echo the quoted remark in the consultation document that it is an 'inherently closed procedure'.

While we recognise the importance of dealing with cases proportionately, and with regard to valuable court resources, it is also important to note that the matters dealt with by the SJP are all criminal offences. Although at the minor end of the spectrum of criminal offences, in many cases convictions for such offences have great significance to the individuals facing them: financial consequences that a defendant and their family can ill afford, the loss of a driving licence and consequential loss of employment, consequences in terms of future employment etc.

There may well be defendants who welcome the opportunity to have matters dealt with under the SJP, to save time and costs, and we would not for a moment advocate depriving those defendants of the opportunity to have their cases dealt with in this way. There is a concern, however, that because the SJP deals with cases where the defendant does not respond to the SJP notice, defendants who are unable to respond to the notice may be convicted and sentenced entirely without their input.

Defendants may fail to respond to the SJP notice for a number of legitimate reasons: first and most commonly, if it is sent to the wrong address. We note and endorse the comments of Transform Justice in their November 2021 written evidence to the Public Bill Committee regarding the then proposed Judicial Review and Courts Bill, now the Judicial Review and Court Act 2022. In that document, they proposed an amendment to the then Bill in which the court would require proof that the SJP notice had been received by the defendant, rather than simply sent to them. In support of that proposed amendment, which was not adopted, they stated the following:

"The flaws in the existing single justice procedure process are clear from the extremely low response rate to single justice procedure notices; two thirds of defendants provide no plea at all in response to the offence they are charged with. This cannot be consistent with the aim to enable people to effectively participate in the justice process. This new clause would update the existing single justice

procedure legislation in the Magistrates' Courts Act 1980 to require prosecutors to obtain proof of receipt of single justice procedure information. The implications of not responding to the single justice procedure notice are significant – the person is convicted and will receive a criminal sanction (the maximum possible fine, costs and a criminal record) in their absence. This change would mean those people who do not participate because they did not receive the letter are not disadvantaged and can participate effectively in the process."

Despite Transform Justice's suggested amendment not being adopted, the concerns underlying it are real and ongoing. The Evening Standard's reported research into the SJP[1] (in the absence of any official statistics) presents a worrying picture of "conveyor belt" justice in which verdicts are determined and sentences imposed in fewer than 90 seconds.

Given these concerns, it is in our view of paramount importance to have better insight into the SJP process through open justice principles. Open justice not only requires public access to court outcomes, but also the ability for the public to examine, if they so wish, the effectiveness of court procedures such as the SJP. If there is to be a meaningful examination of how robust a procedure it is, and whether it achieves just outcomes, then at the very least there should be publication of more detailed statistics such as:

- How many people are prosecuted under the SJP;
- For which offences;
- How many of those prosecuted replied at all to the SJP notice;
- Of those who replied, what plea was entered and what was the outcome;
- Of those who did not reply, how many were convicted and what was the sentence;
- In each case, what information was before the single justice when they determined the plea;

[1] https://www.standard.co.uk/news/uk/magistrates-single-justice-procedure-sjp-courts-prosecutions-b1032398.html; https://www.standard.co.uk/news/crime/single-justice-procedure-magistrates-criminal-convictions-b1026894.html

- Differentiation of the above statistics so that comparisons can be made between different court centres.

We invite the MoJ to consider whether SJP sessions could be audio or video recorded to ameliorate the concerns that have been raised regarding the procedure.

26/. How could the current publication of SJP cases (on CaTH) be enhanced?

At the time of writing, we understand that only information about pending SJP prosecutions is currently available, rather than information about outcomes. However, we have not been able to check this, because criminal practitioners do not yet generally have access to the system. Access for Common Platform account holders, into which category fall most criminal practitioners, is apparently due to be rolled out later this year. For these reasons, in our view it is premature to consult on improvements to a system which may not yet be live in relation to SJP, and to which practitioners do not generally have access.

Questions on public access to judgments

27/. In your experience, have the court judgments or tribunal decisions you need been publicly available online? Please give examples in your response.

As legal practitioners, the experience can be mixed. Sometimes judgments are readily available, but they often rely on being able to specifically search known party names or being able to recognise and deploy the most appropriate search terms. Judgments of the higher courts (for example, Court of Appeal or Supreme Court) are, in the experience of our members, generally more accessible and available which may in part be because there are fewer decisions of higher courts, and/or their publication is more widely publicised or anticipated.

28/. The government plans to consolidate court judgments and tribunal decisions currently published on other government sites into FCL, so that all judgments and decisions would be accessible on one service, available in machine-readable format and subject to FCL's licensing system. The other government sites would then be closed. Do you have any views regarding this?

Provided the ability to navigate easily through the various court jurisdictions is not complicated, and there is an automatic redirect from closed sites, we recognise it may be overall beneficial to have court judgments and tribunal decisions in one place. There is also the question of cost as we understand some judgments are not free to access online whereas others are. There should be a consistent approach and if justice is to be genuinely open, accessing it should not be barred by cost. We appreciate however that there are many demands upon public funds which should take priority such as legal aid for the vulnerable members of society.

29/. The government is working towards publishing a complete record of court judgments and tribunal decisions. Which judgments or decisions would you most like to see published online that are not currently available? Which judgments or decisions should not be published online and only made available on request? Please explain why.

We believe that there is benefit in all determined court and tribunal judgments being accessible online. In some cases, there is understood to be a "cut off" time for historic judgments being available online. It is not clear whether this question assumes that some historic judgments will appear searchable online or whether (as we assume) it will be the position going forwards. Any judgments that have restricted reporting orders or national security concerns are ones that we recognise need to retain the ability to restrict their publication and we believe that safeguards should remain.

30/. Besides court judgments and tribunal decisions, are there other court records that you think should be published online and/or available on request? If so, please explain how and why.

None specifically. If judgments and interim/preliminary judgments are published online, parties to proceedings, especially where there are "two sides" to the proceedings, know that is what they can expect when making decisions about matters such as settlement. Any view that wider court records might be in scope for publication will need to consider that the publication of earlier court records,

especially prior to judgments (for example, decisions to reject grounds of claim or directions) might artificially impact upon this commercial balance.

31/. In your opinion, how can the publication of judgments and decisions be improved to make them more accessible to users of assistive technologies and users with limited digital capability? Please give examples in your response.

Examples include ensure clear, or specimen, search criteria; or the ability to amend document formatting, for example by adjusting font size/spacing.

32/. In your experience has the publication of judgments or tribunal decisions had a negative effect on either court users or wider members of the public?

We believe it is more positive than negative. Sometimes the publication of judgments can have a negative reputational impact upon a party, even if the judgment is not against them (e.g., the very fact of being accused of a matter may damage reputation). However, we believe this is often an inevitable implication of a genuine open justice system. If parties are concerned about confidentiality then mediation or arbitration is often an option such as for commercial disputes.

Questions 33 to 36 on the computational reuse of judgments on Find Case Law and licencing - not answered

Questions on tribunal decisions published on GOV.UK:

37/. Have you searched for tribunal decisions online and if you have, what was your experience, and for what was your reason for searching?

Yes – searches have been made for property tribunal decisions for the purposes of research, advice, correspondence, and pleadings. Our experience is that they are much harder to come by than Court decisions.

38/. Do you think tribunal decisions should appear in online search engines like Google?

Yes, but they should only be available via Government approved and funded websites.

39/. What information is necessary for inclusion in a published decisions register? What safeguards would be necessary?

We do not see why there should be any difference between tribunal decisions and reported Court cases.

Question on public access to sentencing remarks

40/. Do you think that judicial sentencing remarks should be published online / made available on request? If that is the case, in which format do you consider they should be available? Please explain your answer.

We agree that it would not be proportionate to seek to record and publish sentencing remarks for cases in the magistrates' courts. The comments below refer to the publication of sentencing remarks in the Crown Court.

In the Crown Court, sentencing remarks are not routinely published but can be, if the sentencing judge considers that there is sufficient public interest, or that the case has legal significance, or the remarks may assist public understanding of the sentence imposed in a particular case.

While we recognise that there is some public interest in widening the publication of sentencing remarks in Crown Court cases, in accordance with open justice principles, it is important to balance this against the rights of defendants to be rehabilitated. In many cases, depending upon the sentence imposed, convicted and sentenced defendants are entitled to have their conviction ignored after a specified period: they are regarded as having been rehabilitated.

In our experience of advising clients on this issue, it can be seriously undermining to the principle of rehabilitation when information about a conviction remains available

online for many years, long after the rehabilitation period has ended. Although under the law the person is entitled to be treated as if they have not been convicted after the rehabilitation has passed, this is undermined if the public, including prospective employers and the like, have access to online information about the conviction available to them through a simple Google search of that person's name. There is no general right for rehabilitated persons to require a media organisation or any other online presence to remove information they have published online after a conviction is spent. The "right to be forgotten" under EU law can be applied to remove online information from search results, but this does not actually remove the material from the Internet, and in our experience the search providers are inconsistent in their decisions as to whether to remove material from search results at all.

It is axiomatic that the more material about a conviction that exists online, the more likely it is that the rehabilitation principle will be undermined after the relevant period elapses. It follows, then, that the routine publication of sentencing remarks will make it more likely that this important principle is eroded. Even were the courts to impose a limit on the availability of sentencing remarks in accordance with the relevant rehabilitation period, the benefit and danger of the Internet is that any material available on it can be shared and disseminated out of the control of its originator.

For these reasons, we take the view that the current system of occasional, non-routine publication of sentencing remarks strikes the appropriate balance between open justice and respect for the rights of convicted defendants and their families.

Questions on access to court documents

41/. As a non-party to proceedings, for what purpose would you seek access to court or tribunal documents?

A non-party usually requires access to court or tribunal documents for personal or commercial benefit not for altruistic or public interest purposes. A former client might seek disclosure of documents from the Solicitors Disciplinary Tribunal in order to make a complaint or bring a negligence claim against an individual solicitor. A law firm might seek disclosure of documents from a medical tribunal in order to bring a

medical negligence claim for a client or group of clients. A journalist might seek documents to bolster a newspaper article. An academic might seek documents to assist with legal research for a university qualification or to publish a technical article. There are a host of reasons why a non-party might require access to court documents.

The Ministry of Justice needs to balance competing interests here – for parties to maintain privacy in relation to their own disputes; for the public interest in publishing judgments to develop the law and legal knowledge and finally the cost to the public purse of expanding the public access to court and tribunal documents.

42/. Do you (non-party) know when you should apply to the court or tribunal for access to documents and when you should apply to other organisations?

Yes

43/. Do you (non-party) know where to look or who to contact to request access to court or tribunal documents?

Yes

44/. Do you (non-party) know what types of court or tribunal documents are typically held?

As Birmingham Law Society, our members are generally aware of which documents are held. However, lay members of the public may not be aware.

45/. What are the main problems you (non-party) have encountered when seeking access to court or tribunal documents?

Delay would be a factor due to lack of investment in court staff by the Ministry of Justice. A request by a non-party for disclosure of documents is not such a priority (quite rightly) as the day-to-day conduct of the court or tribunal.

46/. How can we clarify the rules and guidance for non-party requests to access material provided to the court or tribunal?

The rules and guidance for each court and tribunal would need to be collated and a central website set up in order that non-parties could have access to the information. We question whether this is a priority in terms of time and cost when so much else is deteriorating within the judicial system. Also, would such an innovation generate many more non-party requests than is presently the case ? Some of the requests may be without good reason and would involve the courts and tribunals in additional work and expense.

47/. At a minimum, what material provided to the court by parties to proceedings should be accessible to non-parties?

The judgment of a court or tribunal should be published online and readily available as a bare minimum – as is generally the case already.

Other material should be the subject of an application to the relevant court or tribunal. If these rules were relaxed, parties may decide not to litigate their disputes in the courts and opt for arbitration or mediation instead where confidentiality can be assured. This could cause considerable damage to our judicial system.

The MOJ should also take into consideration the Article 8 rights of the individual parties in considering any relaxation of the rules. A witness may be reluctant to provide witness evidence if there is a risk that their statement might find its way into the public domain. This could be damaging to the public interest and not in the interests of justice.

48/. How can we improve public access to court documents and strengthen the processes for accessing them across the jurisdictions?

Improvements such as these cost money from the public purse. There are many more deserving causes within the judicial system – such as the fabric of the court buildings to name but one of very many. The Ministry of Justice needs to prioritise not add to its wish list.

49/. Should there be different rules applied for requests by accredited news media, or for research and statistical purposes?

No. The media should be treated exactly the same. Their interest in obtaining the documents is not confined to a charitable or public interest. The media has a commercial interest in obtaining this information i.e., to sell newspapers or online content. Any other interpretation of the media interest would be naive.

50/. Sometimes non-party requests may be for multiple documents across many courts, how should we facilitate these types of requests and improve the bulk distribution of publicly accessible court documents?

We anticipate that such a request would be rare and likely to be for non-public interest purposes so the non-party would need to work with each court or tribunal to access the documents. If a new system were introduced a fee might be appropriate to reflect the cost to the public purse.

Questions 51 to 57 on data access and reuse & Questions 58 to 65 on public legal education – not answered.

Birmingham Law Society
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