Open Justice, the way forward

Ministry of Justice

Consultation Response

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Open Justice in a modern justice system: Purposes, tensions and tools

… it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Lord Hewart CJ, *R v Sussex Magistrates, Ex p McCarthy* [1924] 1 KB 256

How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes - *who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process.*

Lord Justice Toulson, *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420

Sunlight is the best disinfectant.

US Supreme Court Justice Lois Brandeis, *What Publicity Can Do* (1913)

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Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This paper is submitted in response to the Ministry of Justice's Consultation, *Open Justice: the way forward* ("**the Consultation**").[1]

3. Open justice is a fundamental principle in our justice system. Lord Bingham identified its importance to the rule of law when he observed that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[2] Similarly, we see public hearings embedded in international human rights legislation: Article 10 of the Universal Declaration of Human Rights initially secured the right to a "fair and public hearing", which would then be repeated in Article 6 of the European Convention on Human Rights ("**ECHR**") and Article 14 of the International Covenant on Civil and Political Rights.

4. Transparency is furthermore an accepted aspect of good governance in a democracy.[3] The UK is committed to the Open Government Partnership, which it cofounded over a decade ago, and its principles of transparency, accountability and public participation.[4] When we speak of an *open* justice system, therefore, we are not only referring to the accessibility of individual hearings, but also the wider transparency of the law, as well as the government departments, agencies and public bodies who play a part in the administration and delivery of justice (the Ministry of Justice ("**MOJ**"); His Majesty's Courts and Tribunal Service ("**HMCTS**"); the Crown Prosecutive Service ("**CPS**"); and many more). This is particularly relevant given the swell of concerns in recent years about the UK's commitment to transparent governance.[5]

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[1] Ministry of Justice, *Open Justice: the way forward* (11 May 2023)

[2] Lord Bingham of Cornhill, *Speech on the Rule of Law at the Sixth Sir David Williams Lecture*, 16 November 2006, p 5

[3] For example, Angel Gurría, OECD Secretary-General between 2006 and 2021, described "openness and transparency as "key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economies." at Angel Gurría, 'Openness and Transparency - Pillars for Democracy, Trust and Progress (OECD Web Archive, 17 June 2012)

[4] Central Digital and Data Office, *UK National Action Plan for Open Government 2021 - 2023* (GOV UK, last updated 23 August 2022)

[5] Transparency International considers the UK to be a 'country to watch' over the coming year, with its score on the Corruption Perceptions Index plummeting to a decade low of 73; see Transparency International, '*9 Countries to Watch on the 2022 Corruption Perceptions Index*', (2023). The Index on Censorship, which monitors freedom of expression around the world, considers the UK to be only "*partially open*" in terms of academic, digital and media freedom, alongside countries such as Botswana, Czechia, Greece, Moldova, Panama, Romania, South Africa and Tunisia. This stands in contrast to other States enjoying the highest ranking ("*open*"), such as Australia, Belgium, Costa Rica, Estonia, Germany and Portugal; see Index on Censorship, '*Major new global free expression index sees UK ranking stumble across academic, digital and media freedom'* (2023). Likewise, the UK's civic space rating on the Civicus Monitor, which tracks fundamental freedoms in 197 countries, has been downgraded from 'narrowed' to 'obstructed'; see Civicus, '*United Kingdom Downgraded in Global Ratings Report on Civic Freedoms*', (2023).

Context

5. The Consultation authors note that there has not been a "public evaluation" of open justice since 2012.[6] The current consultation is therefore timely, as the last decade has seen several significant developments which have changed both the justice system itself and the legal and social context in which it exists. The following is a non-exhaustive list of some of those changing contexts.

   a) In April 2013, the Legal Aid, Sentencing and Punishment of offenders Act 2012 ("**LASPO**") came into force, drastically curtailing public funding for legal advice on a range of civil and family issues, and thereby limiting the public's access to a professional to help them understand the legal aspects of their problems.

   b) Since 2016, the justice system in England and Wales has been undergoing a vast process of digital transformation under the auspices of the HMCTS Reform Programme. Digital application processes and digital case management systems have replaced paper in some jurisdictions, with the most change seen in criminal processes, for example the Common Platform Programme, the Digital Case System, and the Single Justice Procedure.

   c) The court estate has been significantly reduced in the past decade: over half of the country's magistrates' courts closed between 2010 and 2019; and over one third of the total number of court and tribunal buildings closed during the digitisation process between 2015 and 2019.[7]

   d) The legal framework for controlling and processing personal data was revolutionised in 2016 by the EU General Data Protection Regulation ("**GDPR**"), which continues to be secured in UK domestic law as the UK GDPR.

   e) There has been a decline in the number of journalists reporting on the courts, especially at a local level.[8]

   f) Information can be disseminated at ever increasing speeds and quantities, with the average digitally-enabled individual having effortless global reach through social media channels. Social media has also made communication about that information as accessible as the information itself; instead of traditional one-way dissemination, like newspapers or television broadcasts, social media enables a network in which many can comment on and interact with the information being shared, in real time and with ease.

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[6] JUSTICE is unsure of the public evaluation to which this comment refers. If it is the Justice and Security Green Paper, which consulted between October 2011 and January 2012, it is important to note that consultation focused exclusively on limitations to open justice for reasons of national security. JUSTICE is unaware of any wider consideration of open justice at the time. See Cabinet Office, 'Justice and Security Green Paper' (19 October 2011) and the Government's response at Ministry of Justice, 'Government's response to the public consultation on justice and security' (29 May 2012). See JUSTICE's response to the Green Paper; JUSTICE, 'Justice and Security Green Paper (Cm 8194)' (January 2012) and our briefings on the Justice and Security Bill (now Act 2013) which followed; JUSTICE, 'Justice and Security Bill' (variously dated 2012-2013)

[7] Georgina Sturge, *Data dashboards - Constituency data: Magistrates' court closures* (House of Commons Library, 13 May 2020). In 2019, 127 of 468 court and tribunal buildings in England and Wales had closed. See *HM Courts & Tribunals estate visualisation - Report - Interactive visualisation* (National Audit Office, 4 September 2019)

[8] Frances Cairncross, *The Cairncross Review: A Sustainable Future for Journalism* (Department for Culture, Media and Sport and Department for Digital, Culture, Media & Sport, 2019) p.21

g) The use of video technology to observe and participate in court proceedings remotely was accelerated beyond anything planned in that decade due to the Coronavirus pandemic in 2020. While many in person facilities have resumed, there is a clear legacy of remote practice.

h) There have been advances in artificial intelligence world-wide which enable the mass analysis of data. These include advances in legal and judicial analytics, which can provide predictions on merits and judicial outcomes based on bulk data, with such tools being already marketed by global legal information companies e.g. Bloomberg, Lexis Nexis and Westlaw. In addition, free large language models are accessible worldwide, such as Bard and Chat GPT, which can be used to answer legal questions based on deep neural network text predictions, albeit with varying levels of accuracy.

i) In 2019 the Court of Appeal (Civil Division) began livestreaming its cases on the Judiciary's YouTube channel. In 2022, sentencing remarks in criminal cases began to be filmed by approved press bodies, for broadcast as well as being available on YouTube.

j) In 2022, the Find Case Law site from The National Archives went live; an online archive of judgments in a machine-readable format.[9]

6. We see in this snapshot of developments that resources have been rationalised, systems have been digitised, and there are more tools available to the public than ever before to access, analyse and comment publicly on justice.

7. **JUSTICE therefore welcomes this consultation given the considerable societal and technological changes which have occurred. We also make an initial recommendation at the outset, on the basis that a healthy respect for and consideration of open justice cannot be sustained through sporadic consultations once per decade. We invite the MOJ, HMCTS and other justice executive bodies to reflect on how the open justice principle is integrated in their own policy development, and how this can improve. One very practical example would be inclusion of open justice and transparency within decision-making processes, such as being a header in policy submissions to ministers.**

Summary of response

8. In our response to the consultation below, we interrogate several things in sequence:

a) why open justice is important (*the purpose*);

b) what other interests, rights and principles we need to grapple with (*the tensions*); and then

c) how open justice can be practically enabled, now and in the future (*the tools*).

Where possible, we have linked the sections of this response to specific questions in the consultation.

9. In summary we make the following conclusions and recommendations.

[9] The National Archives, *Find Case Law*

10. **With respect to engagement with individual proceedings, we have concluded that:**

a) Court lists should be more accessible and easier to navigate online. They should include enough information for individuals to make decisions about observation of court hearings, whilst not sharing a disproportionate amount of personal information. They are also a clear opportunity to collocate other relevant information for observers which directly impacts their observation of court, including the general legal restrictions on their behaviour (e.g. contempt of court) and those specific to the case (reporting restrictions/transparency orders).

b) With respect to livestreaming, JUSTICE supports the use of designated livestreaming processes for appropriate cases, automated "request a link" processes, and continued judicial discretion to limit whether a case is livestreamed to the public. We recommend consideration of an intermediary role, to support efficient and effective open justice through liaison with the court and observers. This role could support effective observations of in person hearings as well as livestreamed hearings.

c) MOJ should conduct or commission more research on the impact of livestreaming on witnesses, particularly those who are disadvantaged or marginalised.

d) JUSTICE does not consider that broadcast of proceedings should be rolled out any further without consideration of the risks and further research. Substantial consultation with individuals and organisations representing groups of such participants would need to take place, including the Children's Commissioner, the Victims Commissioner, the Domestic Abuse Commissioner, the Anti-Trafficking and Modern Slavery Commissioner, as well as organisations representing the interests of disadvantaged and marginalised groups.

e) JUSTICE supports the publication of an Open Justice Charter for the public without delay. The Charter should explain in one place their rights of access to case documentation, the existing channels available to them and the practical steps involved.

f) JUSTICE also strongly supports a holistic review of court rules and procedures which facilitate access to court documents. This review should consider the consistency, or lack thereof, of access between different courts; the roles and responsibilities for record keeping, redaction and provision; and take a fresh look at whether rules are justified in the public interest.

g) Before any shift to court documents being made available through an online platform, the Government must carefully consider and consult upon the management of various risks, learning from the use of PACER in the US.

h) JUSTICE supports improvements to media access to court documents, however we are concerned that improvements in media tools should not be the sole focus of open justice reform. There are various legitimate reasons why others – including members of the public, civil society organisations, and academic researchers – may wish to observe and scrutinise the justice system, and indeed bring their own different perspectives.

11. **With respect to access to justice system data, we have concluded that:**

    a) Data collection to evaluate the impact of the justice system on marginalised groups, those with protected characteristics, and those experiencing intersectional disadvantage and discrimination, should be prioritised.

    b) JUSTICE recommends MOJ and HMCTS improve its dialogue with the public about data collection. External actors to the justice system (Parliamentarians, civil society organisations, academic researchers, members of the media and individuals) should all be able to highlight gaps in data, perhaps as a function on the new Justice Data website. This should reliably lead to a response, providing the data and/or explaining the reasons for its absence. These gaps should also be collated and considered for future data collection and publication policy.

    c) JUSTICE strongly recommends regular data collection and publication of statistics for the Single Justice Procedure to enable scrutiny. There should also be a review of the processes and training in place for HMCTS Service Centre call agents to facilitate requests for case outcomes from members of the public.

    d) The new Online Procedure Rule Committee, in their imminent work in designing rules and procedures for online dispute resolution processes, should have at the forefront of its mind the question of how open justice will be built into an online court, especially data collection. This should include consideration of how outcomes of both adjudicated as well as settled cases can be collected and evaluated.

    e) JUSTICE is concerned about the transparency and accountability of the executive's powerful role in gatekeeping justice data. JUSTICE considers a holistic review of the landscape is required, of the actors who are deciding the extent of third party reuse; the criteria they are applying; the mechanisms they are using to control such reuse and what evidence we have of the efficacy of any of these control mechanisms. Any review would benefit from constitutional analysis of the difference between justice data and data held by other executive bodies, and the legitimacy of any criterion which allows or prohibits access to justice data due to its alignment with executive research priorities.

    f) JUSTICE recommends engagement with the public on the question of what third party reuse of data is in fact in the public interest. JUSTICE recommends this public engagement should be a dialogue, not a one-off opportunity like this consultation, which has an ongoing role in informing policy and governance. An intermediary organisation could facilitate such a dialogue, and we have identified an example in the health sector.

12. **With respect to public legal education**, we stress the Government has a key role to play in the provision of information about the law and justice processes. However, public legal education alone cannot close the access to justice gap, and must be part of a package of measures which meet various barriers to equal access to justice.

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Purposes of open justice (Question 1 of the Consultation)

13. There are in our assessment three overarching purposes of open justice:

    i) it preserves the **legitimacy** of the justice system in the eyes of the public;

    ii) it facilitates **scrutiny** of the justice system *and* the actors involved in it;

    iii) it increases the **accessibility** of the law itself.

Legitimacy of the justice system in the eyes of the public

14. The administration of justice is a core state function. The courts apply the law on behalf of society, and that same society is expected to comply with the decisions made. Few would contest that, for such authority and power to be legitimate in a democratic society, the process should be transparent, i.e. members of society should be able to know *how* the courts are administering justice on their behalf.

15. Legitimacy in the eyes of the public is important. Perceptions of a corrupt, secretive or otherwise unaccountable justice system could impact public trust and confidence in the courts, regardless of the quality of the decisions being made.[10] This could undermine compliance with the law and the courts, and therefore the rule of law.[11] The risks are to individuals who benefit from court orders, should those bound by them feel at liberty to ignore them, as well as to those who will be dissuaded from seeking the help of the law through mistrust, such as victims of crime.

16. It is also important to note what references to "legitimacy" and "public trust and confidence" do *not* mean. Open justice will *not* always reveal examples of positive practice which reassure the public and inspire trust and confidence, nor should it. Open justice means "letting in the light and allowing the public to scrutinise the workings of the law, for better or for worse".[12]

17. When "for worse" is exposed, it may well diminish public trust and confidence, be it an individual mistake in a case or exposure of entrenched problems and inequalities. However, more detrimental than when mistakes are made is the cost to legitimacy when they are covered up. Indeed, being open to scrutiny (see below) is the price paid for democratic legitimacy. As such, when considering this "purpose" of open justice, it is important to guard against justifications for limiting open justice in the name of maintaining "public trust and confidence" which in fact seek to cover up poor practice

[10] For example, the Sentencing Council has found in surveys of the public that providing information about sentencing guidelines improves confidence in the fairness of sentencing. See Sentencing Council, Public confidence in sentencing and the criminal justice system: 2022, (Sentencing Council, 12 December 2022).

[11] A key factor shaping public behaviour and their deference and cooperation with legal authorities, is the perceived fairness of the processes legal authorities use. This effect is not limited to individuals with direct experience of those processes; it is relevant to wider community evaluations of the law and legal authorities, and their trust and confidence in them. See Tom R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30, pp. 283-357. In relation to perceptions of the court, see J. Jacobson, G. Hunter and A. Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press, 2015)

[12] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, [1]

or unfair outcomes to preserve reputation. Legitimacy and scrutiny are co-dependent, not alternatives.

Scrutiny of the justice system and other actors

18. Open justice serves a practical civic function. What is learned can better inform citizens' understanding of the society in which they live, their lives and relationships, and assist them to make decisions within that society. The public may of course not always approve of everything they see and learn; they may *critically* engage with, i.e. scrutinise, what they see. That that should be tolerated and indeed facilitated by the very institutions subject to criticism is, as discussed above, the price to pay for democratic legitimacy. The ability to scrutinise further supports democratic pluralist values and fundamental human rights, including freedom of thought and conscience, freedom of expression, and freedom of association and assembly.[13] Indeed, criticism of the three institutions of the state – executive, legislature and the judiciary – is regarded as "political speech" under the ECHR and therefore subject to the highest degree of protection.[14]

19. This is the most direct form of scrutiny enabled by open justice: scrutinising the justice system itself. This includes how law is being interpreted and applied by our courts and tribunals, as well as the way the justice system operates, and the cultures, behaviours and policies of the judges, lawyers, magistrates, legal advisors, and court staff in it.

20. However, open justice also goes further and enables scrutiny of external actors involved in court proceedings. Albeit this is not in a uniform way; different degrees of public interest are engaged in scrutinising different actors. When actors exercise power over individuals, be they public bodies or private actors such as corporations, the public interest in scrutinising them is clear. Open justice can illuminate the cultures, behaviours and policies of those actors, how they have impacted individuals in society, especially when found to be unlawful, and again provide the public with information which may inform their social and political understanding within society and their actions. In turn, the public's ability to observe justice being done in cases featuring powerful actors upholds the rule of law in demonstrating its application to all, including the most powerful. The public interest in individuals is different, and can depend on the individual, their position in society, the sensitivity of the information, and the public interest in the case.

21. Scrutiny can have many outcomes. Firstly, the *potential* for scrutiny may have a preventative effect. As Jeremy Bentham stated "*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial".*[15] Over the last 100 years, the term "Hawthorne effect" has emerged, to reflect the idea that being watched in and of itself

[13] Articles 9, 10 and 11 of the European Convention on Human Rights

[14] *Wingrove v United Kingdom* (1996) 24 EHRR 1; *Lingens v Austria* (1986) 8 EHRR 103; *Thorgeirson v Iceland* (1992) 14 EHRR 843; Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) p. 50-51.

[15] As quoted by Lord Shaw of Dunfermline in his judgment in *Scott v Scott* [1913] AC 417, [477]

can impact the behaviour of those being observed.[16] Some court-observer projects have suggested that, on the whole, professionals including lawyers and judges are on their "best behaviour" when they are being observed.[17] There is also, conversely, the need to be aware of any negative effect that being observed may have on the administration of justice, for example if the quality of evidence is impacted by distress caused to witnesses.

22. Alternatively, scrutiny may not of course always prevent improbity. When it doesn't, it can assist the public to hold actors to account through various channels, for example complaint mechanisms, media publicity, social justice campaigns, and in Parliament.

23. Furthermore, it can ultimately result in improvements and progress. For example, when patterns of unfair or unequal outcomes are identified, they can be subject to specific consideration and reform effort. Or when areas in which the application of the law no longer reflects societal norms are identified, proposals for reform can then emerge for public debate. This is often greatly facilitated by agents, such as journalists, academics and civil society organisations, as well as by individual citizens. And it can also be frustrated by a lack of resources, bureaucracy, and entrenched cultures resistant to change.

Accessibility of the law itself

24. The justice system deals with society's problems according to the rule of law. A key tenet of the rule of law is that the law itself, the rights and remedies therein, must be accessible by all, not just the most privileged or powerful. This means duties and liabilities should be knowable by those bound by them, and rights by law should be enforceable by all those entitled to them.

25. Many barriers exist to making the law and the justice system equally accessible to all, including the resources at people's disposal (financial, relational, emotional, practical, educational etc.) as well as their confidence to act. Ensuring the justice system is open can play a part in supporting access to justice, particularly for those who may be disadvantaged, marginalised or disempowered in society and therefore lack understanding, confidence or resources to claim or defend their legal rights.

26. Knowing the outcomes of cases is a crucial first step. Indeed, since we are a common law jurisdiction, having access to legislation alone cannot inform the lay person of the law as it stands. However, if the lay person is to understand the law as it will be applied in court, they must also understand which judgments are binding, which are not; what is "good law", what has been overturned.

27. Even if an individual does not become involved in litigation, public understanding of the law and how it is likely to be applied informs thousands of behaviours, polices, and practices across society every day. As has been observed by socio-legal researchers

[16] The effect was originally identified in intensely supervised factory workers. Since then, its application has been vast across social sciences, with many researchers agonising over it in their own methodology, asking how they can minimise the impact their presence will have on the outcomes of the research. See further E.A.M Gale, 'The Hawthorne studies—a fable for our times?' (2004) *QJM: An International Journal of Medicine,* 97:7, 439–449

[17] See Bath Publishing, 'Webinar: Does being watched change how justice is done?', (various, 21 January 2021); and with respect to the Court of Protection, see Celia Kitzinger, 'How being watched changes how justice is done: 'Insider' Perspectives', (Open Justice: Court of Protection Project, 20 January 2021).

"law works quietly and unobtrusively, to shape both attitudes and behaviour . . . and communicating particular visions of order, justice, goodness, property, family, health, education."[18] And when a justiciable problem does arise, the public need an understanding of what a realistic legal outcome looks like in their case, or cases similar to theirs.

28. For many years now, efforts to encourage alternative dispute resolution have continued, concurrent with drastic cuts to legal aid. The net risk is that more people than ever are settling cases outside of the justice system, but they are doing so considerably less informed of their legal position. Open justice in the modern age therefore must include making legal norms accessible to those who are not going to court, as well as those who are. Doing so will help secure the rule of law across society, not just within the court building, thereby legally empowering individuals rather than entrenching their disadvantage.

29. Finally, open justice can improve access to justice through familiarisation. This is not legal understanding of black letter law, but rather the demystification of the law, the justice system, and the professionals therein. Should certain members of society who need the law and the courts – for protection from harm, or to enforce their rights – be intimidated by the process, they will be less likely to access it. The consequence will be to further entrench the marginalisation of those individuals and increase their disadvantage, risking the courts being available disproportionately to those who are confident, assertive and with resources.

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[18] Austin Sarat and Susan Silbey, 'The Pull of the Policy Audience' [1988] Law and Policy 10, 2 - 3, p. 85.

Tensions of open justice

> *While the broad principle and its objective are unquestionable, its practical application may need reconsideration from time to time to take account of changes in the way that society and the courts work.*
>
> Lord Justice Toulson, *R (Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [5]

30. Open justice does not exist in a vacuum. As the above quotation from Lord Justice Toulson acknowledges, other principles, rights and interests exist, which need to be taken into account.[19] The below list of other factors does not exhaustively map out all of the tensions that exist with open justice, but gives some indication of the variety of other factors at play when (re)considering how we *do* open justice in practice.

The fair administration of justice

31. Limitations to open justice can be seen when they may undermine the fairness of proceedings themselves. Contempt of court is the most obvious example: a strict liability offence to say or write something in public if it "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced."[20]

32. Further case by case adaptations exist within judicial case management powers. These often involve language of "necessity", of public interest and the interests of justice. For example, witness anonymity applications are "a special measure of last practicable resort".[21] Just preferring to remain anonymous is not enough; the order must be necessary for safety or public interest reasons, the defendant must still get a fair trial, and the witness's testimony must be important in the interests of justice.[22]

33. The courts may also deploy softer measures to limit the extent to which someone is observable in court, such as through the use of video-link evidence or screens.[23] The rationale acknowledges that such measures may "improve the quality of the evidence given".[24]

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[19] Again these other factors are well established in international human rights law; for example Article 6 ECHR explains that the press and public may be excluded from all or part of the trial "in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ..."

[20] Contempt of Court Act 1981, s.2(2)

[21] *R v Mayers* [2008] EWCA Crim 2989

[22] Coroners and Justice Act 2009, s.88

[23] The purpose of screens is to screen the witness from the accused. While some actors in the court, like the judge, any jury, legal representatives, cannot be blocked as a result, the public are not so protected, and it is lawful for the screening to block the public from viewing the witnesses. See Youth Justice and Criminal Evidence Act 1999, s.23

[24] Youth Justice and Criminal Evidence Act 1999, s.19

34. Finally, it is of note that parole hearings can now be held in public, having been entirely closed until July 2022. Whether a hearing will be in public will include consideration of the sensitivity of the evidence, what will ensure best evidence of witnesses, and whether open and honest discussion in the hearing would be inhibited, all of which are factors in whether a public hearing would be "in the interests of justice".[25] Notably, the position implies that that it is not in the public interest to have a presumption of open justice. In fact, the Parole Board applies the opposite presumption; the expectation is that oral hearings will be in private, and good reasons have to be given to displace that presumption.

Privacy

35. Private information is scattered throughout the justice system, in the evidence it hears, the decisions it makes and the data it retains. Perhaps inevitably, there are then a variety of ways in which privacy impacts the openness of justice.

Privacy in courts and tribunals

36. All individuals have a right to privacy and a family life, secured in Article 8 ECHR, which binds the courts as public authorities.[26] However, Article 8 is not absolute, and can be limited in accordance with the law, pursuant to a legitimate aim, and in a proportionate way, including in the protection of the rights and freedoms of others. When an issue of individual privacy is raised in court, within the court's discretion to limit open justice, the court will deal with the right in the context of open justice being a fundamental principle, and will balance Article 8 with Article 10 ECHR, which secures freedom of expression.[27]

37. However, privacy in our justice system is governed by a range of other ways. For example, the family justice system presumptively holds its hearings in private,[28] about which any publication is contempt of court.[29] The same families may also go through housing proceedings or criminal proceedings, however the applicable law regarding their privacy is different. There are plausible wider cultural reasons for this in the family justice system, including the potential for lack of publicity to encourage candour in parents, in a jurisdiction in which the paramount consideration is the child's welfare, not punishment. However, concerns have been raised for some time about the proportionality of the privacy afforded to family justice and the lack of scrutiny available. In response, the President of the Family Division has recently led several transparency pilots in family proceedings, including encouraging judicial judgment writing, reconsidering data transparency, and most notably a reporting pilot for legally trained bloggers and accredited journalists.[30] In all these pilots, tools to maintain individual privacy – anonymised data, anonymised judgments and anonymised reporting – are being used, while enabling improved transparency of the system and other actors,

[25] Parole Board, Oral Hearing Guidance, (Version 2.0, October 2022), p. 27

[26] Human Rights Act 1998, s.6(3)

[27] *Khuja v Times Newspapers Limited and others* [2017] UKSC 49, [15]

[28] Family Procedure Rules 2010 ['FPR'], r 27.10

[29] Administrative Justice Act 1961, s.12

[30] See further at Courts and Tribunals Judiciary, '*Transparency Implementation Group*' (Judiciary UK, undated)

particularly the interactions of these families with state authorities (the court, Cafcass, and local authorities).

38. Elsewhere, carve outs have been created for individuals in particular situations or with particular characteristics, for example the prohibition against publishing any material identifying children in family proceedings,[31] the automatic anonymity for child defendants in youth court proceedings,[32] and for complainants of sexual offences.[33] Here, Parliament has decided to displace the principle of open justice, and create a starting point of privacy. In the above example, the rationales include protecting those who have not reached adulthood from publicity about criminal allegations and convictions; and a desire to prevent victims of sexual offences from being discouraged from reporting crimes for fear of publicity.

39. In public proceedings, when the court is acting outside of any of these legislative carve outs, it has at its disposal discretionary measures to make proceedings more private, both through explicit statutory powers and under the court's inherent jurisdiction. However, privacy is the exception, and not the rule. For example, adult witness anonymity applications (other than for complainants in sexual offences cases) are "a special measure of last practicable resort".[34]

40. There has for some time, however, been concern about "the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as exceptions are applied by analogy to existing cases".[35] Recently, Kerr J warned of a "creeping march of anonymity and redaction" in otherwise public proceedings, commenting, obiter, that "Courts and tribunals should not be squeamish about naming innocent people caught up in alleged wrongdoing of others. It is part of the price of open justice and there is no presumption that their privacy is more important than open justice".[36]

Privacy and data

41. Meanwhile, there is a clear contrast between the approach of courts to individuals' privacy in court proceedings, and in the way in which that data is handled before and after those proceedings. While data protection law does not bind those functioning in a judicial capacity,[37] it does apply to actors in the justice system who control and process personal data outside, such as government departments, agencies and public bodies. It also binds third parties who may access that data. Therefore, in contrast to Kerr J's comment to courts and tribunals above, data protection law *does* create a reason to be "squeamish". Any processing of personal data will only be lawful if and to the extent it can be shown to come under a legal basis. These various legal bases include being consensual, necessary for compliance with a legal obligation, necessary for the protection of the vital interests of an individual, necessary for a task which is in

[31] Children Act 1989, s.97(2)

[32] Children and Young Persons Act 1933, s.49

[33] Sexual Offences (Amendment) Act 1992, s.1

[34] "*Mayers* [2008] EWCA Crim 2989

[35] *R v Legal Aid Board, Ex p Kaim Todne*r [1999] QB 966, [977], per Lord Woolf MR, endorsed by the House of Lords in *Re S (Identification: Restrictions on Publication)* [2005] 1 AC 593, at [29] (Lord Steyn).

[36] *Lu v Solicitors Regulation Authority* [2022] EWHC 1729 (Admin), [2022] IRLR 962, at [138]

[37] Data Protection Act 2018, Schedule 2, paragraph 14

the public interest, or necessary to pursue a legitimate interest.[38] Furthermore, the principles of data minimisation and purpose limitation apply, i.e. the personal data needs to be collected for a specified, explicit and legitimate purpose, not be further processed beyond that purpose, and be limited to what is necessary for that purpose.[39]

Private dispute resolution

42. Finally, individuals may have an interest in preserving their own privacy, to the extent that it can impact their behaviour and how they access justice. This in turn may impact the extent to which justice is "open". In civil matters, parties may decide to settle a case out of court confidentially, factoring in the risk of publicity in open court alongside other factors such as time and cost. In large commercial disputes this can make private arbitration attractive, and in civil claims it can make alternative dispute resolution (ADR) processes like mediation more attractive than court.

43. Policy responses have been extremely favourable here, and private resolutions of civil issues are resoundingly encouraged. Indeed, the MOJ recently announced an intention to make alternative dispute resolution mandatory in small claims, and is considering further integrating ADR in higher value claims.[40] However, increasingly private resolution of disputes is not without problems; there may be impacts on the development of the common law, the level of public understanding of the law and its application, and the level of scrutiny of public actors, whose actions may have wider impact. For example, in the current Post Office Inquiry it has been revealed that Fujitsu settled private claims with non-disclosure agreements attached as far back as 2016 to ensure unfavourable expert evidence about the unreliability of the Horizon system did not get into the public domain.[41] Therefore not all private interests in settlement can be treated as benevolent, but in fact can be a way of powerful actors explicitly trying to undermine one of the key purposes of open justice scrutiny of wider society. It is unclear to what extent open justice can and should be maintained as this direction of travel continues.

44. The above is just a snapshot of the complex and varied tensions between open justice and privacy across the justice system and the information it generates. Indeed the disparity between in court judicial treatment and the data-protection led approach elsewhere is food for thought. When considering any open justice innovations and initiatives, the degree to which the privacy of individuals is and should be protected will need to consider whether and to what extent data protection law applies, at what point and to which actors, and the exceptions which may apply.[42]

[38] Article 6 of Regulation EU 2016/679 (General Data Protection Regulation) as incorporated into domestic law pursuant to the Data Protection Act 2018 and constituting retained EU law for the purposes of the European Union (Withdrawal) Act 2018 and Retained EU Law (Revocation and Reform) Act 2023.

[39] Article 5 (1)(c) - (d) of Regulation EU 2016/679 (General Data Protection Regulation)

[40] MOJ, HMCTS and Lord Bellamy KC, 'New justice reforms to free up vital court capacity' (25 July 2023)

[41] Tom Witherow, 'Post Office scandal: Fujitsu staff 'complicit in cover-up'' (The Times, 2 August 2023)

[42] It is likely that most open justice initiatives will be justifiable as being "in the public interest" or "necessary to pursue a legitimate interest", however it is not inevitable.

Dignity and authority of proceedings

45. Above we identified the role of open justice in maintaining public trust and confidence in the justice system. There is therefore an interest in maintaining the dignity and authority of proceedings in how justice is made "open", so as not to undermine that trust and confidence.

46. This is not, as we made clear, about protecting the reputation of the justice system in the face of proper scrutiny and reasonable debate. In a democracy, the public has a right to speak freely in criticism of power, including judicial proceedings and justice. However, arbitrary and inflammatory remarks about the legal profession and the courts could cause damage to the justice system, undermining its legitimacy in the eyes of the public and undermining the rule of law. Therefore, the impact on the dignity and authority of the courts is a relevant consideration in the design of any new open justice initiative, guarding against any avoidable and arbitrary denigration.

Accuracy

47. Open justice must not be facilitated at the expense of clarity and accuracy. This includes if some information about the justice system is partial, and making it available without context or caveat may in fact paint an inaccurate picture. For example, if information about a person's conviction is made available but not the information about their successful appeal.

48. Ensuring open justice is done in a way that produces quality and reliable information for the public will, in practice, depend on sufficient resources, as well as those involved acting responsibly and competently. In ensuring the accuracy of justice data, for example, this starts with thorough and high quality data collection methods, which can then lead to reliable information being shared to the wider public (and indeed can enable quality evidence-based policy). It also requires that such data be analysed competently, so mistaken conclusions can be avoided.

49. There is real difficulty however in trying to *ensure* accuracy, since confidence in third parties' accuracy often involves heavy restrictions on their access. For example, inaccurate advice is a risk when open access artificial intelligence is used for legal advice; a blunt tool to *ensure* accuracy is simply to ban the technology for that use, but of course to do so restricts many to only accessing legal advice through lawyers, whom they simply cannot afford. Similarly, no inaccurate impressions of the law can be communicated by the public if they are not allowed into a court room; and no mistakes about data interpretation can be made if data is never collected or made public. However, to keep the public out of the court and its data to "protect" the wider public from mistakes would be to undermine open justice entirely. The challenge with "accuracy" therefore lies in identifying proportionate and effective strategies to promote accuracy and manage the risk of inaccuracy without undermining open justice in practice.

Protection from harm and other misuse of information

50. As with accuracy, there is a wide interest in ensuring information is not used in a way which is misaligned with the purposes of open justice and in fact serves an alternative

agenda which is not in the public interest. This is especially the case if such misuse causes harm.

51. Some kinds of misuse are obvious, for example personal data being used to harass the individual, or commit identity theft. However, what is "misuse" is not always clear cut and may be a matter of degree. For example, traditional news media has always reported within a commercial reality: what will pique the public's interest and attract more sales or views will often heavily influence which stories are reported.[43] However, in practice there are differing degrees to which media reports are informative and prompt public debate about the justice system, and the extent to which they are voyeuristic or sensationalising, and encourage the public to view the courts as entertainment.

52. Of course the traditional news media are not the only third parties who may access justice information through open justice tools. Digital technology, especially social media, enables individuals to disseminate information extremely quickly, to large audiences. What's more, digital technology can enable various actors to process and analyse large amounts of data at relatively little cost. These capabilities mean that the potential for misuse, and harm, is likely to be an important consideration. For example, social media may be used for public "naming and shaming" including for relatively minor matters, described by some as 'digital pillory'.[44] Or third parties may monetise personal information that they glean through open justice tools to harm individuals' economic opportunities, for example selling employee blacklists to employers, created from names of those who have brought cases to the Employment Tribunal.

53. Relevant too is the potential impact on those who may anticipate such misuse and, as a result, choose not to engage with the justice system as a result, i.e. decide not to bring the claim, or report the crime. There is a real risk that this could further entrench existing access to justice barriers for those already disadvantaged or marginalised in society, for example those with irregular immigration status, marginalised ethnicities, or simply those with limited resources.

54. The challenge is in responding in an effective way, which limits the potential for misuse and harm without disproportionately obstructing open justice for those with legitimate reasons.

Judicial independence & impartiality

55. The independence and impartiality of the judiciary are embedded within Article 6 ECHR alongside open justice, and again they are fundamental to the rule of law and to democracy. Open justice does not necessarily conflict with these principles; indeed Jeremy Bentham thought that the potential for publicity kept judges to their oaths of impartiality.[45]

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[43] As Judith Townend and Paul Magrath have commented, journalism "is […] (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." 'Remote trial and error: how COVID-19 changed public access to court proceedings' [2021] *Journal of Media Law* 13:2, p. 107-121.

[44] See, e.g., Kristy Hess and Lisa Waller, 'Media as pillory: the power to 'name and shame' in digital times' (The Conversation, 8 August 2014)

[45] Fn 15 above.

56. However, open justice must not undermine impartiality, and there are clear boundaries which have been established which protect the judiciary from being too personally exposed. For example, the judiciary must not be put in the position of personally explaining their decisions outside the court room.[46] This extends to other justice system decision makers too, for example it is a criminal offence to obtain, disclose or solicit details about jury deliberations.[47] This maintains the important distinction between the people who make up the judiciary and the decisions they make when in that role, which are acts of the state. This differentiation preserves their independence and impartiality, and of course is otherwise protected by judicial immunity from prosecution, accountability being by way of appeal.

57. The judiciary's independence from the executive as two separate powers also has to be guarded. The rule of law requires that the judiciary freely and fearlessly can find against the Government as they can any other actor, and the public should be able to see them doing so. Any government involvement in open justice therefore must be scrutinised to ensure it does not undermine the separation of powers and the (perceived) independence of the judiciary.

National Security

58. There are substantial limits to open justice in the interests of national security. These can lead to some of the most restrictive procedural adaptations in any justice system, in which not only are external observers prohibited, but also a party and their representatives are also excluded from part of proceedings due to the national security evidence being heard. Known as Closed Material Procedures, these processes are available due to primary legislation permitting such significant limitations on open justice.[48] JUSTICE has amassed a significant amount of work in this area, including reports, third party interventions in the UK and Strasbourg, briefings and consultation responses.[49]

Resources

59. Finally, the entire justice system is littered with resource constraints which impact the quality of justice, the quality of open justice being no exception. When the court itself

[46] As concluded in House of Lords, Select Committee on Constitution, Sixth Report of Session 2006 - 07 at Chapter 4: Judiciary, Media and Public

[47] Contempt of Court Act 1981, s.8

[48] Justice and Security Act 2013

[49] JUSTICE, *Secret Evidence* (2009); consultation responses and briefings on the Justice and Security Green Paper and then Act 2013 (fn 6 above); the review of that Act's Closed Material Procedures Review of Closed Material Procedures JUSTICE response (2021). See further JUSTICE's interventions in several cases concerning national security evidence and closed procedures: *Chahal v UK* (1996) App no. 22414/93, which led to the establishment of SIAC by Parliament in 1997; *A and Others v the United Kingdom* (2009) App no. 3455/05,: concerning the compatibility of the SIAC special advocate procedure with Articles 5(4) and 6 of the ECHR; *Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 judicial review proceedings regarding whether a coroner has power to exclude properly interested persons from hearings at which sensitive evidence relating to the Security Service would be received; and Al-Rawi v Security Service [2011] UKSC 34 and Tariq v Home Office [2011] UKSC 3 in the Supreme Court concerning the absence of power in ordinary civil litigation to hold closed material procedures without statutory authority. Third party interventions in the latter can be found here.

has limited resources, this can impact the openness of individual proceedings, for example through the availability of technology; the space in court to accommodate journalists; or the time available to a judge to write and publish a judgment rather than deliver it orally. Consideration of the proportionate cost of a case, to the parties but also to the justice system, is not only a practical reality but also a matter of principle, it being embedded in the overriding objective of the procedural rules.[50]

60. When the public lacks resources, they may not be able to afford to attend court, or pay for a subscription service which makes the law itself more accessible, such as Westlaw or LexisNexis. And when journalists and/or media companies lack resources, they may not be commissioned to cover the courts at all.

61. On a system level, resources have been central factor in how the justice system has been reformed over the years. This is not automatically a bad thing; efficiency is an important part of governing in modern society, especially when institutions which still use centuries-old buildings and practices need to work in a technological age.

62. However, there are several instances of resource-driven reform in which open justice has been reduced, rather than enhanced. For example, witness statements taking the place of oral evidence in chief, cemented by the Woolf reforms to the civil procedure rules in 1999. These reforms primarily were aimed at reducing cost and delay in the civil process, but had the collateral effect of reducing the intelligibility of proceedings to observers. More recently, efficiency was a clear guiding consideration in the creation of the Single Justice Procedure ("SJP"), which rationalises court resources away from minor offences subject to guilty pleas or in cases in which there is no engagement from the defendant. However, the impact on open justice has been considerable (further discussion of the SJP is below).

63. Furthermore, to the extent that open justice also means openness of the law itself, the legal aid cuts in 2013 reduced access to legal help for the most economically deprived, with inadequate alternative provision made to ensure the law remained open – let alone accessible – for those without lawyers.

64. Finally, resources are clearly a major impetus behind the encouragement of ADR – out of court settlement can reduce costs to parties, and to the court system, helping backlogs to be cleared and creating more judicial capacity for cases which cannot settle. However, pushing the resolution of agreements into the private sphere means the quality of those outcomes is more opaque. For example, there is no way of knowing if the resolutions are ill-informed or outside the range of outcomes which would have been achieved through court processes.

65. JUSTICE is concerned that policy considerations of resources too often outweigh that of open justice without any substantive policy consideration of the benefits of transparency. The challenge is to reverse this trend, and consider how reformed services can open up the justice system, rather than further close it to the public.

[50] CPR r.1.1 explicitly refers to dealing with cases "at proportionate cost" and "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases". FPR r.1.1 (d)-(e) includes in its definition of dealing with a case justly: "saving expense" and "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases". CrimPR r.1.1 includes dealing with a case "efficiently" (r.1.1(2)(f)), as well as taking account of "the needs of other cases" (r1.1(2)(h)(iv))

Tensions conclusion

66. It is clear from the above summaries that open justice, in practice, is not secured by one area of law (human rights, data protection, common law), nor is there a clear hierarchy of other interests. Instead, open justice is an overarching principle that is always relevant, but its practical effect on the ground can vary significantly in tension with other factors.

67. What is also clear is that it is not only the concern of the judiciary. The judiciary have a significant role to play, of course, and when they do they repeatedly treat the open justice principle as a strong one. However, what must not be lost in any conversation about open justice is the significant role of the executive. The Government departments and executive agencies with responsibility for the justice system *as a system* also have a significant impact on the openness of the justice system, as will be discussed further below.

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Tools of open justice

68. In this final section, we apply the above purposes and tensions to a discussion of the range of "tools" which facilitate open justice, divided by the kind of access or engagement that they facilitate. We differentiate between three kinds of tools:

    i) tools facilitating engagement with individual proceedings;

    ii) tools facilitating access to justice system data; and

    iii) tools facilitating public legal education.

i) Engagement with individual proceedings

Listings (Questions 6-11 of the Consultation)

69. The observer needs to be able to know, ahead of time, what will be heard in court and what they may be able to observe. Resource constraints are in clear tension with open justice when it comes to physically attending hearings. This is because attendance costs time and money and observers therefore need accessible lists containing enough detail for them to be able to weigh up their interest in the case and the benefit of attendance. This is true for members of the public, civil society organisations, academic researchers or the press.

70. A court list is also a summary snapshot of the court's business, so it can not only facilitate observations, but can also allow those who were not able to attend to know what cases were heard. This is the function, for example, of the court lists for the Single Justice Procedure, which is largely dealt with behind closed doors and therefore no external person can observe.

71. To facilitate both these functions, there is a clear need for more than a case reference, names, court number and start time. JUSTICE considers listings can often suffer from being compiled by professionals *for* professionals, ie by court staff and judges for the benefit of the lawyers working in the justice system every day. When this happens, the needs of lay observers – and indeed lay participants – are overlooked, and the justice system becomes more opaque as a result.[51]

72. The question should be asked: does this list provide the public with an adequate understanding of what will be heard, or what was heard, in court? JUSTICE recommends standardised listing for all public hearings would include at a minimum:

    a) the type of case/offence;

    b) names of parties, subject to any orders which restrict the identification of parties;

    c) the length of hearing;

[51] For further discussion of this issues and recommendations for reform, see JUSTICE, 'Understanding Courts: A report by JUSTICE' ,(JUSTICE, 2019)

d) type of hearing in accessible terms (case management, final hearing, etc, not abbreviations like PTPH or CCMC);[52]

e) name of judge;

f) mode of hearing (in person, remote, hybrid);

g) location of hearing;

h) whether remote observation is possible, with information of how to access a link if so.

73. Current online lists lack any standard format, and do not reliably feature the above levels of detail. Some lists are available online via the privately hosted "Court Serve" website, while only higher courts have dedicated judicial websites.[53] The functionality on Court Serve is extremely limited, for example case names are not searchable.

74. **JUSTICE further recommends that court lists are a clear opportunity to collocate other relevant information for observers which directly impacts their observation of court, including the legal restrictions on their behaviour during and after court**. For example, the following could be integrated into online lists or any other platform where they are published:

a) a link to general information for observers on appropriate behaviour when observing a hearing, including an explanation of contempt of court; the prohibition on photography, etc. The Public Charter mentioned in the consultation would be useful here; **JUSTICE urges its completion without delay.**

b) A clear notice (e.g. in bold red text) when reporting restrictions apply in a case. This should then be accompanied by a link to the restrictions themselves in a particular case, i.e. a public version of any reporting restrictions order/ transparency order. This would of course have to be absent any "annex" which usually accompanies the order which identifies the parties or otherwise would undermine the purpose of the order. It would also have to be communicated in plain English.

75. There have been various initiatives, some still in development, focused on improving access for accredited media professionals. These include a Reporters' Charter – guidance for journalists on their access rights to court documents; the Media Protocol – through which HMCTS provides free copies of enhanced court lists and registers to accredited journalists; and the pilot Courtsdesk News service – an information platform supporting the Media Protocol and currently only accessible to journalists.[54] JUSTICE wholly supports these initiatives: journalists are clearly an important trusted third party who are key agents of open justice, often referred to as the eyes and ears of the public.

76. However, **JUSTICE is concerned that improvements in media access to court information must not be the sole focus of open justice reform**. **There are various legitimate reasons why others – including members of the public, civil society**

[52] A "Plea and Trial Preparation Hearing" in criminal proceedings and a "Costs and Case Management Conference" in civil matters

[53] For example, see the daily cause lists for the Court of Appeal at Courts and Tribunals Judiciary, 'Daily lists for the Court of Appeal' (Judiciary UK, undated).

[54] Courtsdesk News has a wider remit in Ireland, where information is accessible by media, legal and financial sectors. See Courtdesk News, 'Courtdesk', (undated). See further on Courtdesk News's UK pilot in collaboration with HMCTS in their written evidence to the Justice Committee, OPJ0017, October 2021.

organisations, and academic researchers – may wish to observe court proceedings, and indeed bring their own different perspectives. These go beyond traditional news reporting, which as discussed above can often be unavoidably entwined with the commercial interests of the publication.

a) Members of the public may wish to observe how unremarkable cases are dealt with, which may not be reported on by the media but which may be a far better representation of how justice is normally done.

b) They may wish to observe cases to better understand how ethical or moral issues are dealt with in our courts, which again would perhaps not be the subject of news coverage. For example, the Court of Protection Open Justice Project has been pioneering in creating a platform for public engagement in the Court of Protection, in which members of the public attend proceedings and blog about them. Those blogs allow for commentary on significant issues of public importance, such as discussions about medical ethics and personal reflections on how those without capacity are treated within our institutions and our legal frameworks.[55]

c) Alternatively, civil society organisations may seek to observe numerous hearings to inform their policy work on improvements to the justice system. JUSTICE's own Bail Observation Project has observed hundreds of bail hearings in order to better understand how the provisions of the Bail Act 1976 are dealt with in practice in the Magistrates Courts, about which very little is known, there are no written records and very few journalists report.

77. **The obvious way in which accessibility of listings could be improved for all would be to make them available in one place online.** The main "tension" caused by increasing such accessibility would be the potential for personal information to be misused by third parties. This is acute when considering the information being available online in a machine-readable format, in light of the potential for some members of the public to access the lists as bulk data, analyse that bulk data including personal data within those lists, and then misuse that data, for example through blacklisting people from employment. In this sense, court lists are one type of court record which is liable to misuse alongside many others. This is discussed further in "Case documentation" below. In summary, JUSTICE considers that safeguards need to be considered which strike a proportionate balance between facilitating public engagement with individual cases, and minimising the risks of misuse.

Livestreaming and remote observation (Questions 14-20)

78. The most traditional "tool" to observe proceedings is the public gallery in a physical court. However, court buildings are not physically accessible to all,[56] and court closures mean that many will be further away from their nearest court than they were ten years

[55] See Open Justice: Court of Protection Project.

[56] See the Magistrates' Association, 'Inaccessible Courts: A Barrier to Inclusive Justice', (June 2023).

ago.[57] The benefits of livestreaming are therefore clear: enabling those who do not have the time, resources or physical ability to access court proceedings.

79. Livestreamed proceedings can also offer an improved observation experience. In JUSTICE's experimental mock virtual jury trial pilots conducted in April 2020, observers could see videos from the court alongside documents in the case displayed on the screen. This enabled the observer to follow the proceedings more closely, and with greater understanding than if they were trying to do so from the public gallery with no access to case documents.

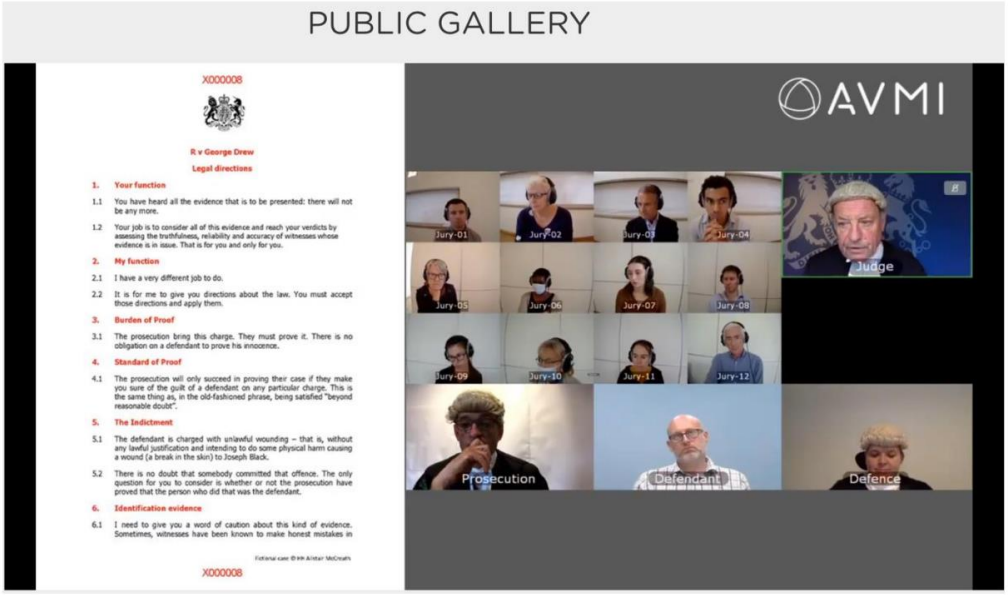

Image from the fourth experimental virtual mock jury trial pilot conducted by JUSTICE[58]

80. This practice is available in some jurisdictions; JUSTICE attended a hearing in the Court of Protection as an observer in August 2023 during which the bundle was available at the bottom of the screen. This was of significant benefit during cross-examination.

81. This is not to say that livestreaming itself is without issues. Links are not publicly available, they must be requested then provided by email. This means if there are administrative delays then access to the hearing can be denied completely. In addition, the quality of the observation facilitated is highly dependent on the technology enabling it. If audio or video difficulties arise, the observer's ability to follow proceedings can be significantly if not entirely undermined, and there may not be a way of alerting those in the court room to the problem. Furthermore, those who are digitally excluded will not be able to participate in this way without support.

[57] Fn 7 above

[58] Professor Linda Mulcahy, Dr. Emma Rowden and Wend Teeder, '*Testing the case for a virtual courtroom with a physical jury hub: Second evaluation of a virtual trial pilot study conducted by JUSTICE*' (June 2020), Figure twelve, p.19

82. The question of whether livestreaming should be increased requires further consideration of the risks. The main risk of course is that third parties may misbehave, either risking the fairness of the proceedings, the safety of participants, and/or that they will otherwise misuse the information. It is important to remember that these concerns are not unique to remote observations; misbehaviour occurs in person in the public gallery. Furthermore, there is always a lack of control *after* the hearing has ended; the observer leaves the remote hearing or the court building and returns to society, and can subvert rules if they choose to. The balance currently struck permits them entry and relies on the threat of sanctions to influence their behaviour.

83. The key difference with remote observation is the court's degree of control and oversight over their behaviour *during* the observation. The court often cannot see who is watching or observe their behaviour, as the judge can in any public gallery. This makes serious infractions extremely easy, for example observers recording or taking photographs of proceedings.

84. These risks are not equal across the board, and may be more pronounced in some proceedings more than others. Witnesses may be intimidated by livestreamed proceedings, particularly if they cannot see those observing. Witnesses may be fearful of those observing in court too, but there may be a difference in the level of intimidation felt by the "unknowns" of remote observation which would require further consideration.

85. This is not to say however that risks cannot be managed. The Court of Protection is successfully facilitating remote observations by the public, without any controls over who may attend, such as press accreditation. This includes hearings in which sensitive issues are being discussed and witness evidence is being heard. The cases often deal with intimate details regarding individuals' care, and almost invariably have reporting restrictions in place. There are at least two lessons which can be taken from the Court of Protection's success:

    a) the link is not publicly available; it must be requested and the court retains a record of the email addresses to whom it has been sent. This creates a train of accountability as well as a stage of effort which may interrupt opportunists seeking to disrupt proceedings, without imposing an onerous application process. JUSTICE considers this link request process could be streamlined in appropriate cases, for example an automated "request a link" function (which could be integrated into the court lists) which takes basic details and an email address then automatically provides a link to those registered emails the day before the hearing.

    b) Observations are being largely facilitated through the Court of Protection Open Justice Project, which is a small initiative led by academics who understand the Court and its rules. Those running the project have developed relationships with judges and court staff and are clearly trusted by the court. They have even been permitted to share the link with public observers (then providing the court with email addresses). They are also trusted by observers, who seek their guidance to observe within the law*;* they provide explanations of who the different participants are, field questions about proceedings, and help edit blogs for their compliance with reporting restrictions.

86. JUSTICE agrees that the use of designated livestreaming premises should also be considered. This was first suggested by JUSTICE in 2015 in our report, *What is a*

Court?, which sought to reimagine justice spaces in a modern justice system. The Working Party identified the potential for technology to "cast a wider net" and in fact increase public participation, however the potential for inappropriate public behaviour was also identified. The Working Party suggested for cases in which that was a particular issue, broadcasts to designated controlled locations, such as a room in a court or tribunal building, could be facilitated.[59] JUSTICE would add other spaces with capacity could also be used, such as libraries or University lecture theatres.

87. In conclusion, **JUSTICE supports the continued availability of livestreaming, and encourages its careful expansion. However, to mitigate the risks of any expansion, JUSTICE recommends:**

    a) **MOJ should conduct or fund improved research on the impact of livestreamed proceedings on witnesses, and JUSTICE particularly supports research which investigates any disproportionate impact of livestreaming on participants from certain groups of marginalised or disadvantaged people.**

    b) **MOJ should not impose any blanket policy to livestream any category of case or type of hearing without scope for judicial discretion. While judicial discretion may lack predictability, there will always be a need for flexibility to the circumstances of the case, particularly when lay participants are involved in the hearing.**

    c) **MOJ should consider introducing an intermediary role, which has been shown to have clear value in the Court of Protection. The aim of the role would be to support efficient and effective open justice, through liaison with the court and observers. This could support in person hearings as well as livestreamed hearings.**

    d) **JUSTICE supports the use of designated livestreaming premises as a possible way of livestreaming cases in which there are identified risks to normal livestreaming. This should not replace normal livestreaming, in all cases, however.**

    e) **In appropriate cases, the link request process can be automated to reduce the administrative burden on the court.**

Broadcasting (Questions 21-24 of the consultation)

88. Video recording and broadcast are currently very restricted to proceedings in the Supreme Court, the Court of Appeal (Civil Division), the Competition Appeal Tribunal and, since July 2022, sentencing remarks in a small number of high profile criminal cases.

89. In answer to Question 21, there are clear benefits to public broadcast. As with livestreaming, broadcast can improve accessibility for those who cannot physically attend court proceedings for reasons of time, money, location, intimidation or unfamiliarity with the process. Of course, television is an established medium by which

[59] JUSTICE, 'What is a Court? A Report by JUSTICE' (JUSTICE, 2015), para 4.35

people access news and information, and so too is online video content.[60] Unlike livestreaming, broadcasting does not require effort and digital ability from the individual; they do not have to connect to the court via a link but rather they are provided with the video information. If the broadcast is being facilitated by a media organisation, they will likely be presented with the video information with some explanatory context, again reducing the effort required from the individual.

90. These factors together make the audience of any broadcasted footage likely to be far broader than those who would attend live observation, either in person or remotely. This has the potential to further all purposes of open justice:

    a) a far broader section of the population can scrutinise the justice system, and the actors within it;

    b) the anticipation of that scrutiny may have further beneficial effects, for example legal representatives and judges being on their "best behaviour" when proceedings are broadcast;

    c) it could also improve the public trust and confidence in the courts by demystifying their workings for a far larger group in society;

    d) finally, it could expose the public to a more accurate record of the law itself and how it is applied. Mrs Justice Cheema-Grubb, who has delivered several broadcasted sentencing remarks, has reflected that the broadcasting facilitates a more direct form of open justice to the public, providing longer source material on the reasons for sentences than shortened soundbites selected by the media.[61]

    e) All of those potential benefits are just that, however: potential. JUSTICE encourages research in the effectiveness of current broadcasting schemes before they are rolled out.

91. Any further expansion would also need to take into account the significant difficulties and risks involved.

    a) Firstly, there is a potential impact on the fairness of proceedings. In the US, concerns have been raised about the impact of inappropriate, prejudicial,[62] or even 'just' increased[63] media coverage on ongoing court proceedings. These risks exist in non-video media coverage, and sanctions exist to constrain them. However, broadcasting may exacerbate those risks to an unknown degree, given the potential for greater circulation amongst the public of video footage and the ease with which third parties can edit footage and comment on it on social media platforms (such as YouTube and Tiktok). Partial or inaccurate editing could result in mis- or

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[60] In recent polling conducted for the Justice Committee, two in five respondents said that they got their information on sentencing decisions from online news sources, whilst one in three get their information via broadcast media. See House of Commons, 'House of Commons Justice Committee Survey' (Savanta, March 2023) at p. 5.

[61] Courts and Tribunals Judiciary, 'One year of broadcasting of sentencing remarks in the Crown Court' (Judiciary UK, 1 August 2023)

62 Sarah J. Eckman, 'Congressional Research Service: Video Broadcasting from the Federal Courts: Issues for Congress', (Congressional Research Service, R44514, 28 October 2019), p. 17.

63 Derek Green, "Live! Broadcasting High-Profile Appeals Reignites Cameras in the Courtroom Debate," [2011] News Media & the Law, 35:1, pp. 37-39.

disinformation about the case, further prejudicing the fairness of ongoing proceedings.

b) Secondly, most people who find themselves in court do so because they are in particularly difficult or distressing circumstances. Witnesses in such circumstances may feel intimidated by the paraphernalia of broadcast media and/or the fact of their case being broadcast, especially where their evidence is of a particularly sensitive nature. Live footage of their testimony may therefore be a disproportionate infringement of their privacy, and/or may affect the quality of their evidence. Furthermore, witnesses who are reluctant to give evidence in proceedings – for example, for fear that doing so will invite reprisal – may be further deterred from giving evidence.[64]

c) Thirdly, JUSTICE is concerned about the impact on those participants who are already marginalised, disadvantaged or otherwise disempowered within society and/or the justice system. For example, those with irregular migration status, victims of domestic abuse, minoritised ethnicities who are disproportionately represented in the criminal justice system. A risk which should be borne in mind is that of broadcasting further entrenching the disadvantage experienced by these groups.

d) Fourthly, even comparatively robust witnesses may be impacted by broadcast. Following Lady Dorrian's report recommending broadcasting of Scottish proceedings in limited circumstances, concerns were raised that a future move towards live broadcasting of criminal trials may deter expert witnesses from appearing in court, as broadcast could heighten the already 'stressful' and 'adversarial' nature of trials.[65]

e) Fifthly, even when there are no witnesses involved and the trial can no longer be prejudiced, questions still remain about the editorial treatment of video footage, and the impact on the dignity and authority of proceedings. During the current sentencing remarks broadcasting trial, the footage has been made available on YouTube by the media broadcast companies. JUSTICE has been concerned by the tone created by advertisements for products running before and occasionally during the sentencing footage. In the US, some media outlets[66] use court footage alongside staged reenactments and live commentary, again also interspersed with advertisements. A key concern is the way in which footage may be edited for a public audience, tipping into a form of entertainment, as opposed to news information.[67]

f) Finally, there is a potential concern about the privacy and safety of lawyers and judges, not just lay participants. Unfortunately, the last few years have seen attacks on the profession, especially those practicing in immigration and asylum law,

64 Eckman, 'Video Broadcasting from the Federal Courts', p. 21

65 The Newsroom, 'Concern over role of TV cameras in Scottish courts', (The Scotsman, 3 January 2018)

66 For example, Court TV, which describes itself as being "devoted to gavel-to-gavel coverage".

67 See further the concerns of Baroness Helena Kennedy of the Shaws KC (President of the JUSTICE Council) expressed ten years ago in '*Cameras in court are a threat to justice*' (The Guardian, 3 November 2013)

including attempts to kill,[68] bomb threats[69] and rhetorical abuse.[70] These incidents are thankfully relatively rare, and most judges and lawyers are able to practice without significant fear for their safety. However, there is a real risk, in JUSTICE's view, of broadcasting proceedings resulting in the identification and targeting of judges and legal representatives in contentious cases.

92. That is not to say there are not possible safeguards. Lady Dorrian's review in Scotland did not recommend witness evidence to be routinely broadcast, with only a handful of exceptions, eg for educational purposes, and only when subject to application.[71] In New Zealand, media guidance prohibits extreme close-ups of all parties;[72] and requires media organisations to provide prior certification of the competence of their staff[73] to comply with the guidance and their own regulatory obligations.

Recommendations on broadcasting

93. Although broadcasting of proceedings may enable a furtherance of open justice in a blunt sense – by allowing a greater volume of the public to view proceedings – its efficacy as a tool of open justice relies on many carefully balanced factors. There would be an unfortunate irony in expanding open justice by broadcast, which then led to a greater need for judges to reduce transparency in other ways, for example an increase in anonymity orders, more hearings held in private, etc. And it would be of great concern if those who need the justice system the most, disengaged with its processes through fear of exposure.

94. In conclusion, **JUSTICE does not consider that broadcast of proceedings should be rolled out any further without consideration of the risks and further research. Substantial consultation with individuals and organisations representing groups of such participants would need to take place, including the Children's Commissioner, the Victims Commissioner, the Domestic Abuse Commissioner, the Anti-Trafficking and Modern Slavery Commissioner, as well as organisations representing the interests of disadvantaged and marginalised groups.**

Access to Court documents (Questions 30, 32, 37-40 and 41-50 of the consultation)

> *In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the*

[68] BBC News, 'Man charged with right-wing terror plot to kill immigration solicitor', (23 October 2020)

69 Haroon Siddique, 'Businessman plotted to intimidate lawyers with fake bombs, jury hears', (The Guardian, 24 April 2023)

70 Miles Ellingham and William Wallis, 'Conservative attacks on "lefty lawyers" fuel hate mail and racist abuse', (Financial Times, 27 August 2023)

[71] Lady Dorrian, '*Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the Use of Live Text Based Communications from Court*', (January 2015)

[72] Sarah Moore, Alex Clayton and Hector Murphy, 'Seeing justice done: Courtroom filming and the deceptions of transparency', [2021] Crime Media Culture, 17:1, p. 133 – 134.

[73] New Zealand Law Society, 'The courts, open justice and the media' (19 May 2016)

> *argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.*
>
> *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38, Lady Hale at [43]

95. Documents facilitate not just observation but also *comprehension* of what is being observed. Without these documents, the observer may be unable to fully comprehend the proceedings in front of them. And as was observed by Lady Hale in the same case as quoted above, "the confidence of the public in the integrity of the judicial process must depend upon having an opportunity to understand the issues."[74]

96. This is not a new concern – it has been recognised in common law for some time. In 1999, Lord Bingham found that "[i]n a case where documents have been placed before a judge and referred to in the course of proceedings … the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong".[75]

97. There is also a strong argument that open justice is somewhat arbitrary if it only facilitates scrutiny by those who could fit in the public gallery or had the opportunity to observe at the time. To extend open justice to others, and allow non-contemporaneous scrutiny, this also means access to case documentation and information of outcomes (judgments, verdicts, sentencing remarks) after the hearing has ended.

98. This retrospective access to court records also facilitates a different type of scrutiny, whereby individuals can scrutinise trends or patterns in the courts. For example, there may be poor conduct by a prosecuting local authority in a case, which is then criticised by the judge in the judgment. It is entirely legitimate for wider society to seek to understand if that practice is a one off, if that particular local authority has been criticised for it before, or if indeed it is a problem which spreads over multiple local authorities. This level of scrutiny is impossible if records of proceedings are unavailable. Another example is the above-quoted case of *Cape v Dring,* in which an asbestos victim support group sought documents from a court case in which a company's negligence in the production of asbestos products was in issue. Their reason to seek the documents was to understand the asbestos research carried out by industry bodies, and the influence the industry had on the Health and Safety Executive.

99. Despite this, there are various practical barriers to accessing case documents. These include:

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[74] *Cape v Dring* at [49].

[75] *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, [1999] CPLR 505, at [512]

a) public knowledge of the means of doing so – there is little information available to the public about different jurisdictional rules governing access to different documents, or indeed the cost;

b) understanding of relevance – there is no means of the public knowing what is available and what may be relevant (or indeed vital) to read before observing a hearing;

c) delay – the administrative delay between the request and its consideration by the court may frustrate the document being available in time to help understand the hearing;

d) roles and responsibilities – there is a lack of clarity in the roles and responsibilities of the court and the parties in retaining and making case documentation available.[76]

100. Judgments are perhaps a special category of documentation: they will not be critical to understanding the majority of hearings since they by definition come at the end of a case (albeit they have some relevance to some kinds of proceedings, such as appeals, costs proceedings, enforcement procedures). They are however the main document to understand the reasons for a case's outcome.

Risks of improving access to court documents

101. In July 2022, the National Archives published a Find Case Law service – a new archive of judgments freely accessible to the public. While it has clear value in *understanding* legal precedent, its focus on higher courts means it still lacks information about the outcomes of the majority of proceedings in England and Wales. It does not feature judgments, verdicts or sentences from any Crown courts, County courts or Magistrates' courts, along with several tribunals. However many of those outcomes will be delivered orally and no official written record exists for publication. Therefore, transcription is also a relevant tool alongside access to court documents.

102. It is reasonable for this new judgment service to prompt consideration of how other court documents can be made available online. The experience of the Public Access to Court Electronic Records service in the United States ("**PACER**") is relevant to this consideration. The resource provides public access to case information found in listings – e.g. names, types of case/offence, the next hearing and the location and date of that hearing – however the case would not only be visible to the public the day before a hearing, as in court lists. It would also facilitate access to publicly disclosable information about the case, including case documents.

103. The benefits of such an online platform are clear. The PACER system was introduced to facilitate ease of access to court records for anyone with internet access, thereby reducing the need for people to visit courthouses to access such information. Using the internet as both the means and host of such data access provides a comparatively 'frictionless' way to ensure open justice for legal and non-legal professionals alike; the

[76] This was outstanding in *Cape v Dring*, in which the postscript at [51] urged "the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of principle and practice raised by this case." It added there was "no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over. This and the other practical questions touched on above are more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case."

'obscurity' afforded by requiring access to physical documents is removed.[77] Additionally, researchers have used PACER to conduct a metadata analysis of sentencing judges in criminal proceedings and trends in their decision-making,[78] thereby making plain the benefits of an online platform for enabling research and scrutiny of the functioning of the justice system.

104. There are risks, however. The nature of court records means they will contain personal, even confidential, information in relation to the actors and issues in the case. PACER is, therefore, a repository of information that is sensitive and personal in nature. Whilst there are rules governing the redaction of certain personal information before it is filed with the federal courts and made available on PACER,[79] the onus for such redaction is put on the legal representatives and persons making the filings; not the clerks receiving the filings or other court staff.

105. This personal information is then liable to misuse. A study of unredacted social security numbers in documents filed with the federal courts, available on PACER, identified 16,811 separate instances of unredacted social security numbers among almost 4 million PACER documents filed in November 2013;[80] just approximately 20% of these appeared to qualify for an exemption from the redaction requirement.[81] These instances involved the social security numbers for just over 5,000 different individuals.[82] Indeed, the widespread use of social security numbers in identity theft has been a major concern since the introduction of the PACER system.[83] The failure to redact such personal information has been attributed to the administrative and practical 'burden' and 'inconvenience' of such work,[84] despite representatives 'best efforts' to comply with the rules.[85]

106. The privacy impact could also be disproportionately borne by people from low-income or ethnic minority backgrounds, who are considerably more likely to be over-policed and wrongfully accused or arrested.[86] In light of such concerns, JUSTICE is alive to the potential that should the UK adopt an equivalent online platform of court records for public access, this may have the effect of compounding already existing

77 David S. Ardia, 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' [2017], University of North Carolina School of Law, p. 1387

78 Maria-Veronica Ciocanel, Chad M. Topaz, Rebecca Santorella, Shilad Sen, Christian Michael Smith, Adam Hufstetler, 'JUSTFAIR: Judicial System Transparency through Federal Archive Inferred Records', [2020] PLoS ONE 15(10).

79 For example, see Rule 49.1 of the Federal Rules of Criminal Procedure, 'Privacy Protection for Filings Made with the Court'

80 Joe S. Cecil, George Cort, Ashley Springer and Vashty Gobinpersad, 'Unredacted Social Security Numbers in Federal Court PACER Documents', Federal Judicial Center, 25 October 2015), p. 2.

81 Ibid at p. 5

82 Ibid at p. 5

83 Amanda Conley and Anupam Datta, 'Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry', [2012] Maryland Law Review 7:3, p. 782; and Lynn E. Sudbeck, '*Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*', (Institute for Court Management, Court Executive Development Program, Phase III Project, May 2005) p. 2; and Charles Toutant, 'Lack of Redaction for PACER Compromised Litigant's Identity, Lawsuit Says', (Law.com, 14 March 2017).

84 Conley and Datta, Sustaining Privacy and Open Justice, p. 801

85 Ibid at p. 782

86 Ibid, p. 784

inequalities, particularly for people and groups from marginalised and disadvantaged backgrounds who are already overrepresented in the justice system as currently stands.[87]

107. A further concern is the impact of partial or incomplete information on PACER, which could misrepresent the outcome of a case and the actors involved. For example, the fact of an individual's arrest or indictment will remain in the court records that are available for public access, even if the charges are ultimately dismissed.[88] Concerns have been raised that potential employers could easily access such incomplete information and mistakenly assume that an applicant has a criminal record,[89] which could disqualify them from being recruited.

108. There is also evidence of serious harm resulting from access to PACER records. A 2016 survey by the US Federal Judicial Centre found that people detained in federal prisons had obtained information about other inmates, via a third party's access to PACER, in order to target such inmates.[90] The survey also found that confidential informants to prosecutions had been identified by inmates using information from PACER.[91] Nearly 700 witnesses and informants had been threatened, wounded or killed over a three-year period.[92]

109. Finally, data in bulk can be subject to different kinds of misuse than discrete data accessed in individual cases. Big data is big business and there are now commercial data aggregators who exploit public data for profit. For example, Axicom and LexisNexis in the US have been identified as "routinely min[ing] court records [on PACER] for personally identifiable information [which] they then incorporate with other data sources to create detailed dossiers on almost every American...when [information taken from court records] is combined with other publicly available data, the resulting intrusions into privacy can be significant."[93] Whether these intrusions can be in the public interest is the subject of debate, with experts warning of "a system where the government extracts personal information from the populace and places it in the public domain, where it is hoarded by private sector corporations that assemble dossiers on

[87] There is strong evidence in the criminal justice system in particular. See JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021). See further David Lammy, *The Lammy Review* (September 2017). And more recently, UN News, *Systemic racism within UK criminal justice system a serious concern: UN human rights experts* (United Nations: UN News, 27 January 2023)

[88] Timothy B. Lee, 'What Gets Redacted in PACER?', (Freedom to Tinker, 16 June 2011)

[89] Conley and Dutta, Sustaining Privacy and Open Justice, p. 784

[90] Margaret S. Williams, Donna Stienstra, and Marvin Astrada, 'Survey of Harm to Cooperators: Final Report: Prepared for the Court Administration and Case Management Committee, the Committee on Defender Services, and the Criminal Law Committee of the Judicial Conference of the United States', (Federal Judicial Center, 2016), p. 136

[91] Jacob Gershman, 'Why Life for 'Snitches' Has Never Been More Dangerous', (Wall Street Journal, 20 June 2017).

[92] D.C. Weiss, 'Attacks on secret informants spur federal courts to consider limiting PACER access(ABA Journal, 20 June 2017)

[93] Ardia, 'Privacy and Court Records', p. 1388

almost every American citizen". [94] It has been argued this leads to a "growing dehumanization, powerlessness, and vulnerability for individuals."[95]

110. Such aggregated data can then be made available to third parties, who in turn can put it to many uses, both those in the public interest, and those resoundingly not. For example, it could be sold to a not for profit organisation, for the purposes of improving their free legal help services; but it could also be of interest to a multinational company to blacklist individuals from their employment; and it could even be of interest internationally to other state governments.

Access to case documents recommendations

111. **JUSTICE supports the creation of an Open Justice Charter for the public without delay, as has been created for the media.** The Charter should explain in one place their rights of access to case documentation, the existing channels available to them and the practical steps involved.

112. **JUSTICE also strongly supports a holistic review of court rules and procedures which facilitate such access. This review should consider the consistency, or lack there of, of access between different courts; the roles and responsibilities for record keeping, redaction and provision; and would benefit from taking a fresh look at whether current rules are justified in the public interest.**[96]

113. **Before any shift to court documents being made available through an online platform, the Government must carefully consider and consult upon the mechanisms involved, and how the above risks are managed. This must include:**

    a) **the redaction/exclusion of certain types of information for public access;**

    b) **how that redaction/exclusion is safely operationalised;**

    c) **how public access is otherwise granted;**

    d) **how personal accountability could be integrated into the process, for example user registration;**

    e) **how information about lawful and unlawful use would be provided, for example, integrated links or notices to information on contempt of court, explained in plain English; and**

    f) **how third party reuse of information is controlled.**

114. Finally, JUSTICE considers that we need to better understand what the *public* think is in the public interest when it comes to third party access to case documents. New ways of treating justice data as computational data, to be aggregated and analysed, need to be considered for their benefits and drawbacks, and this needs to be done in dialogue

[94] Daniel J. Solove, 'Access and Aggregation: Public Records, Privacy and the Constitution', [2002] 86 Minn. L. Rev. 1137 at p. 1142

[95] Ibid

[96] The 6-month deadline used in the criminal justice procedure rules, Part 5, has been criticised by some as arbitrary, arguing it actually undermines accurate reporting. See Courtdesk News, OPJ0017, October 2021.

with the public. This is discussed further in the next section, "access to justice system data".

ii) Access to justice system data (Questions 51-57 of the consultation)

115. If the justice system is going to be open to scrutiny, the importance of data cannot be overstated. Data can illuminate the way the system works, any inefficiencies or inequalities, as well as the cultures, behaviours and policies of actors within it.

116. Making such data available to the public further facilitates the legitimacy and scrutiny of the justice system. This is necessary when the justice system is subject to reform, and there is a clear public interest in understanding if those reforms are improving or undermining access to justice.[97] This starts with the collection of that data in the first place, then how that data is accessible, and finally how that data is usable by third parties.

Data collection & open publication

117. By "data" we mean information, be it spoken, written or digital. Therefore, access to individual proceedings provides data, and there is an overlap in "tools" between this group and the first group. It is possible, for example, for researchers to amass a dataset through repeated observations of cases in court, and indeed JUSTICE has done this recently in its own court observation programme looking at remand decision-making in the magistrates' court.[98]

118. Otherwise, data collection is in the hands of the public authorities involved in the delivery and the administration of justice, most prominently the MOJ and HMCTS, but also other public bodies including the CPS, Cafcass, the police, other prosecuting authorities, etc. That data is collected so those authorities can themselves scrutinise their own ways of working, but also so others can. However, to do so, there has to be transparency in what is available in the first place.

119. There are some easy ways to know what data is being collected. The MOJ publishes data tables alongside statistical analysis in various areas, for example court quarterly statistics (civil, tribunals, family, crime), legal aid statistics, and discrete other subjects such as judicial diversity statistics. More recently a dedicated "Justice Data" website has gone live which provides access to this data in one place, highlighting key figures and trends in a user-friendly way.[99] This joins The National Archives "Find Case Law" service as two examples of open access data for the public.

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[97] Dr. Natalie Byrom, *Digital Justice: HMCTS data strategy and delivering access to justice Report and recommendations* (The Legal Education Foundation, October 2019) at p. 2 "*Data must be collected to confirm that existing legal duties relating to access to and the fairness of the justice system, as well as obligations under the Public Sector Equality Duty are met. The collection and publication of this data is critical to building trust in reformed processes and encouraging adoption of new services."*

[98] See JUSTICE, 'Remand Decision-Making in the Magistrates' Court', (JUSTICE, undated)

[99] GOV UK, Justice Data - Justice in numbers

120. On the openness of HMCTS data, Natalie Byrom recommended in 2019 that more open data catalogues be made available to increase transparency of justice data.[100] This was in the context of the HMCTS Reform programme digitising the justice system, with the purpose of facilitating scrutiny of the reform process. HMCTS thereafter pledged a catalogue of open and accessible Data, however only management information data is currently available.[101]

121. Of concern to JUSTICE are several key areas of justice data that are missing, it being unclear if the data is being collected and not published, or not collected in the first place. Comprehensive work by the Centre for Public Data has recently mapped out several key data gaps in the criminal justice system.[102] These gaps exist despite repeated calls from Parliamentarians and civil society stakeholders for the missing data. For example, data on the numbers of unrepresented defendants in the magistrates. It has also been identified that much of it is available administratively; it just is not being collated and published. However, despite repeated calls the data is not forthcoming, nor is any explanation why. The reasons for continued gaps are therefore unclear, creating an additional layer of opacity.

122. **JUSTICE recommends MOJ and HMCTS improve its dialogue with the public about data collection. External actors to the justice system (Parliamentarians, civil society organisations, academic researchers, members of the media and individuals) should all be able to highlight gaps in data, perhaps as a function on the new Justice Data website. This should reliably lead to a response, providing the data and/or explaining the reasons for its absence. These gaps should also be collated and considered for future data collection and publication policy.**

123. JUSTICE has this week published a report on the rule of law in the UK, *The State We're In: Addressing Threats and Challenges to the Rule of Law.*[103] This report highlights JUSTICE's concerns about uncollected, unpublished and low-quality data across many different public authorities, particularly the Home Office and police forces. In that report our focus was on data which advances understanding of inequality and discrimination, the collection of which is part of how public bodies fulfil their Public Sector Equality Duty.[104] We reiterate here that equality data is crucial to understanding how the justice system is experienced by all those who come into contact with it. **In considering any future open justice initiatives, JUSTICE stresses the importance of considering the data required to evaluate the impact on marginalised groups, those with protected characteristics, and those experiencing intersectional disadvantage and discrimination.**

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[100] Byrom, 'Digital Justice: HMCTS data strategy and delivering access to justice Report and recommendations' ,(October 2019)

[101] HMCTS, *HMCTS data strategy*, December 2021

[102] The Centre for Public Data has mapped data in the criminal justice system, identifying significant data gaps in four areas: the use of remand and bail; sentencing, including for flagged offences like domestic abuse and hate crime; court operations, including legal representation, court backlogs and the effect of interventions; and low-level offences, including anti-social behaviour and out-of-court disposals. See Centre for Public Data, 'Research paper: Data and statistical gaps in criminal justice' (The Centre for Public Data, March 2023)

[103] JUSTICE, *The State We're In: Addressing Threats & Challenges to the Rule of Law*, (September 2023)

[104] Equality Act 2010, s.49

Case study: the Single Justice Procedure (Questions 25 and 26 of the consultation)

124. Data collection and publication are particularly important when other tools are unavailable. For example, the Single Justice Procedure ("**SJP**") takes place entirely behind closed doors when the defendant either does not respond or pleads guilty and does not request a hearing. This has clearly deprived the public, civil society, researchers and the media of their observational tools.

125. In response, there is a media protocol available and media can access case documents and outcomes.[105] However, the wider public's right to access information is extremely unclear. There are daily cause lists published online with minimal information: surnames and first initials, the first two letters of the postcode, the offence and the prosecutor. These lists are not updated with the outcomes, but instead disappear after 24 hours. The Gov.uk information page about the SJP does not provide any information directed to the public seeking information, and the media protocol stipulates the public can access case documents through a judicial application, but is silent on outcomes.[106]

126. When JUSTICE contacted Magistrates' courts to enquire about case outcomes, we were directed to the HMCTS Service Centre call line. However, one Magistrates' court did simply tell us they could not share case outcomes "due to GDPR" with no further signposting or any reasons given. When we rang the call line, the agent was unaware of how to deal with our request for a case outcome, and repeatedly requested more information that a member of the public could not have, such as the date of birth of the individual, the case ID or the car registration. Without further information, he could not locate the case, unless the surname of the individual was particularly unusual. But the agent was nevertheless unsure about whether he was allowed to provide any information at all. Finally, when the agent asked their manager at our request for further guidance, he eventually responded that if we had an unusually named defendant, and therefore he was able to isolate one case, he could give us the verdict and the *type* of sentence, but not the amount of any fine. **It is clear to JUSTICE that there is insufficient training and guidance given to telephone agents on public access to case outcomes, but also that the case management system (which we understand to be the Common Platform) is not designed to answer public requests for outcomes. We recommend this is reviewed as soon as possible.**

127. An implicit idea behind the lack of transparency in the SJP is that the cases are perhaps less in need of scrutiny because they are less serious. The cases subject to the SJP cannot be imprisonable,[107] and HMCTS promotional material refers to them as "minor" and "victimless".[108] JUSTICE disagrees, and considers the SJP is in need of scrutiny in several respects.

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[105] HMCTS, *Protocol on sharing court lists, registers and documents with the media* (July 2023)

[106] Ibid

[107] Magistrates' Courts Act 1980, s.16A inserted by the Criminal Justice and Courts Act 2015, s.48

[108] HMCTS, 'HMCTS Reform: Crime fact sheets - Fact sheet: Single Justice Service', (GOV UK, updated 4 August 2023)

a) Scrutiny of the offences – the majority of the cases listed relate to TV licensing, rail tickets and various motoring offences. However, the SJP has also been used to prosecute Coronavirus offences, and latterly to prosecute parents for truancy offences. JUSTICE is concerned that the procedure – and its attractive speed and ease for those administering justice – has a creeping prevalence without adequate scrutiny of the offences being prosecuted and the appropriateness of their inclusion. This concern is exacerbated by the fact there is no public list of all the offences which may be prosecuted by SJP; as long as it is non-imprisonable, it is at the prosecutor's discretion (prosecutors vary from police forces to rail companies). This means there is a notable *lack* of transparency about the regime as a whole.[109]

b) Scrutiny of the impact of defendants – remarkably, there are no regular statistics published about the SJP.[110] Any such data is typically uncovered through parliamentary questions or Freedom of Information Requests. Despite this, and thanks to the persistent efforts of some who are acutely concerned with the process – those methods have revealed issues of real concern with the process. For example, the engagement rate: through a Parliamentary question we know that in 2020, 71% of individuals did not respond to the initial charge notice and therefore entered no plea — a proportion that rises to almost 90% when looking at charges brought under the Coronavirus Act 2020.[111] Under the SJP, this results in defendants being found guilty and sentenced by a magistrate 'on the papers' without a hearing. However, if the reason for the lack of engagement is that they were unaware of the original charge (which is sent by post), they may also be unaware of the subsequent postal verdict and sentence. Other factors may also be relevant, such as a defendant's mental capacity. While the index offences are not imprisonable, failure to pay a fine attached to any guilty verdict *may* be imprisonable, and therefore the low levels of engagement are concerning and may lead to serious injustice.

c) Scrutiny of the process – through FOI requests by the journalist Tristan Kirk, we know that people have been wrongly convicted of more serious offences than they were being prosecuted for. This included parents being convicted of imprisonable truancy offences,[112] even though to do so is unlawful (an administrative error in which a more serious offence was processed). If the offences were being dealt with in open court – *even if no public or media were in attendance* – it is unlikely that such an error would have been made because the offence would have been read out to both the legal advisor and the prosecutor, who are both legally trained and would have spotted the error. However, in the current scheme prosecutors are absent and magistrates must proactively seek the help of a legal advisor by phone or videocall if they have a query, sharing one legal advisor between three

[109] The charity Unlock has further been told by HMCTS that not all offences dealt with by the SJP can be classed as "non-recordable". This means that, alongside summary only offences which are non-recordable, there are some offences which are subject to SJP which could, should the person be convicted in their absence, appear on an individual's criminal record on the Police National Computer. See Unlock, 'Single Justice Procedure Notice', (Unlock, undated)

[110] The last time the Government published statistics specifically on the SJP was in its Q1 Criminal Court Statistics in 2019: Ministry of Justice, (Ministry of Justice, 2019), ''Criminal court statistics quarterly, England and Wales, January to March 2019', p. 10.

[111] House of Commons, Question for Ministry of Justice, UIN 143756, tabled on 26 January 2021

[112] Tristan Kirk, 'Parents wrongly convicted in truancy cases', (Evening Standard, 30 September 2022)

magistrates.[113] This of course will not assist if they are unaware of an error. Again, it is notable that the three magistrates to one legal advisor ratio was revealed through an FOI, not proactive publication from MOJ. The FOI response also revealed that a target time of just 90 seconds was being used to test the efficiency of the scheme, with "higher levels of productivity" expected in the future.[114]

128. This is not the first time JUSTICE has expressed its concerns regarding the transparency of the SJP.[115] In addition to reviewing the accessibility of outcomes for the public, **JUSTICE strongly recommends regular data collection and publication of statistics for the SJP to enable scrutiny of the above areas.** APPEAL has argued that this might include "*how many people are being prosecuted under the SJP, for which offences, including the number that have pleaded guilty, not guilty or entered no plea*".[116] JUSTICE agrees, and would add the known protected characteristics and other indicators of disadvantage. Given the low levels of engagement, this equality data may be unknown to HMCTS, but it will likely be known to those prosecuting, and therefore JUSTICE urges collaboration in the collection such data. JUSTICE furthermore encourages proactive analysis of that data by the MOJ and external actors to evaluate the impact of the SJP.

Other priority areas of data collection

129. In civil justice, over the past decade, the idea of an Online Court has been growing,[117] with the twin aims of increasing dispute resolution and integrating such dispute resolution into an online process. The recent creation of the Online Procedure Rule Committee means the rules and procedures governing such an Online Court are likely to soon take shape.

130. JUSTICE has long encouraged improved access to alternative dispute resolution where appropriate, including the integration of that dispute resolution into the stages before court.[118] However, when cases are diverted from public courts into private resolution, it comes at a cost to open justice.

131. For this reason, JUSTICE stresses the importance of data collection in any such process, not only of parties and their claims, but also the outcomes. It would be unsatisfactory, for example, to only measure the parties' satisfaction or whether or not they settle the matter as a simple yes/no. The measures do not capture the substantive outcomes to legal claims, nor do they provide any way of evaluating whether outcomes fall within a range of legally acceptable results. This substantive evaluation is important; if a new process, especially a mandatory process, is in fact resulting in

[113] Tristan Kirk, 'Magistrates handing out convictions in private court hearings that last just 90 seconds' (Evening Standard, 23 September 2022)

[114] Ibid.

[115] JUSTICE, 'Judicial Review and Courts Bill (Part 2 - Criminal Procedure) House of Commons Committee Stage Briefing', (JUSTICE, 2021), p. 4.

[116] APPEAL, 'Parliament Committees - Written evidence from APPEAL', (APPEAL, October 2021)

[117] As recommended by the Civil Justice Council's Online Dispute Resolution Advisory Group in 2015 and incorporated into the recommendations of Lord Justice Briggs' Civil Courts Structure Review in 2016. Lord Justice Briggs, Civil Courts Structure Review: Interim Report (Judiciary UK, December 2015), p.75

[118] See for example, JUSTICE, 'Delivering Justice in an Age of Austerity: A Report by JUSTICE', (JUSTICE, 2015); and JUSTICE, 'Solving Housing Disputes: A Report by JUSTICE (JUSTICE, 2020).

substantively worse outcomes for a section of the population, on average, than they would get in court, then this needs to be known. There are clear barriers to such data collection, namely the privacy of the parties in any confidential settlements, however such barriers are not insurmountable, for example, if the outcomes data were de-identified.

132. **JUSTICE therefore recommends the new Online Procedure Rule Committee, in their imminent work in designing rules and procedures for online dispute resolution processes, should have at the forefront of its mind the question of how open justice will be built into an online court, especially data collection. This should include consideration of how outcomes of both adjudicated as well as settled cases can be collected and evaluated.**

Data Access

133. When data is not openly published, various data access tools are available. The usual statutory data access tools are however quite limited; subject access requests ("**SAR**") under data protection law are unavailable when personal data is processed in a judicial capacity, or in any event, if it would be likely to prejudice judicial independence or judicial proceedings.[119] Meanwhile court records are exempt from freedom of information requests ("**FOIs**").[120] Instead, court records are subject to applications, with different rules applying in each jurisdiction.

134. Data from MOJ or HMCTS which are not "court records" *can* be subject to an FOI, and SAR requests can also be made.[121] These requests can also be made of other institutions involved in the justice system, including those involved in the "user journey" before and after court (local authorities, police, probation, prisons) as well as other relevant institutions to the transparency of justice, for example the Judicial Appointments Commission.

135. There are also administrative application procedures for external actors to access unpublished data, which are aimed at academic researchers. HMCTS has a Data Access Panel ("**DAP**") which processes applications, with recourse to the Senior Data Governance Panel ("**SDGP**") for advice on novel or complex requests. The DAP decides whether or not the applicant can access the data, dependent on various aspects of the research, including the proposed methodology of how the data will be collected and analysed (including GDPR compliance and research ethics). Notably, one factor is whether the research is aligned with MOJ areas of research interest.[122]

136. MOJ's "Data First" initiative with ADR UK is also subject to an application process. The initiative provides access to newly available "de-identified and ready to use" data from MOJ, HMCTS, and His Majesty's Prison and Probation Service ("**HMPPS**") and the initiative also supports data-linking between departments, currently MOJ and the Department for Education ("**DfE**"). Applications are determined by groups within the ministerial departments, with projects linking MOJ and DfE data having to be approved

[119] Data Protection Act 2018, Schedule 2, paragraph 14

[120] Freedom of Information Act 2000, s.32

[121] Ministry of Justice, 'Request personal info form service - Ministry of Justice', (GOV UK, undated)

[122] HMCTS, 'Guidance - Access HMCTS data for research', (GOV UK, last updated 24 March 2023)

by both.[123] All applications are scrutinised and decided in accordance with several criteria, including the accreditation of the researcher, the proposed methodology of how the data will be collected and whether the research is in the "public interest".[124] The data is also accessible on the Office for National Statistics' Secure Research Service ("**ONS SRS**").

137. These application processes mirror those in other sectors. For example, JUSTICE is aware that the Data Access Panel model was inspired by the NHS Data Access Request Service.[125] Meanwhile the Data First data uses the ONS SRS's '5 safes' framework to determine applications to use the data. The aspects of the research design which must be "safe" are: the people, the project, the settings, the outputs and the data.[126] These borrowed approaches clearly are designed to protect privacy, safety, and to guard against the misuse of data, which are all key tensions we have identified.

138. However, the different sectors they are borrowed from need to be assessed for their differences as well as their similarities. For example, there is no "open health" principle. The NHS Data Access Request service starts from a position of privacy of confidentiality, and is "committed to only releasing patient and service user data to those who have a genuine need for it and can demonstrate this to an independent oversight panel."[127] It clearly has not been developed with anything like the open justice principle in mind, nor for a system which has a distinct constitutional role as the justice system does. **JUSTICE therefore questions whether justice data access can be dealt with using the same models as used for data access in other sectors without substantial modification to reflect the constitutional role of the courts and the open justice principle.**

139. Unhelpfully, the panels themselves are relatively opaque – the identities of those making the decisions are not publicly available, albeit the members of the referral body, the SDGP, are. There are no minutes available, nor any publicly available records of what requests have been refused and why. This in practice means it is impossible to scrutinise how these panels are functioning and what access to justice data is in fact being facilitated.

140. JUSTICE is particularly concerned with one criterion applied by HMCTS's Data Access Panel: alignment of the applicant's research with MOJ's areas of research interest. **JUSTICE is unclear whether alignment with executive priorities is an appropriate criterion for justice data access. Coming back to our purposes of open justice, it means "letting in the light and allowing the public to scrutinise the workings of the law, for better or for worse". This cannot be said to be done when research access is only permitted to data which supports an executive research agenda.**

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[123] HM Government, 'Data sharing guidance for researchers seeking permission for secure access to data', (HM Government, January 2022)

[124] Ministry of Justice, ''MOJ: Data First, application form for secure access to data', (GOV UK, last updated 13 June 2023)

[125] NHS Digital, Data Access Request Service (DARS)

[126] Office for National Statistics, 'Accessing secure research data as an accredited researcher', (ONS, undated)

[127] NHS Digital, *Data Access Request Service (DARS) products and services*

141. It is acknowledged of course that the executive has a significant role to play in operationalising the courts, collecting their data and making that data available. What is unclear is the extent to which executive policy, as opposed to operations, should be able to directly determine the openness of justice data. The concern is more acute when the process itself lacks transparency and accountability.

Third party reuse

142. Finally, the extent to which third parties can reuse the data is also relevant to its openness – "reuse" being a broad term encompassing many actions (e.g., further publishing and distribution; commercial exploitation; academic research; artificial intelligence-enabled computational analysis).[128]

143. When data is part of court records, the potential for reuse, and what that might be, may be considered by the judge deciding access. The judge could for example impose reporting restrictions, if the re-use would be publication. In *Cape v Dring* the reuse would have been policy research and campaigning. JUSTICE is unaware of any provisions in the procedural rules which at length canvas the types of restrictions available for different types of reuse. However, the civil procedure rules give wide discretion: the judge may restrict the persons or classes of persons who may obtain a copy of a case record, order that a non-party may not have a copy, or "make such other order as it thinks fit."[129]

144. In application procedures to data access panels, how researchers will use the data – the methodology and the intended purpose of any publication – is scrutinised in the application process.

145. In contrast, openly published data, like court quarterly statistics, is published under the Open Government Licence for public sector information.[130] This licence permits almost all kinds of third-party use of information, in terms of how the information can be processed, analysed, and exploited commercially. One exception is the reuse of any personal data in the information, albeit the majority of data containing personal data is subject to restricted access procedures.

146. That is not true of course for judgments, which contain a lot of personal data. The National Archives' "Find Case Law" judgments are published under a different licence: the Open *Justice* Licence.[131] Like the Open Government Licence, it permits the copying, publication, distribution and commercial exploitation of the data. Notably, the judgments contain personal data, such as names, dates of birth, addresses, and in many instances will contain special category personal data (revealing racial or ethnic origin, political opinions, religious or philosophical beliefs; trade-union membership; genetic data; biometric data processed solely to identify a human being; health-related data; data concerning a person's sex life or sexual orientation).[132] The license does not

[128] See OECD, 'OECD - OURdata Index Policy Paper' (OECD, 2019)

[129] Civil Procedure Rules r. 5.4C

[130] The National Archives, 'Open Government Licence for public sector information', (The National Archives, version 3, undated)

[131] The National Archives, Find case law - Open Justice Licence

[132] Article 9, GDPR (General Data Protection Regulation) (EU) 2016/679

permit any additional use of this personal data, by explicitly stating it is not a data sharing or processing agreement, and therefore the use of personal data and special category data is the responsibility of those using it.[133] The licence also reiterates the need for the user to comply with judicial restrictions on the use of personal data.

147. The Open Justice Licence also explicitly excludes several uses, the most notable of which is the computational analysis of the information (including indexing by search engines). For that, a Transactional Licence is required, available through an application process.[134] Like the above application processes to data access panels, the decision-making process for granting or refusing transactional licences is opaque; even more so in fact, since the criteria are also not published. It is impossible therefore to know what the current policy is on what reuse is in the public interest, and what is not.

148. These Transactional Licences are particularly relevant in a modern context, in which technology can enable the analysis of very large datasets in unprecedented ways. We discussed above the concerns identified in the US with respect to PACER: commercial aggregation of personal data and its reuse by private and public actors for a variety of reasons, both reuse which may be in the public interest and that which may not.

149. Aside from personal data, judgments contain data of legal argumentation and judicial reasoning. Both legal and judicial analytics have been advancing globally, including predictions around likelihood and value of settlement.[135] In the US, analytics include the litigation history of individual attorneys and individual judges, their experiences, and with respect to judges their "ruling tendencies".[136] Reception of judicial analytics has not been unanimously positive, however. Concerns about judicial independence have been prominent, with France having taken the decision to prohibit the reuse of identity data of magistrates and members of the judiciary with the purpose or effect of evaluating, analysing, comparing or predicting their actual or alleged professional practices.[137]

Recommendations

150. The landscape of data access and reuse is clearly complex. It features different decision-makers, actors, levels of access and safeguarding mechanisms which can control the reuse of justice data by third parties. **JUSTICE considers a holistic review of the landscape is required, of the actors who are deciding the extent of third party reuse; the criteria they are applying; the mechanisms they are using to control such reuse and what evidence we have of the efficacy of any of these control mechanisms. We reiterate our concern about the transparency and accountability of the executive's powerful role in gatekeeping justice data, and**

[133] As "data controllers" are defined in Article 4 GDPR, although note Article 2 (a) GDPR which states an individual processing data in the course of a purely personal or household activity is not subject to the GDPR.

[134] The National Archives, Transactional Licence Form. So far 7 organisations hold transactional licences: British and Irish Legal Information Institute (BAILII); Debt Squared Group Limited; Incorporated Council of Law Reporting for England and Wales (ICLR); Law Notion; RELX Limited t/a LexisNexis; Vizlegal; World Intellectual Property Office (WIPO).

[135] In France, see Predictrice; or LexMachina from LexisNexis in the UK.

[136] See Bloomberg Law, Litigation Intelligence Center - Litigation Analytics; Lexis+, Litigation Analytics Tools; and Westlaw Edge, Litigation Analytics

[137] Justice Reform Act 2019, Article 33

we consider any review would benefit from constitutional analysis of the difference between justice data and data held by other executive bodies.

151. **As discussed above, JUSTICE also considers this needs to be conducted alongside public engagement on the question of what third party reuse of data is in fact in the public interest.** This is particularly important when it comes to personal data, but public opinion is also highly relevant to other data, such as judicial ruling tendencies, and questions of the commercialisation of justice data. This work has been started by LEF's Justice Lab, which conducted a survey and several workshops last year with members of the public about court data use.[138] It found that the public wants robust governance of commercial use of court record data, and that third party use of court data can cause discomfort and low trust. There is more comfort and public confidence in third party data use when its use is transparent and individuals feel informed; meanwhile the lack of information and transparency in government decision-making about data use caused concern. Critically, the public felt that public interest should be prioritised in considering different uses of court data, but what was in the public interest may not be agreed between the public and government policy makers or ministers. For example, the development of low-cost alternatives to court for those on low incomes was particularly controversial. The public expressed concern at this creating more incentive for low-income groups to settle out of court or enter mitigation, meaning that fewer cases by low-income people make it to court. They identified the risk of a two-tier justice system, and the data set of litigated cases becoming further skewed. They also worried that consistently advising those on low incomes to avoid court would support unethical organisations or individuals with wealth to be able to routinely pay their way out of trouble and keep patterns of misconduct out of public knowledge (as JUSTICE has also identified in its discussion of the tension between open justice and private settlement, above).

152. Finally, **JUSTICE stresses that any mechanism for such public engagement should be a dialogue, not a one-off opportunity, which has an ongoing role in informing policy and governance.** This allows the public to engage with the issues properly, which is important given there is low public awareness of how court records are used at present, let alone the full range of possible uses in the future.[139] For example, with respect to health data since 2016, an intermediary organisation *Understanding Patient Data* has supported conversations with the public about uses of health and care data. This includes creating resources; commissioning attitudes research; developing partnerships and networks of those working in health and care data; advice and advocacy; and media communications.[140] JUSTICE considers such a model could have significant benefits, both to the decision-makers and their understanding of public opinion and public interest; and the public themselves, and their understanding of the actors, processes and criteria which determine the public's

[138] Jennifer Gisborne, Reema Patel, Caroline Paskell, Charlie Peto, 'Justice Data Matters: Building a Public Mandate for Court Data Use', (Justice Lab, July 2022)

[139] As found by the Justice Lab researchers. Most (70%) said that they knew "nothing" or "not very much" about the information contained in court records, and 74% said that they knew "not very much" or "nothing at all" about who has access to court records. Almost two thirds of respondents (64%) felt that the government keeps the public "fairly poorly" or "very poorly" informed about how information from court records is used. Ibid, pp. 19-20

[140] Understanding Patient Data, About Us

access to court data. The public's understanding of the law and legal processes is further discussed in the final section below.

iii) Public legal education (Questions 2, 3 and 58-65 of the consultation)

153. Public legal education tools can further the "accessibility of the law" purpose of open justice. They will of course be less important to those in the population who can access the law through a legal professional, who can then provide advice and representation on specific problems. Lawyers have at their disposal both their own professional experience and legal resources. These resources include expensive books, journals, and paid-for subscriptions to online legal resources, all of which are mostly inaccessible to the lay person.

154. However, for those who are unable to access a lawyer, there is some evidence to suggest that well-designed public legal education initiatives can improve the legal capability of individuals with legal problems by increasing their knowledge and building confidence.[141]

155. Firstly, there are tools which help when a person has a legal problem, otherwise known as "just in time" public legal education.[142] At its most direct, the law is available through primary source tools, through the availability of judgments, rules and legislation, on legislation.gov website. However, without being ordered and searchable by the substantive issue or area of law, these sources can be confusing and alienating to non-lawyers. Indeed, if judgments are not even clear on their face if they are still good law, or if they have been overturned, they could be potentially misleading.

156. Legal information tools which can help make legal information digestible are therefore crucial. They can summarise the law, procedural rules and practical experience and present it per topic.[143] Furthermore, there are interactive self-help tools which go further, and use automated questions and decision-trees to triage the person's inquiry to identify the relevant information for their specific problem.[144] Integrating artificial intelligence into those tools may drastically change their capability to provide information which is even more tailored to the individual's needs at a much reduced cost.[145]

157. Secondly, there are "just in case" public legal education tools. These tools are not helping to answer a specific legal question, but rather demystifying the law and the justice system, and introducing people to the concepts of having legally enforceable obligations, rights and remedies. They depend on using existing opportunities for information provision, and therefore schools often are mentioned as the earliest opportunity for public legal education. Methods include the taught school curriculum,

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[141] Dr. Lisa Wintersteiger, Sarah Morse, Michael Olatokun and Dr Christopher J Morris, 'Effectiveness of Public Legal Education initiatives: A literature review,' (Legal Services Board, February 2021)

[142] Solicitor's General Committee on Public Legal Education, 'A Ten Year Vision for Public Legal Education', (Lawworks, undated)

[143] For example, the clear, step-by-step, user-friendly practical guides available from Advice Now

[144] For example, the MOJ's housing disrepair tool, **Check how to get repairs done in your rented home**

[145] See for example Grapple which asks questions about an employment problem and can produce a tailored advice note and a letter, having integrated the use of a large language model into the process.

[146] as well as civil society initiatives, such as the *Streetlaw* pro bono programme which provides additional rights-based education to school children.[147] JUSTICE Scotland intends to launch some work on public legal education in Scottish schools in 2024.

158. For adults, who get information from a variety of places rather than one formal education provider, there are a range of options. TV, radio and print media all play a large role; however if only the most extreme and serious cases make it into the press, and the decline of local court reporting goes unaddressed, this may result in an inaccurate understanding in the wider public of what justice usually looks like. Storylines in fictional programmes can also raise awareness of legal rights and possible remedies, particularly when done in coordination with civil society organisations and targeting a particular popular misconception.[148] Social media can also be used for this purpose, and JUSTICE considers public legal education on social media platforms is likely to continue to grow.

159. Other familiarisation tools can facilitate understanding of justice spaces and rituals, outside of their depictions in fiction, television dramas and films. These can include court and tribunal open days, or information videos online, such as HMCTS's "Preparing to come to court" video guides.[149]

Public legal education recommendations

160. In JUSTICE's *Understanding Courts* report, we identified lay users' understanding of the process of attending court or a tribunal as a key area of public legal education which needed improvement.[150] We identified gaps in understanding of outcomes, such as sentencing[151] and acquittal."[152] We also identified fundamental issues with the resources available to the general public to understand the courts and justice system, including outdated resources;[153] lack of centralised guidance;[154] and a lack of resources using effective communication styles and clear language.[155] This was true for lay observers, but was also true for lay participants in cases, with evidence that

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[146] There is some, albeit limited, inclusion of the justice system and the law in the Citizenship curriculum for Key Stage 3 in England. Department for Education, 'Statutory guidance: National curriculum in England: citizenship programmes of study for key stages 3 and 4 (GOV UK, published 11 September 2013)

[147] For example, see the Open University Law School, 'Streetlaw: What Is That All About?' (Open University Law school, undated) and information about the original US Street Law initiative here, Street Law, 'Our Work' (Street Law, undated) What We Do at Street Law

[148] For example, the storyline in BBC's The Archers about coercive and controlling behaviour, see BBC News, '"The Archers made me realise I was a victim of domestic abuse"' (7 March 2018). Previous to this, a media campaign was central to the success of Advice Services Alliance's *Living Together* Campaign, which aimed to target popular misconceptions about the legal position of cohabiting couples and to raise awareness of what they can do to protect themselves. It involved a storyline in the TV show 'Emmerdale' and coverage on breakfast and daytime TV, as well as plentiful coverage on local radio and in local newspapers. See PLEAS Task Force, Developing capable citizens: the role of public legal education', (Public Legal Education and Support, July 2007)

[149] HMCTS, Preparing to come to court - video guides

[150] JUSTICE, 'Understanding Courts: A Report by JUSTICE' p.1 - 2; p.17 para 2.2.

[151] Ibid, p. 105

[152] Ibid, p. 59. Similarly, a survey by the Sentencing Council found further gaps, such as poor understanding of the term "on licence" Nicola Marsh, Emma McKay, Clara Pelly and Simon Cereda, 'Public Knowledge of and Confidence in the Criminal Justice System and Sentencing: A Report for the Sentencing Council' (Sentencing Council, August 2019), p. 24

[153] JUSTICE, *Understanding Courts*, pp. 27, 32 – 33

[154] Ibid, p. 28, 31 – 32

[155] Ibid, pp. 18 – 19

litigants in person persistently struggle to navigate the court system, which is still designed for lawyers.[156]

161. We consider that many of the issues we identified in our Understanding Courts report remain. Much of the court process continues to be alien and marginalising to the lay users trying to navigate it. **We reiterate our recommendations in Understanding Courts which all stress that that the legal system must place the lay user at its heart, and the process be shaped around their needs.**

162. We further consider that the Government should within its work be promoting the rule of law, and the principles of open justice and access to justice which are so fundamental to it. Therefore, in answer to the question of whether it is the Government's role to produce information tools, JUSTICE considers it to be squarely within the Government's role. That is not to say that the Government must do it all themselves, and indeed JUSTICE considers there is substantial benefit to working with others in the legal information sector to ensure resources are truly accessible to those who need them. But JUSTICE does consider there to be a clear imperative for the Government to facilitate equal access to the law. In doing so, we support the use of digital technology, particularly that which is interactive and customisable to the needs of the individual.

163. Finally, however, we not ignore the significance of the substantial cuts in legal aid in the last ten years, which have resulted in large swathes of the population not having access to affordable legal representation. JUSTICE does not consider that legal information tools can dissolve financial inequality, nor can they entirely replace legal advice. Furthermore, we know that not everyone with a justiciable problem will approach a lawyer to even find out about the affordability of advice, because many different factors influence how people act when they are presented with a problem; they may not be legally empowered, they may not appreciate their problem to be "legal" in nature,[157] or they may have other powerful emotional drivers, including fear, anxiety and shame, which may influence their engagement in legal processes.[158] Public legal education therefore cannot close the access to justice gap, and must be part of a package of measures which meet these varied barriers to justice.

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[156] Ibid, p. 28. With respect to family proceedings, see further JUSTICE, 'Improving access to justice for separating families (JUSTICE, 2022)

[157] Professor Pascoe Pleasence and Dr. Nigel J. Balmer, 'How People Resolve 'Legal' Problems: a report to the Legal Services Board' , (PPSR, 2014), p.27.

[158] Isabella Pereira, Chris Perry, Helen Greevy and Hannah Shrimpton, 'The Varying Paths to Justice Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems' ,(MOJ Analytical Series, 2015)

Conclusion (Questions 4 and 5 of the Consultation)

164. A review of "open justice" in our justice system is timely, given the vast societal and technological changes which have occurred since the last public evaluation of open justice by the Government, and which continue apace.

165. In JUSTICE's assessment, open justice has three clear purposes: it preserves the **legitimacy** of the justice system in the eyes of the public; it facilitates **scrutiny** of the justice system *and* the actors involved in it; and it increases the **accessibility** of the law itself. However, there are various factors in tension with open justice, which impact the way it is given practical effect. These include the fair administration of justice; privacy; dignity and authority of proceedings; accuracy; protection from harm and other misuse of information; judicial independence & impartiality; national security; and resources.

166. The challenge, therefore, is to identify how the tools which enable open justice in practice can strike the right balance with these tensions, while ensuring open justice is not eroded to the extent it is an optional add-on, but rather continues to be protected as a fundamental principle of our justice system.

167. **With respect to engagement with individual proceedings, we have concluded that:**

a) Court lists should be more accessible and easier to navigate online. They should include enough information for individuals to make decisions about observation of court hearings, whilst not sharing a disproportionate amount of personal information. They are also a clear opportunity to collocate other relevant information for observers which directly impacts their observation of court, including the general legal restrictions on their behaviour (e.g. contempt of court) and those specific to the case (reporting restrictions/transparency orders).

b) With respect to livestreaming, JUSTICE supports the use of designated livestreaming processes for appropriate cases, automated "request a link" processes, and continued judicial discretion to limit whether a case is livestreamed to the public. We recommend consideration of an intermediary role, to support efficient and effective open justice through liaison with the court and observers. This role could support effective observations of in person hearings as well as livestreamed hearings.

c) MOJ should conduct or commission more research on the impact of livestreaming on witnesses, particularly those who are disadvantaged or marginalised.

d) JUSTICE does not consider that broadcast of proceedings should be rolled out any further without consideration of the risks and further research. Substantial consultation with individuals and organisations representing groups of such participants would need to take place, including the Children's Commissioner, the Victims Commissioner, the Domestic Abuse Commissioner, the Anti-Trafficking and Modern Slavery Commissioner, as well as organisations representing the interests of disadvantaged and marginalised groups.

e) JUSTICE supports the publication of an Open Justice Charter for the public without delay. The Charter should explain in one place their rights of access to case

documentation, the existing channels available to them and the practical steps involved.

f) JUSTICE also strongly supports a holistic review of court rules and procedures which facilitate access to court documents. This review should consider the consistency, or lack thereof, of access between different courts; the roles and responsibilities for record keeping, redaction and provision; and take a fresh look at whether rules are justified in the public interest.

g) Before any shift to court documents being made available through an online platform, the Government must carefully consider and consult upon the management of various risks, learning from the use of PACER in the US.

h) JUSTICE supports improvements to media access to court documents, however we are concerned that improvements in media tools should not be the sole focus of open justice reform. There are various legitimate reasons why others – including members of the public, civil society organisations, and academic researchers – may wish to observe and scrutinise the justice system, and indeed bring their own different perspectives.

168. **With respect to access to justice system data, we have concluded that:**

a) Data collection to evaluate the impact of the justice system on marginalised groups, those with protected characteristics, and those experiencing intersectional disadvantage and discrimination, should be prioritised.

b) JUSTICE recommends MOJ and HMCTS improve its dialogue with the public about data collection. External actors to the justice system (Parliamentarians, civil society organisations, academic researchers, members of the media and individuals) should all be able to highlight gaps in data, perhaps as a function on the new Justice Data website. This should reliably lead to a response, providing the data and/or explaining the reasons for its absence. These gaps should also be collated and considered for future data collection and publication policy.

c) JUSTICE strongly recommends regular data collection and publication of statistics for the Single Justice Procedure to enable scrutiny. There should also be a review of the processes and training in place for HMCTS Service Centre call agents to facilitate requests for case outcomes from members of the public.

d) The new Online Procedure Rule Committee, in their imminent work in designing rules and procedures for online dispute resolution processes, should have at the forefront of its mind the question of how open justice will be built into an online court, especially data collection. This should include consideration of how outcomes of both adjudicated as well as settled cases can be collected and evaluated.

e) JUSTICE is concerned about the transparency and accountability of the executive's powerful role in gatekeeping justice data. JUSTICE considers a holistic review of the landscape is required, of the actors who are deciding the extent of third party reuse; the criteria they are applying; the mechanisms they are using to control such reuse and what evidence we have of the efficacy of any of these control mechanisms. Any review would benefit from constitutional analysis of the difference between justice data and data held by other executive bodies, and the legitimacy of

any criterion which allows or prohibits access to justice data due to its alignment with executive research priorities.

f) JUSTICE recommends engagement with the public on the question of what third party reuse of data is in fact in the public interest. JUSTICE recommends this public engagement should be a dialogue, not a one-off opportunity like this consultation, which has an ongoing role in informing policy and governance. An intermediary organisation could facilitate such a dialogue, and we have identified an example in the health sector.

169. **With respect to public legal education**, we stress the Government has a key role to play in the provision of information about the law and justice processes. However, public legal education alone cannot close the access to justice gap, and must be part of a package of measures which meet various barriers to equal access to justice.

170. Finally, we invite the MOJ, HMCTS and other justice executive bodies to reflect on how the open justice principle is integrated in their own policy development, and how this can improve. A healthy respect for and consideration of open justice cannot be sustained through sporadic consultations once per decade. One very practical example would be inclusion of open justice and transparency within decision-making processes, such as being a header in policy submissions to ministers.