

## Open justice: the way forward

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**If you would like us to acknowledge receipt of your response, please tick this 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 is my own individual submission. I have also made a separate submission on behalf of the Courts and Tribunals Observers' Network which focuses on fewer questions.

### Introduction/summary

1. I am a socio-legal researcher, having originally trained and worked in journalism. I have a longstanding interest in the practice, law and policy of open justice, court reporting, and access to court information and data. I authored a working paper making recommendations for the open justice commitment in the UK's Open Government National Action Plan; and a report for the Legal Education Foundation on 'justice system data' comparing the management of court and justice data in Canada, Ireland and Australia. Relevant publications are listed at the bottom of this submission. My roles include: core member of The Transparency Project (registered charity 1161471); public interest group representative on the Royal Courts of Justice Media and Communications List User Group Committee (Maclug); fellow at Connected by Data. With Dr Lucy Welsh, University of Sussex, I am co-author of the book *Observing Justice: Digital Transparency, Openness and Accountability in Criminal Courts* which is due to be published by Bristol University Press in November 2023 (in the Law, Society, Policy series).
2. I participated in civil society discussions with Government on the drafting of a proposed open justice commitment in the previous Open Government Partnership National Action Plan; I gave oral and written evidence to the Justice select committee in 2021 (some of which I reproduce here), that was cited in its final report in 2022; and have subsequently convened an ad hoc network of court and tribunal observers from academic, NGO, law and media backgrounds (<https://courtoobservers.wordpress.com/>) which is submitting separate evidence. A report of the workshop in May 2023 at Green Templeton College,

University of Oxford, and subsequent remote meeting in June 2023 that led to the establishment of the network can be read here. Some of the detail speaks directly to the questions of the consultation: <https://www.gtc.ox.ac.uk/courts-and-tribunals-access-and-observation-workshop/>.

3. Advances in digital technology have radically altered forms of justice and court reporting, and emergency measures instigated by the COVID-19 pandemic have become normalised and adopted into current practice. Given these significant changes, there is need for a review and reform of open justice practice and policy – i.e. the mechanisms that facilitate transparency and observation of the justice process, and therefore contribute to justice system accountability.
4. There are two main areas in particular need of political and judicial attention: first collection and management of justice data within the system; and second, the design of appropriate models for public and media access, that take into consideration a range of competing interests and rights, including but not limited to, those of traditional media organisations. These suggestions are based on my research over many years that has tracked developments in court reporting and ‘justice system data’ – i.e. the information that is generated by the process of justice. A short-term proposition is for the Ministry of Justice and Judiciary to set up a consultative group on transparency policy, with membership drawn from academia, non-governmental organisations and charities, as well as the legal and media profession (I expand on these suggestions below).
5. I welcome this consultation, following the Justice Committee report in 2022, as an opportunity to scrutinise open justice practices and policy that have evolved in a piecemeal fashion over centuries. Most obviously, it is an opportunity to consider access to information and the right to impart and receive information under ECHR Article 10 and the common law open justice principle. However, factors that should also be considered include, but are not limited to, rights to respect for private and family life; data protection and security; rehabilitation of offenders; contempt of court; and – in different contexts<sup>1</sup> – citizens’ fair and equal access to justice (including the right to a public hearing under ECHR Article 6). Some of these aspects are often overlooked in policy discussions on the topic of court reporting and open justice.
6. It is good to see the consultation paper acknowledge the growing interest in the development of machine-learning technology to automate the dissemination and analysis of courts data, as this deserves more detailed research and policy attention.<sup>2</sup> I encourage the MOJ and HMCTS to think more broadly than media and journalism, in terms of the role and position of other categories of observers and data requesters: academic researchers, NGOs, and other members of the public who wish to observe court (including

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<sup>1</sup> Here, I am primarily thinking of the impact on different court users (or prospective users), for example, criminal defendants and victims, or civil litigants; as well as the impact on civic access to information about courts and the legal process.

<sup>2</sup> See, for e.g. ‘Unlocking the Potential of Artificial Intelligence for English Law’ (*Oxford Law Faculty*, 20 December 2018) <<https://www.law.ox.ac.uk/unlocking-potential-artificial-intelligence-english-law>>

those connected to direct court participants – e.g. family members). A final consideration should be the varying administration of open justice in the different jurisdictions (civil, criminal, family, tribunals) and at lower and higher levels, where distinct rules and guidance apply.

7. In my response, I have reproduced some of my written evidence to the select committee which still remains relevant two years on, refer to the Transparency Project's evidence (I am a core member of the group) where I would be merely duplicating, and draw on submissions by Paul Magrath (ICLR) and Penelope Gibbs (Transform Justice). I have made a separate submission on behalf of the ad hoc Courts and Tribunals Observers' Network formed partly in response to the consultation, which concentrates on questions 4 and 5. Further relevant resources are listed at the bottom.

## Questions on open justice

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

8. The principle of open justice allows scrutiny of the process and outcomes of the justice system, acting as a mechanism of accountability. By permitting public observation of court proceedings, and access to certain case data, members of the public are able to witness the conduct of proceedings and monitor any disparities or unfair treatment that may arise during the process (in individual cases, as well as contributing to systemic injustices).<sup>3</sup> This includes, for example, monitoring of racial bias. Open justice should be understood more broadly than observation of a court hearing; its facilitation also requires access to statistical data about court cases, access to documents and case details, and transcripts of what has been heard in court. My work offers a broad view of open justice that looks beyond the news media as a sole proxy for transparency and accountability, also perceiving an important role for members of NGOs, legal and academic organisations, and other interested members of the public.

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

9. Here, I refer you to the evidence submitted by the Transparency Project charity (of which I am a core member).

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

10. In principle, the justice system is open and transparent. In practice, there are many obstacles to observing the process of justice in courts in England and Wales. Further, the mechanisms have evolved over time in a piecemeal and partly privatised fashion, leading

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<sup>3</sup> See the work of the international NGO Systemic Justice for examples and discussions of 'systemic injustices': <https://systemicjustice.ngo/2023/06/research-a-necessary-component-of-strategic-litigation-against-systemic-injustice/>

to information blockages, inconsistencies, and confusion. While there are important reasons for restricting access to hearings and data in some courts and case types, it should be done consistently and lawfully.

### *The role of the media*

11. As recognised by the courts, the media plays an important role in delivering open justice. It is often observed that there has been a decline in court reporting, especially at the local level, implying that the range and volume of court reporting has decreased in recent years, and that there are fewer specialist court reporters attending court. In general, these observations are based on anecdote, in the absence of reliable empirical evidence. No formal public records are kept on public court attendance, so there is no central source with which to verify the claims. However, there have been a number of useful studies which provide evidence for the nature of reporting from English courts.<sup>4</sup>
12. While these studies are valuable in building a picture of court reporting, and provide some robust empirical evidence, more research is needed to substantiate anecdotal claims. This entails overcoming methodological challenges; particularly in collecting historical data on public court attendance and reporting to compare with contemporary patterns. Further, research findings are always likely to be indicative of a ‘snapshot’ period in a particular court or jurisdiction; systematic observation is timely and costly to do.
13. Another aspect worthy of attention is the value of such media reporting and its contribution to justice system transparency and accountability. The traditional media (i.e. newspapers and their websites, broadcasters and their websites) may contribute to justice system accountability but this cannot be assumed. As Paul Magrath and I have argued:
14. *“Even if journalists covering the courts are assumed to be the ‘eyes and ears of the public’, as they are often described, such journalists only cover a tiny proportion of the hearings taking place each day. Further, the decline of court reporting, especially at a local level, is well documented. At a time when many journalists have been laid off or furloughed, this decline in court coverage is likely to be exacerbated (...)*
15. *“(...) ‘Press reporting from the courts may enhance public scrutiny and accountability, but it is also (and often primarily) aimed at furthering circulation and profitability by finding ‘good copy’, that is a sensational or human interest story deemed newsworthy, which may be at the cost of other important aspects of justice accountability. Media organisational interests and those of other observers do not always converge.”<sup>5</sup>*

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<sup>4</sup> E.g. Moran LJ, ‘Mass-Mediated “Open Justice”: Court and Judicial Reports in the Press in England and Wales’ (2014) 34 *Legal Studies* 143; Thornton B, ‘The Mysterious Case of the Vanishing Court Reporter – The Justice Gap’ (17 April 2017) <https://www.thejusticegap.com/mysterious-case-vanishing-court-reporter/>; Richard Jones (2021) ‘“It’s the Best Job on the Paper” – The Courts Beat During the Journalism Crisis’, *Journalism Practice*, DOI: 10.1080/17512786.2021.1910980; Chamberlain P and others, ‘It Is Criminal: The State of Magistrates’ Court Reporting in England and Wales:’ (2021) 22 *Journalism* 2404.

<sup>5</sup> Townend J and Magrath P ‘Remote trial and error: how COVID-19 changed public access to court proceedings’ (2021), *Journal of Media Law*, DOI: 10.1080/17577632.2021.1979844 <<https://www.tandfonline.com/doi/full/10.1080/17577632.2021.1979844?src=>>>

16. This is not to dismiss the important contribution of media and journalistic reporting. To highlight two important recent examples of public interest reporting from the courts: Nick Wallis's sustained coverage of the Post Office Horizon trial at the High Court (via his blog and other outlets), and the Bureau of Investigative Journalism's reporting on possession hearings during the pandemic, leading to evictions.<sup>6</sup> Interestingly, both have relied on alternative funding models including crowdfunding (Wallis) and philanthropic funding (TBIJ).
17. Finally, it should be emphasised that open justice mechanisms allow for the possibility of observation, even if a public observer is not in fact present for a hearing. It is vital that these mechanisms exist – in order to uphold the common law principle of open justice and meet obligations under Articles 6 and 10 of the European Convention on Human Rights – even if media observation and reporting is, as anecdotally reported, in decline.
18. Inspired by the study of Bristol Magistrates' Court conducted by Chamberlain et al., my colleague Dr Lucy Welsh and I - with the support of Jon Robins of the Justice Gap website - planned a pilot study of the Magistrates' Court in Brighton. The pilot project, involving student volunteers from the Criminal Justice Law Clinic, began smoothly, with no issues raised in terms of accessing hearings we selected to observe.
19. However, during the first lockdown commencing in March 2020, it became impossible to continue with the research, as we were not supplied with any details of hearings (without visiting the court), nor provided with any means to observe remotely. Obviously, this was a unique situation in terms of navigating the rules of a national lockdown (not only in terms of following national law and guidance relating to COVID-19, but also guidance issued by HMCTS and the court, and our own institution's guidance on fieldwork) but it did highlight issues with the management of justice system data. With physical access restricted, there was no way of observing or tracking what was happening at the Magistrates Court in our local area. As our purpose and status was considered to fall outside the HMCTS policy for accredited journalists, we were not permitted to access any listings information remotely, which meant we did not know what cases were being heard during the first lockdown period.
20. Since then, basic magistrates court lists information has been made available via the Courtserve service, with some variance between courts (e.g. whether full charge information included). The example does, however, highlight a continued tension about access to court hearings and data for those engaged in observation for purposes deemed other than journalism (e.g. research, or NGO courts monitoring projects).

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<sup>6</sup> Wallis N, 'Horizon Trial Menu' (*Post Office Trial*, 10 March 2019) <<https://www.postofficetrial.com/2019/03/horizon-trial-menu.html>>; McClenaghan M, 'Evicted in Less than 10 Minutes: Courts Fail Tenants Broken by Pandemic' (*The Bureau of Investigative Journalism*) <<https://www.thebureauinvestigates.com/stories/2021-09-23/evicted-in-less-than-10-minutes-courts-fail-tenants-broken-by-pandemic>>

21. I began collecting examples of other people's experiences during the period and identified many instances of people struggling to observe court hearings during the pandemic period. There were problems pre-dating the pandemic in terms of accessing listings and hearing information but these were exacerbated by the lack of physical access to courts.<sup>7</sup>
22. In 2020, the House of Commons select committee on justice was assured by members of the government, judiciary and court service that open justice continued, despite changes to the nature of physical hearings, and increased use of technology for many types of hearings. While this may have been the case in some courts, journalists and other observers were reporting issues with accessing hearings. To draw attention to this, I coordinated an open letter reporting the problems and calling for improved access mechanisms.<sup>8</sup> The (then) CEO of HMCTS responded to the letter, promising further action.<sup>9</sup> Since then, I have had several remote meetings with the Ministry of Justice team working on open justice and transparency (as well as joining the open meetings held for this consultation) but I remain concerned that further review and reform is needed.
23. Byrom's report of 2019<sup>10</sup> provides a detailed overview of the discrepancies and issues with justice system data in England and Wales, where access is made difficult or impossible owing to deficiencies in the system, or costs and management. Example data/information types, in need of urgent attention, include: Hearing listings; Hearing outcomes / results; User data (user characteristics, experience, outcomes); Sentencing remarks; Closed, or unpublished judgments (e.g. for national security reasons<sup>11</sup>); Transcripts; Court documents (e.g. skeleton arguments, claim forms, statements of claim).
24. One aspect that should also be considered is whether the move to remote hearings providing real-time observation, or information about cases (what Professor Richard Susskind has described as 'information transparency'<sup>12</sup>) is affecting practice in the physical courts. If so, they should be scrutinised critically, and subject to independent review.

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<sup>7</sup> For more detail see: Townend J and Magrath P 'Remote trial and error: how COVID-19 changed public access to court proceedings' (2021), *Journal of Media Law*, DOI: 10.1080/17577632.2021.1979844

<<https://www.tandfonline.com/doi/full/10.1080/17577632.2021.1979844?src=>>

<sup>8</sup> Open Letter from NGOs and Academics on Open Justice in the Covid-19 Emergency' (*The Transparency Project Blog*, 29 May 2020) <<https://www.transparencyproject.org.uk/open-letter-from-ngos-and-academics-on-open-justice-in-the-covid-19-emergency/>>

<sup>9</sup> Townend J, 'HMCTS Response to Letter on Open Justice in the COVID-19 Emergency | The Transparency Project' <<https://www.transparencyproject.org.uk/hmcts-response-to-letter-on-open-justice-in-the-covid-19-emergency/>>

<sup>10</sup> Byrom N, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (The Legal Education Foundation 2019) <<https://research.thelegaleducationfoundation.org/blog/digital-justice-hmcts-data-strategy-and-delivering-access-to-justice>>

<sup>11</sup> See Dr Lawrence McNamara's important work on this aspect; e.g. McNamara, L (2019) 'Closed judgments: security, accountability and court processes'. UK Human Rights Blog <<https://ukhumanrightsblog.com/2019/01/25/closed-judgments-security-accountability-and-court-processes/>>

<sup>12</sup> Susskind R, *Online Courts and the Future of Justice* (Oxford University Press 2019), Ch 19.

#### **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?**

25. As I recommended to the select committee in 2021, to inform the development of open justice policy and practice, the Ministry of Justice and Judiciary should set up a consultative group on transparency policy and practice with membership drawn from academia, charities and non-governmental organisations, as well as the legal and media profession. In its response to the select committee in 2023, the Government said it was not currently planning to introduce such a group. However, I would urge it to consider the case again. The HMCTS media working group is limited to members of traditional media organisations and therefore overlooking other important voices (such as those from academic and NGO backgrounds). There are no other dedicated stakeholder groups to the issue of transparency, and given its importance in providing justice, such a group could provide specialist insights, drawing on experiences across criminal, civil and family jurisdictions and court types.
26. As set out in more detail in my accompanying submission on behalf of the Courts and Tribunals Observers Network, 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 to establish its working principles.

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

##### *Data collection, management and dissemination*

27. There are two main areas in particular need of political and judicial attention: first, the collection and management of justice data within the system; and second, the design of appropriate models for public and media access, that take into consideration a range of competing interests and rights, including but not limited to, those of traditional media organisations.
28. Dr Natalie Byrom has made a range of recommendations in her detailed report on digital justice in England and Wales, particularly in relation to improving data quality and management, which HMCTS fully responded to in 2020.<sup>13</sup> My own recommendations in a

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<sup>13</sup> HMCTS, ‘Making the Most of HMCTS Data: HMCTS’ Full Response and Update to Dr Byrom’s Recommendations’ <<https://www.gov.uk/government/news/hmcts-response-and-progress-update-on-dr-natalie-byrom-report>>

follow up report which compared justice system data in Australia, Canada and Ireland include:

29. (a) Clearly presented policies, shared publicly, on the differing roles for executive, court service, judiciary and any third-party providers in the management of justice system data
  - (b) Accountability mechanisms for access to justice data: i.e. appropriate routes of application and appeal for accessing justice data that is not readily available in the public domain.
  - (c) Consideration of public and court user views and experiences in the design of justice system data processes (especially with regard to the use of personal data).
  - (d) Detailed measurement of the impact of data sharing practices on outcomes of the justice system.<sup>14</sup>
30. In the longer term, there should be some form of public-facing office within the justice system through which to raise day-to-day or longer term data access or control issues, with independent oversight (especially since the judicial processing of data – not subject to regulatory oversight by the Information Commissioner’s Office if performed in a judicial capacity – has exemptions from specified GDPR provisions on personal data, and the Freedom of Information Act 2000).<sup>15</sup> Jason Bosland and I have previously discussed the establishment of an Open Justice Advocate,<sup>16</sup> following Bosland’s earlier recommendation,<sup>17</sup> but this is just one of different models to explore. More information should be made public about the ongoing role of the Senior Data Governance Panel, formally announced in 2023.
31. Any review of open justice practice and policy should consider the following factors: rights to respect for private and family life; data protection and security; rehabilitation of offenders; contempt of court, and – in different contexts – citizens’ fair and equal access to justice. It should take account of advances in machine learning technology and opportunities and risks of automated analysis and dissemination of courts data. Finally, it should consider rights to information beyond the traditional media – for direct court users (including criminal defendants and family members), academic and NGO observers, as well as the general public. It should take into account the differences between the court jurisdictions (civil, criminal, family and tribunals), and at lower and higher level.

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<sup>14</sup> Townend J and Wiener C, “Justice System Data” : A Comparative Study’ (The Legal Education Foundation 2021) <<https://research.thelegaleducationfoundation.org/research-learning/funded-research/justice-system-data-a-comparative-study>>; executive summary here: <<https://research.thelegaleducationfoundation.org/wp-content/uploads/2021/07/WJ21-LEF-V10-16072021-FAW.pdf>>

<sup>15</sup> ‘Judicial Data Processing Complaints Handling Policy’ <<https://www.judiciary.uk/wp-content/uploads/2019/04/Judicial-data-processing-complaints-handling-policy-June-2021.pdf>>

<sup>16</sup> Bosland J and Townend J, ‘Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom’ (2018) 23 Communications Law 21 <<https://sro.sussex.ac.uk/id/eprint/80451/3/ARTICLE%201%20December%20issue.pdf>>

<sup>17</sup> Bosland J, ‘Suppression Orders vs Open Justice’ (*Pursuit*, 1 March 2017) <<https://pursuit.unimelb.edu.au/articles/suppression-orders-vs-open-justice>>



32. The Government previously agreed a commitment to open justice in its national action plan on open government 2021-23.<sup>18</sup> This process provides a useful opportunity for reform and to track the implementation of reforms but a future NAP could be more ambitious, and further engage with the Judiciary. The Government could do more to publicise its work in this area – as the Canadian Department of Justice has done.<sup>19</sup>

#### *The ‘human impacts’ and side-effects of court transparency*

33. An impact of digital and social media is the retrieval of justice system data. Historically, an individual convicted of a minor offence (or even acquitted) could hope that their encounter with the court was forgotten over time, allowing (in the case of a conviction), rehabilitation. Research by Hess and Waller has considered the stigmatising effect of Australian media coverage of ‘non-convictions’ or convictions for minor offences, and what they describe as the media or ‘digital pillory’.<sup>20</sup> Sarah Lageson’s work in the United States explores the ‘digital punishment’ arising from ‘data-driven justice’.<sup>21</sup> In the UK, Unlock, a charity that represents people with convictions, has run a programme of work drawing attention to the ‘Google Effect’ for people with spent convictions.

34. In 2018, I conducted a pilot focus group with people with convictions, facilitated by Unlock to explore the impact of digital publicity and court proceedings. This preliminary research exercise – which I would like to develop with further funding – indicated that digital publicity of crimes (particularly by the media) had substantial knock-on effects for people with even minor convictions, hindering future employment and social relations. It is a complex topic with competing interests at play, and at this stage, I do not offer firm conclusions, but flag it as an area worthy of further investigation. See *Observing Justice* (Townend and Welsh, forthcoming 2023, BUP).

35. While increasing court transparency is desirable, the side-effects must also be considered. To date, these tensions are often overlooked. For example, in the Lammy Review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System in 2017, there were two interesting but potentially conflicting recommendations: to publish sentencing remarks; and to seal certain criminal records. There would be societal benefits in both initiatives, but the former could potentially undermine the latter, depending on the mechanism and rules for sentencing remark publication. We need to develop mechanisms that maximise societal benefits – enhancing transparency whilst also encouraging rehabilitation and avoiding undue stigmatisation.

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<sup>18</sup> <https://www.gov.uk/government/publications/uk-national-action-plan-for-open-government-2021-2023/uk-national-action-plan-for-open-government-2021-2023#commitment-2-open-justice>

<sup>19</sup> Department of Justice, ‘Open Government at Justice’ <<https://justice.gc.ca/eng/trans/open-ouvert.html>>

<sup>20</sup> See, e.g., Hess K and Waller L, ‘Media as Pillory: The Power to “name and Shame” in Digital Times’ (*The Conversation*, 8 August 2014) <<http://theconversation.com/media-as-pillory-the-power-to-name-and-shame-in-digital-times-15914>>.

<sup>21</sup> Lageson SE, *Digital Punishment: Privacy, Stigma, and the Harms of Data-Driven Criminal Justice* (Oxford University Press 2020)

36. Although privacy measures are often portrayed as inimical to open justice, it is possible to respect both transparency and privacy (where justified). As the Transparency Project explained in its submission to the Family Division Transparency Review in 2020:
37. *“Our charitable objectives do not require us to abandon important principles of privacy or to support transparency that is unsafe, because the objectives relate to the sound administration of the law. We see our role as one of responsibility, that we should support ways of achieving greater transparency without compromising the core objectives of a family justice system or any individuals. We do not see transparency and privacy as straightforwardly opposed, though they may often be in tension.”*<sup>22</sup>

## 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?**

38. The information is essential for court reporting, especially as non-accredited journalists are not generally permitted access to the ‘full’ court lists. However, I am concerned about the potentially stigmatising effects of fuller digital publication of court records, and I think a more consistent and informed approach needs to be developed over time, based on research and consultation among the public and affected communities. The MOJ, might, for example, commission comparative research considering how other countries’ process their records and the impacts on access to justice, freedom of expression, and rehabilitation/recidivism (among other factors).

### **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)?**

39. Names should be anonymised if subject to an automatic or discretionary restriction. The MOJ should undertake research on different listings access and publication models that would allow those interested in the case to access the necessary information (to which they are permitted to access under court rules), while minimising the impact on the individuals involved. For example, the case number/code can be listed publicly, and separately that number could be used to retrieve information about the parties (introducing some informational friction into the design of the system).
40. More detail should be made available about the nature of the proceedings (e.g. the details of a criminal charge) which is currently inconsistently available in the current system for online listings.

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<sup>22</sup> ‘Response of The Transparency Project to the Call for Evidence’ (April 2020) <<https://www.transparencyproject.org.uk/press/wp-content/uploads/transparency-consultation-response-29-April-2020.pdf>> p.5

41. Additionally, lists and results should be historically archived (according to an archiving policy) to allow legal research and scrutiny of cases after a case has completed.

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

42. At present, discretionary or automatic restrictions are not reliably listed against listings. Previously there have been discussions about creating some of database for the media to access which have not been operationalised. Obviously, any system needs careful design: to allow wide access to the detail of any reporting restriction order would undermine its purpose.

43. As a minimum, a case listing should be accurately tagged with notification of a restriction and notification of restrictions should also be communicated clearly in physical and remote hearings. Details of this restriction should be available on request to any person intending on publicly reporting the case. It may not be necessary to communicate the identity of the person to an observer, but they can be told that a court participant (e.g. victim) cannot be named. However, any system would need to be suitably designed for the many varieties of court types across civil and criminal courts and tribunals (for family, please refer to evidence submitted by the Transparency Project).

**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?**

44. No. But perhaps a relevant point to mention here is that listings data could be of relevance to academic researchers and made accessible following an application to HMCTS.

**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?**

45. Other types of public interest observers (e.g. academic researchers) may have a legitimate interest in access some additional courts data but their requirements may differ from that of media organisations: they may be more interested in the details of a case, and demographic category data, rather than personal names and addresses.

**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?**

46. N/A

## 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?**

47. Yes.

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

48. Listings should link to the relevant FaCT listing contact information.

49. There is currently not sufficient instruction or information to observers about how to contact a court to check listing information, or request remote hearing information and details of reporting restrictions: the relevant contacts (to a responsive point of contact) should be clearly listed on each FaCT listing.

## 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?**

50. Journalists and other observers struggled to obtain access to remote hearings during the pandemic period, though improvements have since been reported.

51. This is an area that requires more research and attention by MOJ/HMCTS and the Judiciary.

52. At the present time, given the paucity of research on the impacts on court participants, I think it would be too radical a leap to begin broadcasting and live-streaming online (as currently permitted in the UK Supreme Court and for some hearings in the Court of Appeal) proceedings involving lay participants (and, indeed, would require legislative reform). However, in general, people who wish to observe proceedings should be supplied

with the relevant joining information. They should also be notified of any reporting restrictions that apply, and provided with information about contempt of court and the risks for anyone publicly sharing details about, or commenting on, a case.

53. Presently, there seems to be some inconsistency in terms of how this is administered according to judicial guidance and court rules. HMCTS should gather data on the conduct of remote hearings, monitor how public access is being provided, and review access mechanisms in light of this data.

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

54. Yes: if they respect proceedings and agree to comply 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. Design of remote platform access and restriction mechanisms needs further attention.

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

55. Yes, subject to reporting restrictions and the established derogations from open justice.
56. Restriction of access exclusively to the 'accredited' media, that would exclude other public observers, must be strictly justified.

**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?**

57. N/A (refer to evidence submitted by the Transparency Project).

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

58. N/A (refer to evidence submitted by the Transparency Project).

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

59. Publicly accessible buildings with disabled access and easily accessible by public transport. Details should be clearly publicised online.

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

60. At the moment, court observers (journalists and non-journalists) report frequent difficulties with accessing remote hearing details in sufficient time to attend proceedings. Participants in a workshop held in May 2023 noted that it was currently a highly inefficient system for accessing details of physical and remote hearings to facilitate attendance.<sup>23</sup>
61. One participant noted that there is a need for advanced and sufficiently detailed listing information and a more efficient method of information sharing, than emailing individual courts on an ad hoc basis.
62. A reliable point of contact email/phone number needs to be advertised for the court, so that details can be obtained in sufficient notice. It may be possible to develop an online portal for registered users, but the design and access of this needs careful consideration (see above).

## **Questions on broadcasting**

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

63. N/A (refer to evidence submitted by the Transparency Project).

**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?**

64. N/A (refer to evidence submitted by the Transparency Project).

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

65. N/A (refer to evidence submitted by the Transparency Project).

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<sup>23</sup> See: <https://www.gtc.ox.ac.uk/courts-and-tribunals-access-and-observation-workshop/>

**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?**

66. N/A (refer to evidence submitted by the Transparency Project).

## Questions on Single Justice Procedure

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

67. The provision of basic online listings and the supply of further information about SJP cases for members of the 'accredited' media were positive developments, given widespread concerns about SJP and the initial absence of information; however, this is insufficient for full transparency of proceedings and the process of justice. Again, as proposed above, a system could be designed to allow further information on request without necessarily publishing full personal details online.

Please refer to evidence submitted by Transform Justice.

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

Please refer to evidence submitted by Transform Justice.

68. Separately but related to SJP, a particularly overlooked issue is how transparency can be achieved for online conviction processes. Not only is there a concern about accessing specific case information, but it also means the nature of the 'hearing' or process is unobserved; the charity Transform Justice has drawn attention to this, observing that for online criminal convictions (for specified minor offences), not only is the information about cases unavailable but 'the theoretical online process is not accessible for scrutiny. It is only visible to those who have been charged'.<sup>24</sup>

## 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.**

69. Please refer to evidence submitted by the Transparency Project.

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<sup>24</sup> Transform Justice, 'Briefing on the Criminal Justice Aspects of the Judicial Review and Courts Bill' (2021) < <https://www.transformjustice.org.uk/publication/briefing-on-the-criminal-justice-aspects-of-the-judicial-review-and-courts-bill/> > p.9.

**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?**

70. A more consistently administered service makes sense in principle. However, third party processing of personal data needs careful thought and impact assessment, in terms of developing the licensing system. Such a system would need careful roll-out and education of court staff and judges to ensure that the process functions effectively (and leads to more rather than less archiving and dissemination of judgments).

**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.**

71. N/A

**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.**

72. Transcripts and recordings of hearings should also be preserved and made available for research purposes under appropriate conditions.

73. The National Archives may be a suitable host 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. At present it seems many such recordings are simply destroyed after a number of years and not made available when requested (with, if the recording is still available, the only option being the commission of an expensive transcript which is outside the budget of many potential requesters).

74. This has an impact for access to justice and appellant's ability to access relevant information (as highlighted by the organisations APPEAL and the Justice Gap in recent years).<sup>25</sup>

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<sup>25</sup> <https://appeal.org.uk/open-justice>



**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.**

75. N/A

**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?**

76. I am not aware of extensive or systematic research on this. Some research has considered the potential impact on employment tribunal users<sup>26</sup> and there is wider research on the stigmatising impacts of digital records in the criminal context (see above). Further independent and MOJ-commissioned research on the human impacts (as discussed in my forthcoming book with Welsh, *Observing Justice*) would be welcome.

77. Please also refer to the evidence of the Transparency Project.

## 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?**

78. As noted in the evidence provided by the Transparency Project, to understand a case while watching the hearing, and to enable rounded, balanced and accurate reporting of the case if and when writing it up. Since much of the evidence and submissions in most cases is now presented in writing, and only a proportion of it is read out into the audible record, it is impossible to fully observe a hearing without having access to such material. Indeed, it calls into question how much meaningful the right of observation is for anyone not having access to such written material.

**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?**

79. It would be helpful if this was clearly communicated on court websites.

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

80. It would be helpful if this was clearly communicated on court websites.

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<sup>26</sup> Adams, Z., Adams-Prassl, A., & Adams-Prassl, J. (2022). Online tribunal judgments and the limits of open justice. *Legal Studies*, 42(1), 42-60. doi:10.1017/lst.2021.30

81. My understanding, based on conversations with court observers, that documents cannot always be reliably accessed (even via the correct routes and when legitimately requested) and can be overly costly, if trying to access a large number of documents (as necessary, for example, to scrutinise systemic issues). See workshop report in May 2023:  
<https://www.gtc.ox.ac.uk/courts-and-tribunals-access-and-observation-workshop/>

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

82. It would be helpful if this was clearly communicated on court websites.

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

83. As well as court lists, participants in a workshop in May 2023<sup>27</sup> reported their frustrations with accessing court documents physically and virtually. These include witness statements and skeleton arguments, as well as statements of case. One issue for observers is that documents are not always read out in court, making it impossible or difficult to follow proceedings, when legal representatives refer to documents to which they have no access.
84. Some courts – such as the Commercial Court – has guidance which stipulates that members of the public can access skeleton arguments, which is helpful for observers. The group also discussed issues around accessing reporting restriction orders. In the Court of Protection, a Transparency Order sets out what cannot be reported in a given case, which is essential to its reporting. However, the TO is not always made available.
85. A better and more reliable system for accessing documents is required (as highlighted in *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 (29 July 2019) [51]).
86. Many years ago I struggled to obtain access to a large number of court documents held in the Queen’s Bench Division at the Royal Courts of Justice to which I was entitled to access but there was no practical means of identifying. These documents would now be made available via CE-file (with cases searchable by type). However, there would likely remain a cost barrier (as similar fees apply despite the electronic availability of the documents). Academics and public interest researchers should be able to access documents in bulk for a lower fee, or no fee, to reduce cost barriers to research on important systemic issues.

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<sup>27</sup> <https://www.gtc.ox.ac.uk/courts-and-tribunals-access-and-observation-workshop/>

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

87. A clear practice direction applying generally across all jurisdictions, citing the relevant procedural rules for all the different jurisdictions.

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

90. A clear practice direction applying generally across all jurisdictions, citing the relevant procedural rules for all the different jurisdictions. Originating document (claim form, appellant's notice, etc) plus skeleton arguments relied on by all parties, plus any other document (e.g. witness statement) read out in or referred to during the hearing.

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

91. See evidence submitted by Transparency Project. By linking together online filing, case listing, and publication of judgments and orders. Where cases are heard or accessible remotely, the documents could be made accessible via the online hearing platform or portal.

92. Access to such a portal would need careful design (and in terms of managing restricted information) with oversight by the Data Governance Panel.

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

93. There could be rules permitting greater access to confidential material or personal data, subject to restrictions as to the use or onward publication of the material. It should be recognised that other public interest actors (e.g. from NGOs or academic institutions) may have an interest in accessing this data as well as media organisations. However, again, principles and mechanisms of access need careful design and oversight.

**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?**

94. N/A

## **Questions on data access and reuse**

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

95. To develop legal services and products; to promote research; to support access to justice; to facilitate accountability and transparency; to provide public legal education.

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

96. N/A

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

97. N/A

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

98. Lack of consistency in the collection, archiving and dissemination of such data.

**55/. 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?**

99. See evidence from the Transparency Project, which I duplicate here: a survey conducted by IPSOS for The Legal Education Foundation published in 2022 (to which I was an advisor)<sup>28</sup> 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.

100. Another common misconception might be that judges' decisions can be predicted by analysing their previous decisions. But judgments (particularly family court judgments) are too unstructured to permit reliable analysis to detect such patterns of behaviour, and we [the Transparency Project] think that the evaluative nature of much family judge decision making is not susceptible to easy analysis. Data based on court filings (type of action, issues, sums

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<sup>28</sup> 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>>

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.

**56/. 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.**

101. There is a need for further research here; I am considering options for such a project. The MOJ would do well to consider a community-involved approach to technology uses and governance, as advocated by Connected by Data (to which I am affiliated as a fellow).<sup>29</sup>

**57/. 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?**

102. As above.

## Questions on public legal education

**58/. 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.**

103. It was encouraging to see the Attorney General's Office draw public awareness to the rules of contempt in an online campaign<sup>30</sup> (even though an earlier consultation on the impact of social media on the administration of justice concluded that social media did not pose a serious threat).<sup>31</sup> However, the reach of this campaign may be limited. More can be done through public legal education, including within secondary schools and further/higher education. Further, HMCTS could offer better guidance and resources to court users, explaining that reporting restrictions may apply, and that there are strict rules concerning the reporting of court. One problem is that discretionary reporting restrictions are often difficult to clarify, even for experienced journalists with good knowledge of court practices. The

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<sup>29</sup> <https://connectedbydata.org/>

<sup>30</sup> 'Attorney General Launches New Campaign to Combat Contempt of Court Online' (*Gov.uk*, 28 June 2021) <<https://www.gov.uk/government/news/attorney-general-launches-new-campaign-to-combat-contempt-of-court-online>>

<sup>31</sup> 'Is Social Media Harming Our Criminal Justice System?' (*Gov.uk*, 5 March 2019) <<https://www.gov.uk/government/news/is-social-media-harming-our-criminal-justice-system>>

notification of discretionary reporting restrictions is inconsistent between courts, and it is assumed that court users will be aware of the automatic restrictions in law.

**59/. Do you think the government are successful in making the public aware when new developments or processes are made in relation to the justice system?**

104. Please refer to evidence by the Transparency Project.

**60/. What do you think are the main knowledge gaps in the public's understanding of the justice system?**

105. It is evident that there are large knowledge gaps, though this is not something I have directly researched. The MOJ and Attorney General's Office should commission such research to guide their work in this area. Although NGOs and research organisations play an important role here, centralised/official information should also be provided by the MOJ, HMCTS, AJO and Judicial Office.

106. It may be helpful for the Judicial Office/HMCTS to make available explainers about different aspects of the legal system, to clarify common misperceptions which are sometimes replicated in the media.

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

107. Please refer to evidence by the Transparency Project.

**62/. 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.**

108. Yes. Please refer to evidence by the Transparency Project.

**63/. Do you think the government is best placed to increase knowledge around the justice system? Please explain the reasons for your answer.**

109. Please refer to evidence by the Transparency Project.

**64/. Who else do you think can help to increase knowledge of the justice system?**

110. Please refer to evidence by the Transparency Project.

65/. Which methods do you feel are most effective for increasing public knowledge of the justice system e.g., government campaigns, the school curriculum, court and tribunal open days etc.?

111. Education through online tools, social media platforms and educational institutions. The school curriculum could be expanded to more fully explain the legal system and courts, as well as practical information on the legal issues and processes that people living in the UK are most likely to encounter. The MOJ would do well to survey other countries to see what examples of best practice in public legal education can be found, and potentially commission research that examines the impact of PLE provision.

### Further information

My relevant affiliations include: core member, The Transparency Project; member of the advisory board, Justice Gap; fellow, Connected by Data. I have been commissioned/funded to undertake research in this area by Spotlight on Corruption (formerly part of Corruption Watch) in 2019 and the Legal Education Foundation in 2020. Relevant publications include:

- Townend J and Welsh L (forthcoming November 2023) *Observing Justice: Digital Transparency, Openness and Accountability in Criminal Courts* (Law, Society, Policy series) Bristol University Press: Bristol, UK [extracts available on request]
- Townend, J. and Prasad, A. (2023) Courts and Tribunals Access and Observation Workshop Report. Oxford: Sheila Kitzinger Programme, Green Templeton College, University of Oxford, pp. 1–15. <<https://www.gtc.ox.ac.uk/courts-and-tribunals-access-and-observation-workshop/>> [open access]
- Townend, J. and Bosland, J. (2023) ‘Reporting crime in the wake of the Human Rights Act 1998: privacy, criminal justice and the media in England & Wales’, in A. Roberts, J. Purhouse, and J. Bosland (eds) *Privacy, Technology, and the Criminal Process*. Routledge.
- Townend J and Magrath P ‘Remote trial and error: how COVID-19 changed public access to court proceedings’ (2021), *Journal of Media Law*, DOI: 10.1080/17577632.2021.1979844 <<https://www.tandfonline.com/doi/full/10.1080/17577632.2021.1979844?src=>> [open access]
- Townend J and Wiener C, ‘“Justice System Data” : A Comparative Study’ (The Legal Education Foundation 2021) <<https://research.thelegaleducationfoundation.org/research-learning/funded-research/justice-system-data-a-comparative-study>> [open access]; executive summary here: <<https://research.thelegaleducationfoundation.org/wp-content/uploads/2021/07/WJ21-LEF-V10-16072021-FAW.pdf>>
- Townend J, ‘We Must See Them in Court’ (2019) 30 *British Journalism Review* 35 <<https://www.bjr.org.uk/archive+we+must+see+them+in+court>> [open access]
- Townend J, ‘Towards a National Commitment to Open Justice Data in the United Kingdom’ (Spotlight on Corruption / Open Government Network 2019)

<https://www.opengovernment.org.uk/wp-content/uploads/2019/10/Open-courts-final-October-2019-latest.pdf>> [open access]

- Bosland J and Townend J, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) 23 Communications Law 21 <<https://sro.sussex.ac.uk/id/eprint/80451/3/ARTICLE%201%20December%20issue.pdf>> [open access]

Almost all these should be available open access via the links above but please let me know if you require copies or extracts. A full list of my academic publications, with published or pre-publication versions, can be found here: <https://profiles.sussex.ac.uk/p373643-judith-townend/publications>

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