



**Attorney
General's
Office**

Rt Hon Suella Braverman QC MP
Attorney General

102 Petty France
London
SW1H 9AJ

Tel: 0207 271 2492

www.gov.uk/ago

Sir Bob Neill MP
Chair
Justice Select Committee
House of Commons
London
SW1A 0AA

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Dear Sir Bob,

Thank you for your letter dated 1st February 2022, following my appearance before the Justice Select Committee on the 25th January.

I am happy to provide updates on the issues we were unable to cover during the session, and to provide clarity on information I gave in relation to the work of the Serious Fraud Office.

I will respond to each matter in turn.

Open justice

You asked how I would assess the current state of open justice in England and Wales. The Government is committed to the principle of open justice, which is as rooted in the common law as it is reflected in Article 6 of the European Convention on Human Rights (ECHR). The public can access, and be informed about, the vast majority of legal proceedings. There are some types of proceedings which, for particular compelling reasons prescribed by law, cannot be conducted in accordance with the principles of open justice. The common law and the ECHR recognise those proper and important exceptions. The state of open justice as a matter of the legal framework is, in my view, in good health, although I acknowledge the points you have made in the questions I seek to address below. In saying that, I do not underestimate the importance of continued and proper scrutiny of how the principle of open justice is applied in practice asking, in particular circumstances whether justice is as open as it can be or whether there is a good reason why it cannot be.

You also asked for my reaction to the President of the Family Division's report on transparency in the family court. I welcome Sir Andrew's considered and thorough report into this critical issue. I agree with Sir Andrew that, after 60 years, the approach to open justice in the family jurisdiction merited detailed consideration. Clearly, as Sir Andrew recognises, there is a balance to be struck between allowing greater transparency in family proceedings and maintaining the anonymity of the individuals involved. I look forward to seeing how the proposals of the transparency implementation group strike that balance.

Finally, you asked whether decreasing coverage of court proceedings is a cause for concern. Informed, accurate reporting – by professional and accredited journalists – greatly assists public understanding of the justice system and helps ensure that legal proceedings remain fair, so I would entirely agree that this merits attention. This decline in reporting falls against the backdrop of decline over the past two decades, of dedicated court reporters.

This Government is wholly committed to open justice, increasing transparency and supporting journalists to attend hearings and access information about courts and tribunals proceedings. I would refer to the evidence the Ministry of Justice submitted to the Committee's open justice inquiry for a list of the measures that have and are being taken in this regard, which include HMCTS Media Working Group working with the news media to improve access to courts and tribunals.

Contempt of court

You asked about the role the Law Officers play in relation to contempt proceedings, and the number of contempt proceedings we have instituted. The role of the Law Officers in relation to contempt of court is to act in exceptional circumstances where the public interest requires it. The purpose is to ensure and promote the administration of justice and thereby the rule of law. Usually the judge in the proceedings, the parties themselves, or the police are well-placed to deal with instances of contempt. Each year, the AGO instigates committal proceedings in a handful of cases (recently, between 1 and 7 in number). The contempt cases brought by the Law Officers almost always relate to criminal or quasi-criminal acts (that is, conduct which interferes, or risks interfering, with the administration of justice).

With regard to the effect of social media on the reporting of criminal proceedings, my experience is that mainstream media organisations understand their responsibilities under the law of contempt and comply with them. I am, however, concerned about the potential for prejudicial social media activity to interfere with live proceedings. I will be taking further the work commenced last summer, seeking to improve public understanding of the risk of social media contempts through the #ThinkBeforeYouPost campaign. I would be pleased if the Committee would support the campaign and my officials can provide further information if this would be of interest.

Regarding the Law Commission's recommendation that there should be an online list of the reporting restrictions in place which the media can access, this is ultimately a matter for the Lord Chancellor but I understand that he intends to implement the recommendation.

Finally, in relation to the proposal for a Reporters' Charter for covering courts, I have read John Battle's proposals with interest. Again, this would need to be worked through both from the policy and operational perspective by my colleague the Lord Chancellor and the Ministry of Justice, and Her Majesty's Courts and Tribunals Service. It is these bodies whom I understand would have responsibility for developing and implementing such proposals.

Sentencing practice

Unduly lenient sentence (ULS) scheme

You asked how the Solicitor General and I decide whether to refer a sentence under the ULS scheme. The unduly lenient scheme does not create an automatic right of appeal against the original sentence. It was created by statute to create a limited exception, in the interests of justice, to the principle of legal certainty in sentencing in the most serious cases. The purpose of the power is to correct an error of principle which occurred at sentence which, if unaltered, would damage public confidence. The power is entrusted to the Law Officers to exercise quasi-judicially, and in the public interest.

We are only able to refer sentences passed in the Crown Court to the Court of Appeal for certain offences if they appear to us to be unduly lenient. This is a high bar. The Court of Appeal will only grant permission to refer a sentence in exceptional circumstances: for example, if the judge has passed a sentence that falls outside the range of sentences which a judge, applying their mind to all the relevant factors before them, could properly consider appropriate, or if the judge has made some gross error in law.

If the test is not met, it is not proper to refer the case to the Court of Appeal.

In respect of the extent to which the application of sentencing guidelines informs the decision to refer a case, most offences within the ULS scheme have guidelines in place issued by the Sentencing Council (sentencing for murder is governed by Schedule 21 of the Sentencing Act 2020). Judges are obliged to follow the guidelines unless it would be contrary to the interests of justice to do so. Because the guidelines are designed to address the different ways in which offences can be committed and the relevant factors which might arise at sentence, it will be rare for their application to be contrary to the interests of justice. We scrutinise very carefully the application of the relevant guidelines when asking ourselves whether the sentence passed was within the reasonable range, or whether or not the judge fell into gross error. We are in effect reviewing whether the judge properly applied the applicable guideline.

As to whether public reaction plays a part in considering whether a sentence should be referred, as I set out above: the Law Officers act quasi-judicially and that means that we cannot and do not take into account public reaction in our objective legal assessment of whether the test for undue leniency is met. It is right once that decision has been made to engage with the public as appropriate, to explain the decision where necessary and where appropriate to present it, in public, in court. Public reaction is not, however, a factor in the decision-making process.

It has been suggested that something can be read into the rates of referral to the Court of Appeal. Whether or not cases are referred to us and in what number is a matter for the members of the public, the CPS and the victims of crime who do so when they have a concern about a sentence. Whether or not the undue leniency test is met is an objective, legal decision for the Law Officers taken carefully in each and every case. The vast majority of sentences are correctly decided, and the unduly lenient sentence scheme remains a sparingly-exercised power to ensure justice in individual and particular cases. The Solicitor General and I personally consider approximately 500 cases each year. Between 2018 and 2020, the Court of Appeal granted leave to appeal in over 80% of the sentences we referred. In 2021, I personally presented cases to the Court of Appeal including the case of Michael Smith, who raped a woman and made false allegations about her to the police. Following my intervention, his sentence was increased from 3 years and 9 months' imprisonment to 5 years and 6 months' imprisonment.

Public understanding of sentencing practice

Firstly, you asked for my assessment of how sentencing has changed in recent years. In my view, the availability of sentencing guidelines and their review and revision have greatly improved the sentencing exercise in courts up and down the land, and clarity and transparency in that process. While there are many trends which may be identified, for me, the key trend concerns transparency and explicability of sentencing, and it is going in the right direction.

You asked what more could be done to help improve understanding amongst MPs and members of the public, and whether the Sentencing Council could play a fuller role in improving public understanding of sentencing. In my view, the Sentencing Council already does promote awareness among the public regarding the realities of sentencing by publishing information about sentencing practice and producing clear and accessible guidelines. It is to be commended for doing so. I would only suggest they could do more as part of a general recognition that we all – my office included – are not complacent and would wish to do as much as we can, recognising the importance of public confidence in sentencing. My office works closely with a range of organisations via the Public Legal Education Committee to support public understanding of the law. I would commend the excellent work done by these organisations and am committed to continuing to support public legal education across a wide range of legal topics.

The Serious Fraud Office and the Committee's inquiry into Fraud and the Justice System

I am happy to provide an update on the SFO's allocation in the latest spending review. This Government is committed to driving improvements in the Serious Fraud Office, investing £4.2m across three years to embed cutting edge technology to decrease the time it takes to prosecute cases. This extra funding will also be used to bring in experienced disclosure counsel to quickly address challenges on priority cases.

A further £8.4m will be invested over three years to modernise the SFO's ICT systems, support their accommodation move, and build a new data capability in response to the increased volume and complexity of case data.

I can also provide an update in response to Paul Maynard's questions on the Unaoil review. I am pleased to say I have appointed Sir David Calvert-Smith to lead the review, and I will update Parliament on his findings and with the Government's response. Further information on the review can be found in my Written Ministerial Statement, which was recently laid before the House.

Finally, while the Government is committed to bringing the Economic Crime Bill forward, I am not able to comment on timings or the contents of any future Queen's speech.

Yours sincerely,


RT HON SUELLA BRAVERMAN QC MP
ATTORNEY GENERAL