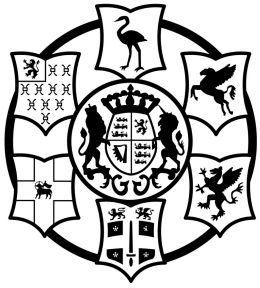

ICLR

Call for Evidence: Open Justice, the way forward

(Ministry of Justice open consultation)

Response of the Incorporated Council of Law Report for England and Wales (ICLR), Megarry House, 119 Chancery Lane, London WC2A 1PP.

1. The ICLR was established in 1865 by members of the legal profession with the object of the "*preparation and publication, in a convenient form, at a moderate price, and under gratuitous professional control, of Reports of Judicial Decisions of the Superior and Appellate Courts in England and Wales.*" (Memorandum and Articles of Association, 1870). It is a company limited by guarantee and a registered charity (No 250605).

2. This response has been prepared by Paul Magrath, Head of Product Development and Online Content.

3. The ICLR supports open justice and transparency, of which law reporting is an important component. Our work depends on court hearings being listed for hearing and conducted in public, and on access to court papers, such as pleadings and skeleton arguments, as well as being able to attend either in person or online and to take a note of oral judgments, and to obtain and publish copies of written judgments whenever handed down or otherwise distributed. Our reporters and editors are all either barristers or solicitors.

4. Judgments are selected for reporting according to their importance and value as precedents. In practice, these are primarily those given in the most senior courts, including the High Court, Court of Appeal, Supreme Court, the Upper and Employment Appeal Tribunals, and the European Court of Justice. Reporters are assigned to these courts and rely on information provided by court staff and the judiciary in order to monitor the activity of the court, attend hearings of importance, and report decisions in a timely and accurate manner. Proofs of full text law reports are sent to the judges for approval prior to publication. Where a case appearing in

the official series of The Law Reports contains a note of the argument, a proof of this is also sent to counsel prior to publication. Reports of cases in The Law Reports published by ICLR are required to be cited in preference over reports from any other series: *Practice Direction (Citation of Authorities)* [2012] 1 WLR 780.

5. Our response to this consultation is primarily informed by the work of our law reporters but includes observations more generally in support of open justice, derived from our collective experience in court reporting.[1]

In answer to the specific questions listed in the consultation:

Q1/. Please explain what you think the principle of open justice means.

6. Open justice means justice being not only done but seen, and understood, to be done. Judicial proceedings conducted in the public's name should be open to public scrutiny, whether by means of access to a physical court room or by remote link or broadcast, or indeed by maintaining and preserving a public record (such as an audio recording or transcript). Open justice also means that it should be possible for those observing proceedings to follow and understand their nature and outcome.

Q3/. What is your view on how open and transparent the justice system currently is?

7. The justice system is open in most courts but the public may not have sufficient information for it to be truly transparent.

8. There are parts of the system which, for justifiable reasons (such as privacy, confidentiality, national security etc), remain largely hidden from public view. In the family courts there is a measure of transparency by way of access to accredited reporters or duly authorised lawyers ("legal bloggers"), but since most such cases are not reported, the public remains unaware of them.

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?

9. Apart from public consultation, the best way to engage with public and experts on the development and operation of open justice policy is to engage with

[1] Paul Magrath, who drafted this response, has also contributed to that submitted by The Transparency Project, of which he is a trustee.

representative groups and stakeholders. (ICLR is an obvious example of such a stakeholder.)

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

10. With the closure of many smaller courts, and the reorganisation of court business into larger provincial court centres, justice has become much less local. That is a barrier to casual public observation, and makes planned observation (especially where it involves travel to physical courts) more dependent on access to information (such as cause lists, case documents etc) in advance. Such information needs to be both transparent and accessible. Designing the best way to improve such information requires public engagement and feedback. The public should also be consulted about the contents of the promised court observers' Charter.

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

11. Yes. It is essential. ICLR uses this information to enable its reporters to cover the cases in the senior courts and tribunals that may merit reporting.

12. Any court observer wishing to identify a hearing that they may wish to observe needs to be able to find out about the case in advance of the hearing.

Q7/. Do you think that there should be any restrictions on what information should be included in these published lists (for example, identifying all parties)?

13. Yes. The names of parties may be anonymised if the hearing is being conducted in private for a justifiable reason. Subject to that, it is normally sufficient to list the first named party on each side in a case, ie claimant / applicant / appellant and defendant / respondent, as well as the Crown where relevant. However, more information could be provided about the nature of the proceedings, to assist potential observers.

14. The most significant current restriction is the inability to search and retrieve previous days' lists, once a new day's list has been published. There is no publicly accessible archive of old lists.

Q8/. Please explain whether you feel the way reporting restrictions are currently listed could be improved.

15. Reporting restrictions do not generally appear to be listed. If applicable in a particular case, potential observers should be able to obtain a copy in advance of the hearing. A central repository of reporting restrictions would be very useful.

Q9/. 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?

16. Yes. ICLR is considering developing a service alerting readers of judgments in a lower court that an appeal to a higher court is in prospect or pending, and, if listed, where. However, such information is currently mainly available (if at all) from sources other than public court lists.

17. ICLR is developing a process to download and save public court lists (for senior courts only - ie RCJ and Rolls Building daily cause lists) into an internal database for reference, for reporting purposes (ie to check details in law reports). There are no plans to provide such retained listing information to subscribers or the general public. But the inability to search previous days' listing once an updated list is published online has made such a method of retention and storage essential.

Q14/. 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?

18. The ability to observe a hearing remotely via audio or video conference software or livestream broadcast is a major enhancement to open justice, for the following reasons:

- Given the closure and reorganisation of many courts, and the time and cost of travelling to a physical court, it makes the courts more accessible.
- For representatives of the media and others attending court as observers in a professional capacity, it makes the process more economically viable.
- For those of limited mobility or sensory impairment, with suitable technological support, it can make the difference between being able to attend or not attend for observation purposes.
- Where proceedings are recorded for livestreaming purposes, and made available for later catchup viewing, it also enables observers to view proceedings in their own time and allows for repeated viewings.

19. There are, evidently, risks involved in permitting remote viewing. In a physical court hearing, the judge can control behaviour within the court and where necessary prevent or punish unacceptable behaviour such as disturbing the proceedings, unlawfully recording them, etc. The same is much harder for the judge in a remote hearing, which to some extent justifies the conditions imposed in providing access

via a remote link, such as requiring the observer's name and email address, even though in other circumstances that might be perceived as a form of gatekeeping or as having a chilling effect.

20. A livestreamed (broadcast) hearing is easier to control, in that the entire broadcast can be suspended if necessary, or its publication delayed, or edited to enable the redaction or excision of harmful material.

Q15/. Do you think that all members of the public should be allowed to observe open court and tribunal hearings remotely?

21. Yes, provided they agree to conduct themselves properly and in accordance with existing restrictions on filming and recording. However, there may be some justification for restricting such access to those within the court's contempt jurisdiction.

Q16/. Do you think that the media should be able to attend all open court proceedings remotely?

22. Yes, subject to reporting restrictions and the established derogations from open justice, eg for national security, etc. In cases of high public interest remote access would avoid the need for large numbers of journalists to attend in person, or indeed other observers, obviating the need for an enlarged court room or overflow relay rooms. But any restriction of access just to the media, such as would exclude other public observers, must be strictly justified.

Q17/. 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?

23. Not all parts of all hearings. For example, one might exclude the examination of vulnerable witnesses or complainants, as well as exempting entire proceedings under the established derogations from open justice (privacy, confidentiality, national security, etc.)

Q18/. Would you impose restrictions on the reporting of court cases? If so, which cases and why?

24. Yes. Restrictions may be justified for reasons of national security, to protect the integrity of the court process, to protect industrial and commercial secrecy (where this is justified), and to protect vulnerable parties such as children or those lacking

mental capacity, and victims or witnesses in certain criminal trials. But since cases are now actively case managed, it should be possible to agree the restrictions applicable in a particular case and then to make those restrictions available to anyone attending and observing the hearing, alongside relevant (cited/quoted) case documents in order to boost transparency.

Q20/. How could the process for gaining access to remotely observe a hearing be made easier for the public and media?

25. At present, the system is cumbersome and resource intensive, because each request to join a hearing remotely (otherwise than by published livestream) must be made individually to the court or judge's clerk and administered by them. The alternative might be to publish a link and allow anyone to use it, subject to being invited into the hearing individually by a clerk or the judge. This, again, imposes a burden which could be a hindrance to the conduct of the proceedings.

26. What we would suggest is the establishment of an online portal by HMCTS on which regular or occasional observers would be able to register an account. This would record details of the observer's name and email address and, if necessary, their reasons for wanting to observe (although the mere fact of registering should be assumed a sufficient expression of legitimate interest).

27. A person could, by registering, also agree to submit to the jurisdiction of the court, regardless of their geographical location. Each registered user would then be accorded a joining code, enabling them to join and observe proceedings without necessarily disclosing their identity. The database could include a search facility linked to the daily cause lists, thus enabling registered users to find cases to join, be sent alerts to remind them to log in, and enable them to download relevant case documents and (crucially) reporting restrictions or transparency orders, before the hearing commenced.

Q21/. What do you think are the benefits to the public of broadcasting court proceedings?

28. Broadcasting court proceedings benefits public legal education and promotes transparency. Broadcasting also aids observation for various purposes, including reporting, and public scrutiny of the justice system in action. In cases of high public interest, broadcasting would obviate the need for large numbers of observers and reporters to crowd the court itself, making the trial more manageable.

Q22/. 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?

29. In addition to what is already in some form or other broadcast or live streamed:

- Appeal hearings in the Court of Appeal, Criminal Division as well as Civil Division.
- Hearings in the Upper Tribunal, Employment Appeal Tribunal
- Hearings in the High Court for substantive relief and judicial review hearings
- Parts of hearings in the Crown Court, eg opening, closing speeches, summing up, sentencing.
- Coroners' court hearings

30. Hearings involving children in the family courts and criminal courts should not usually be broadcast, or those in the Court of Protection.

31. The New Zealand approach, which gives ultimate control to the trial judge, appears to be a sensible option.

Q23/. Do you think that there are any risks to broadcasting court proceedings?

32. Yes. But they do not include disruption of the proceedings by an observer, which is a risk associated with remote access to online hearings. Although broadcasting would facilitate the illicit recording of proceedings, it is hard to see why that should be a problem unless such recording were abused or misreported (which could be dealt with under the Contempt of Court Act 1981).

Q24/. 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?

33. No, they are not still fit for purpose and now seem anachronistic and even absurd in the modern age. The risk of abuse of recorded sound or images may be a real one, but any such abuse would probably already be addressed by the Contempt of Court Act 1981, or could be the subject of a separate new criminal offence. In addition, there are many courts and tribunals (eg Employment Tribunals, Magistrates' Courts) where no recording or transcription is routinely made or available, and where participants or observers might very justifiably expect to be permitted to record them themselves.

34. Emerging technologies and the risks associated with them which should be considered include:

- the use of holographic projections or virtual reality (the metaverse) as a medium for remote hearings, and the risks associated with that; and
- the use of AI and other techniques to make the manipulation of sound, images or other sensory information, and the fake generation thereof, more realistic and convincing.

Q27/. In your experience, have the court judgments or tribunal decisions you need been publicly available online? Please give examples in your response.

35. No. ICLR reporters sometimes experience problems in getting hold of approved judgments which we wish to report. In some cases, this is because there is no transcript available from an oral judgments. In other cases, the judgment is awaiting approval before being circulated, or copies have only been supplied to the parties and their advisers.

36. ICLR has been monitoring the publication by The National Archives on the new Find Case Law (FCL) database of judgments listed in the Daily Cause List for the Royal Courts of Justice and Rolls Building over the last year. In an interim report covering the first three full months (May, June and July 2022) we found that up to a quarter of all listed judgments were not published, and a substantial number that were published appeared late (ie not on the day of judgment, as intended).[2] A final report, covering the whole of the first 12 months of FCL's operation, will be published soon.

37. ICLR also obtains and publishes judgments directly from the official court transcribers, mainly judgments given orally and not handed down in writing, which may not appear on Find Case Law or BAILII or the Judiciary website.

Q28/. 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?

[2] Publication of listed judgments: towards a new benchmark of digital open justice (January 2023) https://www.iclr.co.uk/wp-content/uploads/media//2023/01/Publication-of-listed-judgments-final.pdf

38. Yes. ICLR has benefited greatly from the establishment of FCL and the licensing regime introduced by The National Archives, which has enabled us to publish unreported cases alongside our case reports and summaries, and thereby to provide a more comprehensive service to both paying and non-paying users. It has increased the range and scope of case search tools such as Case Genie. The expansion of such content can only be a good thing.

39. In any event, it makes sense to publish everything officially in one place. It would also be useful for the development of legal research tools to have everything in a machine readable format. Currently many of the tribunal decisions are hard to find and only published in PDF format, which is less user-friendly to read online and harder to index, enrich with links, and search.

Q29/. 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.

40. Important historical and educational precedents, many of which have been supplied by ICLR and some commercial publishers to BAILII under their Openlaw project, can and should be included on FCL. They could be given retrospective neutral citations in the same way as those already assigned by BAILII for pre-2001 cases.

41. There are collections of earlier court judgment transcripts (such as those which used to be archived in the Judges' Library in the RCJ) which should also be published. General and specialist law reports containing historic judicial decisions could be made available for archiving and research purposes under terms that respect the intellectual property rights of the original publisher.

Q30/. 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.

42. Transcripts and recordings of hearings should also be preserved, and made available for research purposes under suitable conditions. Those courts which are not even recorded should be recorded, and the recording preserved. While such recordings or transcripts may not always be suitable for online access, they could easily to preserved as a public record. The National Archives have the expertise and facilities to archive digital audio and video recordings of hearings. There would be benefits both to researchers and for the purposes of appeals and the investigations

of miscarriages of justice, which are often hampered by the lack of an accessible public record of earlier proceedings. At present it seems that even where such recordings are made, they are simply destroyed after a number of years, or preserved in unsuitable and insecure conditions.

Q31/. 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.

43. If the judgments are machine readable, then there must be assistive technology capable of making them accessible in various ways already. Unless the platform itself is to be enhanced with such features, it is probably better to rely on the individual user's own adaptive browser to supply any assistive enhancements.

44. For those requiring an easy read version or explainer, it is likely that tools could be developed using techniques of artificial intelligence such as natural language processing and machine learning, in much the same way as automated translation could also be provided (eg into Welsh).

45. Embedded links to a legal glossary or dictionary could be created, in much the same way as links to other cases or legislation where mentioned in a judgment.

Q32/. 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?

46. No.

Q41/. As a non-party to proceedings, for what purpose would you seek access to court or tribunal documents?

47. ICLR reporters frequently seek access to court and tribunal documents for reporting purposes. It is essential that any law report of a judgment is as accurate as possible and that includes checking facts, dates, submissions, authorities and previous judgments in the case.

48. In the case of physical court hearings, where physical papers are filed with the court, it used to be possible for accredited news reporters and law reporters to request to see a copy of pleadings and other papers from the associate or clerk of the court, subject to their not being removed from the court. The increasing use of written arguments and digital filing has made it much harder for reporters to ascertain the background facts and issues in a case when listening to submissions in court, and that problem is only compounded when attending a hearing remotely.

49. Traditionally, law reporters have also relied extensively on the assistance of counsel and solicitors in supplying copies of relevant papers, particularly skeleton arguments. Unfortunately, the increasing use of digital bundling and a heightened concern for privacy and confidentiality has led to a growing reluctance by legal teams to loan or provide copies of court papers.

Q42/. 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?

50. The first port of call is to apply to the court where the hearing is taking place. For skeleton arguments, and some other documents, it may be easier and quicker to ask the lawyers directly. If necessary, a request can be made to the judge.

51. The media and media organisations should not be involved in gatekeeping the information accessible to other types of observer attending court. Nor, in most cases heard in open court, should the matter depend on the permission or consent of the parties.

Q46/. How can we clarify the rules and guidance for non-party requests to access material provided to the court or tribunal?

52. There should be a clear practice direction applying generally across all jurisdictions, citing the relevant procedural rules for all the different jurisdictions.

Q47/. At a minimum, what material provided to the court by parties to proceedings should be accessible to non-parties?

53. It is a generally accepted principle that oral submissions should be made in open court. Since skeleton arguments now frequently take the place of oral argument, copies should be made available to the public. A practice direction to that effect applies in the Court of Appeal, but not in first instance courts.

54. In addition, access could be provided to any originating documents (claim form, appellant's notice, etc) and any other document (eg witness statement) read out in or referred to during the hearing.

Q49/. Should there be different rules applied for requests by accredited news media, or for research and statistical purposes?

55. There could be rules permitting greater access to confidential material or personal data, of the sort that might be subject to a right to be forgotten, subject to restrictions as to the use or onward publication of the material.

Q50/. 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?

56. A licensing regime similar to the Transactional Licence operated by The National Archives in respect of bulk processing of judgments.

Q51/. For what purposes should data derived from the justice system be shared and reused by the public?

57. To develop legal services and products; to promote research; to support access to justice and transparency.

Q52/. How can we support access and the responsible re-use of data derived from the justice system?

58. Access requires making data available in a convenient format at timely intervals or on a continuous basis. Responsible re-use might best be governed by some sort of licensing regime. Responsible use may depend on anonymising certain types of data before sharing.

Q53/. Which types of data reuse should we be encouraging? Please provide examples.

59. Social and other characteristics of litigants; whether litigants in person, or advised by professional lawyers and if so how funded; nature of proceedings; sums involved; remedy sought; dates of various interactions with justice system; time lag before hearing, before judgment, before sentencing, etc; outcomes; reporting restrictions; reasons for judgment; appellate history, etc. These and other data points can be harnessed for research, bulk monitoring of the performance of the justice system; development of tools and services, including prediction of chances of different outcomes.

Q54/. What is the biggest barrier to accessing data and enabling its reuse?

60. Lack of consistency in the collection, archiving and publication of such data.

Q55/. Do you have any evidence about common misconceptions of the use of data by third parties? Are there examples of how these can be mitigated?

61. A survey conducted by IPSOS for The Legal Education Foundation published in 2022[3] found that over 70% of participants said that they knew nothing or not very much about the information contained in court records, or about who has access to court records; that 50% of polling respondents expressed discomfort about use of court data by tech companies, credit rating agencies (42%), and insurance companies (42%); and that while 56% said they were comfortable with the information from court records being used to improve judges' decision-making or reduce costs in the justice system, only 26% were comfortable with commercial companies having access to develop products and services. This showed, among other things, a lack of awareness of how judgments are used as precedents in a common law system, and services developed by commercial publishers using justice data.

62. Another common misconception might be that judges' decisions can be predicted by analysing their previous decisions. But judgments are generally too unstructured to permit reliable analysis to detect such patterns of behaviour. Data based on court filings (type of action, issues, sums involved, nature of dispute etc, types and length of hearing, duration of proceedings, plus disposals outcome) would be more reliable, regardless of identity of judge; but at present such data is not available in sufficient quantities or consistency of format to permit such bulk analysis.

Q56/. Do you have evidence or experience to indicate how artificial intelligence (AI) is currently used in relation to justice data? Please use your own definition of the term.

63. ICLR has been involved in developing two products using artificial intelligence (AI). Both use natural language processing (NLP) to break down large volumes of text into individual "tokens" of meaning which can then be analysed and classified. Both models have been trained using techniques of machine learning (ML) on large sets of data.

- One product (Case Genie) analyses and compares a legal text and then suggests other cases based on similar subject matter.

---

3 Gisborne, J. Patel, R. Paskell, C. and Peto, C., Justice Data Matters: building a public mandate for court data use (TLEF 2022) https://research.thelegaleducationfoundation.org/research-learning/funded-research/justice-data-matters-building-a-public-mandate-for-court-data-use

- Another (the Case Summariser) can create a brief abstract-like summary of any new judgment added to the collection.

64. We are aware of other, similar products developed by legal publishers, within and outside the United Kingdom.

Q57/. Government has published sector-agnostic advice in recent years on the use of AI. What guidance would you like to see provided specifically for the legal setting? In your view, should this be provided by government or legal services regulators?

65. It is important, particularly with generative AI (which does not merely analyse, compare and/or extract existing sections of text from source material, but actually generates fresh prose) to identify the source material on which it has been trained (via machine learning) or from which it draws its answers.

66. In a legal setting, this may include previous case data, suitably adapted, which should also be appropriately anonymised to comply with data protection laws. Legal services regulators may be better placed to regulate this, but many of the developers of AI products will not be legal professionals. They may work within or for law firms or chambers. They are more likely to be independent tech companies, in which case the legal regulators will not hold much sway over them, except in so far as they are employed by, for or with regulated legal professionals.

Q58/. Do you think the public has sufficient understanding of our justice system, including key issues such as contempt of court? Please explain the reasons for your answer.

67. Probably not. The law on contempt of court is complicated, and hard to find, being derived from a mixture of individual provisions in various statutes, in rules of court, previous cases, and practice directions. There is no single reliable source of information available to the public. While most members of the public may have a vague idea about the need to prevent prejudicing a live criminal trial and not disobeying court orders, it is unlikely they would know anything more or where to find out.

Q61/. Do you think there is currently sufficient information available to help the public navigate the justice system/seek justice?

68. No. There is a lot of information available in various different places, but it is hard to find and it is not linked together in a way that makes it easy to navigate.

Some of the information can be found on the gov.uk pages, some on legislation.gov, some on Find Case Law, some on Justice.gov, some on Courtserve, some on legal charity sites, some only behind paywalls beyond the reach of the public.

69. There is no single portal that would guide a user through all the information they might want about the justice system, where they could find information about all the different courts and tribunals, legislation, rules of court, case law, practice directions, courts, forms and online procedures relevant to each type of case, let alone any way of finding out what that type of case is.

Q62/. Do you think there is a role for digital technologies in supporting PLE to help people understand and resolve their legal disputes? Please explain your answer.

70. Yes. For example, a chatbot could be developed to help people identify the nature of their dispute, and suggest information to help them resolve it. Common problems like housing, divorce, small claims etc would be amenable to online triaging with a view to directing the users to the relevant materials on a dedicated site.

Concluding remarks

71. Law reporting is a good demonstration of how the common law system of justice is predicated on the assumption of justice being done, and seen to be done, in public. The description of precedent-setting courts as "courts of record" bears this out. Technology has changed the way litigation is conducted, and it has also provided opportunities for expanding the way justice is seen and recorded. While recent developments in court procedure and the conduct of litigation have sought to make the administration of justice more efficient, increasing access to justice and reducing its cost, it should not be forgotten that open justice is not simply a "nice to have" add-on, but needs to remain a foundational principle around which the entire system is built. Where technology can be used to support scrutiny and transparency, it will ensure that what is seen to be done is also justly done.

Paul Magrath

On behalf of ICLR

6 September 2023