

Written evidence from Transform Justice

Transform Justice is a criminal justice “think tank” which advocates for a fair, humane, open and effective justice system in the UK. We research issues such as the over-use of remand, the under-use of out of court disposals and the implications of digital justice for the fair trial rights of suspects and defendants.

All our work touches on or is affected by open justice since we cannot shine light on the justice system without having access to its actors and data.

The importance of open justice

Open justice is a principle of our justice system in common law and in relation to the European Convention on Human Rights. All defendants have a right to a “fair and public hearing” (Article 6 Human Rights Act). Open justice refers both to access to observing the court hearing itself and to access to information and data.

Open justice ensures that justice is seen to be done as well as done. It offers the potential of increasing public understanding of how justice works and of improving the accountability of the justice system. Greater accountability is sorely needed. There is no courts inspectorate so no inspectors are scrutinising how courts operate. There are appeal mechanisms in all jurisdictions but the barriers to appealing are considerable. Thus, the number and proportion of appeals cannot be used as an indicator of the fairness of the system in any England and Wales jurisdiction. Without media and public access to live court hearings and to information about them, systemic and individual miscarriages of justice are more likely to occur.

Is justice open?

Many court hearings are either actually or in effect closed to the public. All family and youth court hearings are only open to those the court allows to attend, though accredited media has default access. Many other civil and some adult criminal hearings are held *in camera* and an increasing number of court cases are dealt with “on the papers”, either using physical papers or online. In addition, many hearings (e.g. tribunal hearings and immigration cases) are theoretically open, but information about where they are held and when is not readily available and thus they are, in effect, closed to the public.

Who is the media and who is reporting on court hearings?

One of the barriers to achieving open justice in our courts is a traditional and limited view of who reports from, and has the potential to report from, court. Most judicial rules on access to and reporting on court hearings distinguish between accredited journalists (members of the NUJ or equivalent), legal commentators and the public. It is assumed that journalists report, and the public observes. These distinctions are no longer valid and restrict the activity of some potential reporters. Many of those who see themselves as journalists (and are treated as such by the mainstream media) do not have formal journalism training and do not belong to one of the main unions. Many of those who report on court proceedings using social media do not see themselves as journalists or members of the media.

The introduction of special dispensations for “legal commentators” to report on specific types of hearings and to report live from fully open hearings has further muddied the waters. There are two definitions in operation. A pilot for legal bloggers in the family courts mandates that

such bloggers must be legally qualified and get the permission of the judge to observe in every case <http://www.transparencyproject.org.uk/legalbloggers/>. But the guidance for criminal courts is far vaguer. It is not clear exactly what defines a legal commentator, nor how an individual could check whether they meet that definition. Penelope Gibbs, Director of Transform Justice, has defined herself as a legal commentator (because she comments on legal matters) for the purposes of live tweeting from a magistrates' court, but she has always feared being reprimanded by the judge for doing so. She has been concerned that either the judge would not be aware of the most recent guidance, or that they may disagree that she should be defined as a legal commentator.

The advent of citizen journalism and social media news sites means that most court "reporting" is probably done by people with no formal journalism training nor accreditation. The Open Justice Court of Protection project <https://openjusticecourtofprotection.org/> encourages anyone interested to remotely observe Court of Protection hearings. Observations and commentary are featured on social media such as Twitter and the project website. This is high quality court reporting by non-journalists on very sensitive hearings. None of the reporting is done live.

Transform Justice would argue that most of the reporting privileges open to accredited media should also be open to legal commentators and that the latter should be defined broadly. It is however important that all legal commentators should understand the basic dos and don'ts of what can be reported and be challenged should they breach the rules.

Access to courts during the pandemic

The pandemic highlighted how fragile is adherence to the principle of open justice. When the first Covid travel regulations were tabled, they omitted to clarify whether members of the public who wanted to observe courts were permitted to travel to a court to do so. This permission was only confirmed in oral evidence by Minister Chris Philp to the Justice committee (4th May 2020) six weeks after the regulations came into force. Even then Penelope Gibbs, Director of Transform Justice, was initially turned away from a number of magistrates' courts she sought to observe in person in May 2020. Only by requesting to speak to senior court staff did she gain entry.

The widespread use of remote links during the pandemic could have heralded a new dawn in open justice. But it didn't. Although most magistrates' courts continued to operate with judges and court staff attending physically, many parties took part by video from home, office, prison or police custody. This meant that the media and public observers, many of whom did not want to travel due to Covid, could theoretically observe court hearings via video link. The media were given access by video (though they sometimes found it hard to get the actual links) to all criminal court cases but the public were not. If someone knew exactly who to email and the judge concerned gave permission, it was possible to access some courts. But other judges refused point blank to give access. Sometimes the legal advisor made the decision. One emailed Penelope Gibbs "This matter has recently been researched by a colleague and, as a member of the public, there is no provision for you to appear remotely in the magistrates' court". The following week the magistrates' court nearest to this one did give Penelope Gibbs remote access.

The reason why judges were reluctant to give the public remote access to criminal hearings was never articulated. They may have feared that observers might record the hearing which is a criminal offence. It should however have been possible to mitigate that risk rather than ban remote observation.

Given the public disapproval of travel during lockdown, the negative reaction of court staff to public observers, and the barriers to accessing the courts remotely, the criminal courts were to all intents and purposes closed to public observers during peak periods of Covid restrictions, particularly during the first lockdown.

In contrast, the Court of Protection became more open than it had ever been before. The Court of Protection has been on a ten year journey from being closed to the public, to being open to anyone who has obtained permission to observe remotely a Professor Celia Kitzinger set up the Open Justice Court of Protection project <https://openjusticecourtofprotection.org/> during the pandemic and persuaded Court of Protection judges to give remote access to hearings almost by default. Celia and colleagues obtained information as to what hearings were listed and publicised the opportunity to observe on social media. They did not vet those who wanted to observe remotely – simply gave the information needed to access a hearing. Observation was and is seldom refused. Since most cases were done with all parties on video, remote observation was the only feasible way of observing the court. Now that judges are returning to courtrooms, we presume people are allowed to observe in person again.

There is irony in the Court of Protection becoming more accessible to public observation during the pandemic and the criminal courts less so, given that the Court of Protection is not in theory open, while criminal courts are. This is attributable to the work of the Open Justice Court of Protection project and the progressive attitude of Court of Protection judges in facilitating remote access.

Social media and public reporting on court cases

Most criminal court cases are in non covid times open to the public to observe. So the public may hear information which is personal and sensitive about witnesses, alleged victims and those accused of crime. Members of the public may commit contempt of court and/or publicise sensitive information through reporting evidence heard in court in open and private social media channels . There is little that can be done to prevent public observers communicating sensitive information, for instance from a rape case, if they are not in contempt of court. But education about, and policing of, contempt of court should be improved with the support of the big tech companies.

Cases involving child defendants illustrate the problem. Youth court cases are closed to the public but Crown Court cases involving child defendants are open to observers. Reporting is subject to strict rules on the naming of the defendant during the hearing and often on conviction too. But there are many breaches of these restrictions. The names of children on whom there are reporting restrictions are frequently available through quite straightforward google searches. In the past, Penelope Gibbs has tried reporting these breaches of reporting restrictions to the social media platforms, but the process is difficult to access and slow. She has also reported them to the Attorney General but is not aware of any action taken as a result.

There are two possible solutions to the widespread contempt of court in social media. The first is to increase public education about the law concerning court cases, the second is for the tech companies and the Attorney General to more actively police contempt. Through algorithms it would be possible to detect when a name had been published illegally, to delete the post and to warn the poster about contempt of court.

Effect of court reforms and remote hearings on open justice

The HMCTS court reform programme involves the closure of physical court and tribunal buildings to be replaced by all video/audio hearings and online processes. This has profound consequences for open justice. Transform Justice will focus here on the criminal justice implications.

- 1) Remote hearings and links. Video links have been used for defendants and witnesses for many years in criminal hearings. But criminal court hearings using video links have until recently been entirely hybrid – with the judge and court staff in the court room interacting with other parties (usually defendants in prison) appearing on a TV screen. Apart from during lockdown periods, public observers could access hybrid hearings through sitting in the public gallery. However, it is far more difficult to observe a hybrid hearing than one where all parties are in person, since the sound and visual quality are often poor. In addition, the screens in courtrooms are often placed at an angle to the public gallery and quite far away. The Covid criminal justice legislation permitted all-video hearings for some summary trials. It is not clear whether any took place and whether any media or public were allowed to observe.
- 2) Online and paper justice processes. Pre-pandemic a new criminal justice process was introduced – the single justice procedure or SJP. Some summary offences, prosecuted by non CPS bodies, were prosecuted and defendants convicted in their absence in a closed court on the papers. The sentencing was done by a single magistrate reading paper forms. The defendant who pleaded not guilty was instructed to attend the actual court, while all those who pleaded guilty, or who did not plead at all, were convicted in their absence. Small print says a defendant who pleads guilty can opt instead for an in-person hearing, but this is not made clear. Most criminal cases now go through the SJP where the court is closed to the public. Paper and online listings are available, but these give very little information about each case, and outcome information is not available to the public except by phoning about individual cases.
- 3) Automatic online conviction. In the Judicial Review and Courts Bill, the government proposes to introduce automatic online conviction. This is a development of the existing make a plea, SJP and online fixed penalty systems. The automatic online conviction process allows for someone who has received a postal charge, to plead guilty, be sentenced and pay the fine by filling in an online form. This process will apply to two offences initially - travelling without a valid ticket on a tram or train and fishing with an unlicensed rod - and to more via secondary legislation in the future. Automatic online convictions will be processed behind closed doors, with just the outcomes available to public scrutiny.

Barriers to obtaining information in advance of and after court cases

One of the key barriers to the public observing and reporting on court cases is the absence of accessible information on the location and details of criminal court cases. Most people do not

know the location of their local magistrates' or Crown court, nor that most cases are open to the public. Online information on magistrates' courts does not invite visits¹. Information about future hearings is extremely hard to find online and not much easier to find in the courthouse itself. Observers in the court-room are not given access to detailed court lists and can struggle to understand what each case is about. Magistrates' court case outcomes are not easily accessible to the public and the hearings are not transcribed.

Students and those observing courts often encounter resistance to their presence, from court staff and judges. Observers are sometimes asked what they are doing in the court and why they are taking notes. Some staff and judges have attempted to ban observers from taking notes. This staff and judicial behaviour may not be typical, but it illustrates that many do not understand the guidance on court observation and/or are not supportive of open justice. If courts are to be truly open to observers, no individual should be asked why they are in the public gallery, nor why they are taking notes. If a judge is concerned that a witness in the public gallery may be hearing evidence that may prejudice their own, they should make a general pronouncement that witnesses should not sit in the public gallery prior to giving their evidence.

The risks of open criminal justice

While Transform Justice is a proponent of open justice as a crucial means of improving accountability, we are also aware of the risks of open justice, particularly to vulnerable defendants. There is a huge stigma associated just with being accused of a crime, let alone convicted. Anyone charged with rape has their name and personal life put in the public domain. If they are acquitted, that information remains in the public domain.

Someone convicted of a crime will complete their sentence and want to move on in their lives. But the availability of media reports may prevent that. If we are to have open justice, we should also have better enforcement of the right to privacy, when the case is no longer relevant. Primary legislation says that those convicted should in general be able to have their case details removed from the public domain when their "rehabilitation period" has ended. But there is no obligation on media outlets to remove such details by default. Those who wish to enforce their legal rights must go through a long and complicated process via Google's right to be forgotten appeal process and the ICO and/or pay a private lawyer to support them. Even then case law is complex and judgments seemingly contradictory.

If we are to have functioning open justice and court reporting, it needs to go hand in hand with better support for redress and correction when that reporting is inaccurate and/or out of date.

Summary

Open justice ensures the accountability of the justice system. The advent of remote and hybrid hearings and of digital "courts" risks a fundamental tenet of open justice – that justice is seen to be done. When a defendant pleads online or a member of the public is forced to get permission to watch a criminal trial, then the hearing is not truly open.

¹ <https://www.find-court-tribunal.service.gov.uk/courts/highbury-corner-magistrates-court>

Both the media and observers need open access to report on what is happening in court. But the rules, guidance and attitudes to allowing access seem to differ according to jurisdiction and even individual judge. In addition, the very different rules applying to journalists and others create confusion and anxiety. It seems likely that the mainstream media will invest less in traditional court reporting in the future. So, if reporting is to continue, initiatives like the Open Justice Court of Protection project should be supported and expanded into other jurisdictions. Citizen observers will never replace mainstream media reporters, but they have the potential to provide much needed “eyes on the court”.

There are aspects of the justice system which should always be closed and/or subject to reporting restrictions. The challenge is not only to police and enforce restrictions, but to promote understanding of those restrictions and their rationale. Few members of the public understand contempt of court and consequently many more commit contempt than are caught. If contempt law is not to become as ass, it needs to be simplified and widely disseminated.

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