

Open justice: the way forward

Response of the Courts and Tribunals Observers' Network

Full name: Dr Judith Townend on behalf of the Courts and Tribunals Observers' Network

Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.): Academic / Professional / Civil Society group

Date: 7 September 2023

Company name/organisation: c/o University of Sussex

Address: Freeman Building, School of Law, Politics and Sociology, University of Sussex, Brighton

Postcode: BN1 9QE

Email: judith.townend@sussex.ac.uk

If you would like us to acknowledge receipt of your response, please tick this box (please tick box):
YES (via email)

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent:

This submission is made on behalf of the Courts and Tribunals Observers' Network: an ad hoc collective of courts and tribunals observers within England and Wales, formed in response to the House of Commons Justice Committee report in 2022 and this consultation opportunity (<https://courtoobservers.wordpress.com>). The network includes (listed alphabetically by surname):

- Dr Julie Doughty, Cardiff University
- Penelope Gibbs, Transform Justice
- Steve Goodrich, Transparency International UK
- Dr Bernhard Gross, University of the West of England
- Mark Hanna, co-author, McNae's Essential Law for Journalists
- Celia Kitinger, Open Justice Court of Protection Project
- Paul Magrath, Incorporated Council of Law Reporting
- Keir Monteith KC, Garden Court Chambers
- Marcus Keppel-Palmer, University of the West of England
- Dr Sally Reardon, University of the West of England
- Lucy Reed KC, The Transparency Project
- Dr Jon Robins, University of Brighton
- Dr Andrew Scott, London School of Economics and Political Science
- Dr Tom Smith, University of the West of England
- Dr Helen Taylor, Spotlight on Corruption
- Dr Judith Townend, University of Sussex (network convenor)
- Dr Lucy Welsh, University of Sussex

Context

Some of those engaged in this initiative first raised concerns about public access to courts and tribunals in an open letter in 2020,¹ following their difficulties accessing hearings and courts data (difficulties which were exacerbated by COVID-19-related restrictions). The letter received a reply from the then CEO of HMCTS.² Many of the concerns raised at that time still stand.

This prompted a more formal initiative funded by the Sheila Kitzinger Programme at Green Templeton College, University of Oxford, focused on Open Justice and Courts and Tribunals Observation and Access, building on UK civil society and legal policy work on technological changes to the justice system.

The starting prompt for the initiative was this: how can the public be supported to observe courts and access court information in digital and physical environments? Answering this requires us to consider whether certain categories of observers (such as journalists) should enjoy special privileged access (as can sometimes be the case); and how we minimise the detrimental impacts on people from vulnerable and marginalised backgrounds at particular risk of systemic bias.

To address these questions, a group of specialists considered the practical detail of doing 'open justice' (that is, observing and reporting the work of courts), as well as the broader legal and ethical landscape. Our group included civil society campaigners involved in justice data projects and courts monitoring work; lawyers with expertise in access to justice, equalities and human rights; and academics studying court design and process, and open justice and journalism.

Our workshop in May 2023, and a follow up remote session in June, considered ways in which we might take our ideas forward, such as establishing a stakeholder network on Courts and Tribunals Observation and Access that would inform the UK Government and Judiciary and other relevant bodies about access problems in the justice system; and help develop better policies and law. This report summarises the key themes emerging in our discussions in May and June 2023:

Link: <https://www.gtc.ox.ac.uk/courts-and-tribunals-access-and-observation-workshop/>

It is anticipated that individual participants will make their own submissions to the MOJ consultation, focussing on the courts and jurisdictions in which they specialise. To supplement these, this short collective submission focuses on questions 4-5 of the consultation in the section on Open Justice.

Q4. 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?

In the workshop report we explain how, typically, journalists have been understood as the main observers of a court and references to open justice often focus on the traditional media organisations. In the past few years, HMCTS has published a 'reporters' charter', media guidance resources and agreed – with media industry representative groups – an updated protocol for specified justice data sharing. The HMCTS stakeholder group relating to issues of transparency has been confined to members from traditional media organisations.

¹ <https://www.thejusticegap.com/we-need-to-protect-open-justice-during-the-covid-19-emergency/>

² <https://transparencyproject.org.uk/hmcts-response-to-letter-on-open-justice-in-the-covid-19-emergency/>

However, we argue that other sorts of observers should be involved in the development and operation of open justice: those from, for example, NGO and academic backgrounds, and those engaged in specialist legal blogging (whether or not they are ‘duly authorised lawyers’ under the Family Transparency Pilot rules). In 2022 the House of Commons Justice Committee recommended the creation of a new court user information group, involving members from NGO, academic and legal technology background. In its response to the committee the Government said it did not have plans to establish a ‘court information users’ group’ (referencing the existing HMCTS media working group and other engagement forums). In this collective submission we urge the Government to consider the creation of such a group.

A new working group on open justice should have representation from different professional and civil society groups, including – potentially – journalists, a judge, and those with technical and data expertise. The working group could have a core membership that would draft a court observers’ charter / set of principles. Work could be done to educate court personnel and judges in the application of open justice; facilitate more direct communication with the MOJ, HMCTS board and judges; and other relevant stakeholder groups. There should be a transparent process for recruitment to the group, and for establishing its working principles.

Q5. Are there specific policy matters within open justice that we should prioritise engaging the public on?

As noted above, this group holds concerns about day-to-day access issues, especially for those who do not hold press cards (and inconsistency in the application of rules), in relation to access to listings and documents, remote and physical hearings, and communication with the court. Individual submissions will provide more detail.

With regard to prioritisation of so-called ‘accredited’ journalists (despite there being no formal regulation of this professional description), the Criminal Practice Directions state that while public access to certain information is provided:

‘...if the application is made by legal representatives instructed by the media, or by an accredited member of the media, who is able to produce in support of the application a valid Press Card, then there is a greater presumption in favour of providing the requested material. This approach respects the role of the press as a ‘public watchdog’ in a democratic society.’³

Further, the drafting of rules such as Practice Direction 51Y in the Civil Procedure Rules reflect an assumption that providing access to media reporters is sufficient to constitute, or is equivalent to, open justice.⁴

However, these roles are changing, according to our group. One participant talked about how ‘we are all publishers in the age of social media’ raising questions about what we do with the material

³ <https://www.judiciary.uk/wp-content/uploads/2023/04/Criminal-Practice-Directions-2023-1.pdf>, at para 2.6.7.

⁴ See: The Transparency Project, ‘Written Evidence from Transparency Project (PCS0252)’ <<https://committees.parliament.uk/writtenevidence/35874/html/>>.

we have access to, as well as what an observer has as a right, and what they have by permission. The key questions are: ‘access to what, by whom, and what can you do with it?’.

In some settings, the question of ‘who’ is more significant than in others. The family court is the obvious example of restricted access, where only certain types of observer are permitted to attend and report (with reporting further widened under an ongoing pilot). Here, observers must be journalists with press cards within the UK Press Card Authority scheme, or ‘legal bloggers’ fulfilling a narrow set of criteria (including legal qualification). In most other courts, no such restriction applies.⁵

In practice, however, as reflected in the Criminal Practice Directions, ‘accredited’ journalists may get privileged access: they may receive advance information from those involved in the case, or given access to remote hearings when others are denied access. One civil society participant described this happening: they had been refused access to a document by a legal representative in a criminal case, yet it was supplied to a journalist reporting the same case. This, they said, was problematic because their role was to provide ‘expert comment’ to the media but could not do so if they did not have access to the necessary information.

Notwithstanding media complaints about accessing and reporting hearings, one participant described how journalists are the ‘in-group’. The local courts provide information to a pool of local reporters. This, the participant said, was not a principled approach to access. Another civil society participant rejected the idea that it was necessary to tell the court or the court administrator who they were, and their purpose in reporting.

A participant in our follow up meeting observed the tendency to create a ‘two-tier’ system for information sharing which was problematic, given that non-journalists as well as journalists played an important role in holding the justice system accountable. For example, public presence in the courts and publication of data on cases could play an important part on exposing and monitoring racial bias.⁶ Further, racism could also manifest in the treatment of court observers, as described in a recent article by journalist Bernie Choudhury.⁷

Additionally, participants were sceptical of the current ‘accreditation’ process – tied to the UK press card system – as a check on quality: it did not require any training on reporting restrictions. It was conceded by some participants, however, that there were practical issues to work out, such as whom to entrust with confidential information that could not be published or disseminated further.

In terms of models of access it was suggested that, rather than the focus on the current hierarchies of access to accredited journalists, the court needs to assess who has access to this information

⁵ <https://transparencyproject.org.uk/legalbloggers/>

⁶ Many of the recommendations of the Lammy Review on race and justice in 2017 have not been introduced and more recent research by the University of Manchester provided evidence of racial bias within the Judiciary. See Monteith K and others, ‘Racial Bias and the Bench’ (2022) <<https://documents.manchester.ac.uk/display.aspx?DocID=64125>>.

⁷ Choudhury B, ‘Our Job Is to Hold Power to Account, and We Must Challenge Authority – Respectfully of Course’ (21 April 2023) <<https://www.easterneye.biz/our-job-is-to-hold-power-to-account-and-we-must-challenge-authority-respectfully-of-course/>>

through different levels of control. It was suggested that ‘what you do with the data rather than who gets the data is important’.

Here, we do not propose a fully developed response to these issues but suggest that this is an urgent issue for MOJ and HMCTS, working with the Judicial Office and the Senior Data Governance Panel. There should be more public engagement and policy attention to the mechanics of open justice and the introduction of measures to ensure that courts and tribunals can be properly observed. Although judges retain discretion on core aspects of open justice (such as the application of discretionary reporting restriction orders) there are important questions that fall within the remit of MOJ and HMCTS – such as the facilitation of information provision to which the public is entitled. A new stakeholder group, as proposed above in response to Q4, could play a key role in assisting with this work.