

Written evidence from the Bar Council

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of response

This short submission addresses points 2, 3, and 5.

Point 2: What barriers there are to the media obtaining information from the courts

1. Court reporters have made the Bar Council aware of the difficulties they face doing their jobs due to the inefficiencies of the existing set up.
2. By way of example, a small (3-4 person) team of journalists rely on covering the Royal Courts of Justice, which involves physically going to each individual court room to ask to see barristers' skeleton arguments, so that they can get an overview of what the case is about and make quick decisions as to priorities for coverage. Given the calibre of the publication's legal understanding and output, almost every media outlet in the country relies on their accurate and timely copy for their own output, particularly when it comes to significant or major public interest cases.
3. However, the journalists face inconsistencies in the responses they receive from counsel when they request skeletons. They tell us that they often need to put in submissions to the judge to receive the skeleton – a request is always then granted and needlessly wastes court time at the start of hearings. The Bar Council is currently examining its own ethical guidance to barristers on this topic,¹ and notes that the present process at court is time-consuming and unnecessarily cumbersome in terms of easy and efficient open justice. The process by which journalists, barristers and other parties share skeleton arguments needs to be modernised and streamlined.
4. Other parties likely to be interested in streamlining this issue include the Judicial Office, The Law Society, and a range of press including legal and crime correspondents.

Point 3: What could be done to make information on court cases more transparent and accessible

5. The Bar Council considers that an attractive solution to the current problem of acquiring accurate skeletons is the process be streamlined and open justice facilitated by the court that provides a copy of the skeletons to accredited reporters. This would ideally be done electronically.
6. In short, the court would make it clear that copies would be made available unless the parties object for good reason.

¹ <https://www.barcouncilethics.co.uk/wp-content/uploads/2019/10/Journalists-law-reporters-and-other-non-parties-provision-of-documents.pdf>

7. In terms of ensuring greater transparency and accessibility for claimants, respondents (and defendants) and the legal profession, the Bar Council has expressed qualified support for remote hearings, when deployed correctly. In May 2021, the Bar Council was part of a Four Bars statement² proposing that remote hearings be carefully considered before further rollout, because of the potential drawbacks including those relating to open justice.
8. In our Spending Review submission of September 2021³, the Bar Council asked that HMCTS improve the quality and availability of its data to aid open justice and transparency. We said:

[The Bar Council welcomes] the June 2021 announcement that the National Archives will host a repository of judgements in an effort to make open justice a reality and allow monitoring of access to justice.⁴ We also welcome HMCTS' attempts to engage with Dr Natalie Byrom's recommendations on the use of data.⁵ We feel these and other projects and programmes designed to improve data collection and transparency should be adequately resourced by central government.
9. We continue to stand by this assessment. This greater openness and transparency with regard to data would, theoretically, allow not just the media but the general public more access to information from the courts on cases. The Bar Council notes that, although HMCTS accepted the principles of Dr Byrom's recommendations for greater capture, publication and analysis of court data, there are still serious issues surrounding its availability and no progress against these proposals seems to have been made.
10. The Bar Council is aware of HMCTS' ongoing Publications & Information project (and has engaged in focus groups surrounding this project), which aims to support the delivery of its commitment to open justice and to modernise and improve public access to HMCTS information by publishing or displaying court/tribunal information (such as court and tribunal lists), according to the relevant policy requirements and business rules. It is paramount that these objectives are put into practice.

Point 5: The effect of court reform and remote hearings on open justice

11. As the Bar Council said in its Budget Submission of January 2021⁶, many of the outstanding cases in the criminal courts are particularly complex and challenging cases that need trial by jury or otherwise cannot be dealt with by remote hearings. The backlog of cases needs to be resolved quickly, in the interests of victims, witnesses, defendants and public confidence in the justice system. The Institute for Government estimates the government would need to spend an extra £55m–110m a year for two years to run the necessary extra trials.
12. The Bar Council published its response to the Chancellor's recent Budget and the provision of £2.2 billion to drive recovery in the courts, prisons and probation, including £477 million to tackle the court backlog, saying it was a step in the right

² <https://www.barcouncil.org.uk/resource/four-bars-statement-on-the-administration-of-justice-post-pandemic.html>

³ <https://www.barcouncil.org.uk/resource/bar-council-spending-review-submission-2021.html>

⁴ <https://www.gov.uk/government/news/boost-for-open-justice-as-court-judgments-get-new-home>

⁵ <https://www.gov.uk/government/news/hmcts-response-and-progress-update-on-dr-natalie-byrom-report>

⁶ <https://www.barcouncil.org.uk/resource/bar-council-budget-submission-january-2021-pdf.html>

direction.⁷ But it will still result in an overall shortfall of funding and more must be done; without further support, the court reform project will fail in its objectives. Justice delayed is justice denied.

13. Regarding the ability of the public to view an online hearing, in our response⁸ to the Police, Crime, Sentencing and Courts Bill, we said of Clause 166, which concerned remote observation and recording of court and tribunal proceedings (directly relating to open justice):

The first stage [of the process] requires the Lord Chancellor, by regulations made with the concurrence of the Lord Chief Justice, to approve the proceedings and conditions for access, including who may watch the proceedings. The second stage applies only to proceedings which are approved under the first stage. This provides discretion for a judge to order that proceedings can be viewed or listened to. The exercise of this discretion is unlimited.

The Bar Council does not see any objection to being able to control access where necessary, but the burden should be reversed – the default position should be that all proceedings should be accessible unless there is a justifiable reason to exclude them, such as proceedings normally held in private or where an order has been made to protect a witness or confidential information. That mirrors the position with physical access to hearings.

Given the number of remote hearings which are currently ongoing, this places an additional burden on the judiciary and tribunals, with no guidance as to how the discretion is to be exercised. A positive step to grant permission would be required in each case. There is nobody to represent the interests of the public in seeking to challenge the situation where the judge/tribunal makes no order.

14. We continue to stand by this assessment.

The Bar Council
November 2021

⁷ <https://www.barcouncil.org.uk/resource/bar-council-says-budget-is-a-step-in-the-right-direction-on-justice-funding.html>

⁸ <https://bills.parliament.uk/publications/41876/documents/397>