

Written submission on behalf of the judiciary

Introduction

The judiciary welcomes public access to legal proceedings and supports fair and accurate reporting to the wider public of what takes place in courts and tribunals. These are essential means of ensuring better public understanding of the judicial system, and public confidence in the administration of justice.

Most of the ways in which the judiciary ensure that the administration of justice is open and accessible are of long standing. Court lists are published, with details of hearings, the parties and the Judges. Key court documents held on the court file are generally accessible to the public under the relevant procedural rules. Other documents can be obtained with the court's permission. As a general rule, hearings are open to the public and/or media reporters without restriction and thus decisions and orders are made in public. Exceptions to this require strict justification. Transcripts of public proceedings generally can be made available.

Beyond this, the judiciary regards engagement and collaboration with representatives of the media as key factors in ensuring that justice is open and transparent. Journalists, bound by a code of ethics, who understand the court process, are invaluable partners. Excellent relationships are established and maintained between the judiciary, their support staff, and reporters in the national and local media. An example of fruitful collaboration is the guide to *Reporting Restrictions in the Criminal Courts*, produced by the Judicial College in association with the Media Lawyers Association, News Media Association, and Society of Editors. The Communications Team at the Judicial Office (JO) provide additional support to reporters seeking access to or information about individual cases.

The main constraints on what can be done to provide media access to court proceedings and information about them are the need to respect the rights of those involved in the court process as parties and witnesses, the need to protect the administration of justice from abuse, and the limitations of technology and resources.

Media coverage: changes and implications for open justice

Reporting by mainstream media organisations remains the main source of information for most of the public, according to the Judicial Office Communications Team. Although there is a lot of online and social media reporting and comment on court cases, a large proportion of this comes from specialist court reporters and much of the rest is drawn from or based on mainstream media reports.

If a judgment or sentencing remarks have been put in the public domain on the judiciary website for example, the subsequent debate and opinion is to an extent self-correcting, as any misreporting can be challenged and countered by accurate information given by other posts and commentators.

The judiciary and those staffing the courts do what they can to ensure that court reporters are in a position to report fairly, accurately, and swiftly, but this, and the modern news cycle places an additional burden on the judiciary and HMCTS.

A decade ago the judiciary laid down a default rule that media representatives can report live from court by text, via Twitter or otherwise. This form of reporting has become common in high-profile cases. Done to a professional standard, this enhances open justice by allowing more detailed and immediate accounts of proceedings as they unfold.

It is however well-documented that the number of professional court reporters has dwindled over recent years. The loss of expertise and understanding is a source of concern, as it could lead to a loss of accuracy in reporting and impair public understanding of the workings of the justice system. In addition, the casual, inexperienced or inexperienced reporter is less likely to be aware of legal constraints on reporting such as (for example) the prohibition on reporting information that would tend to identify the complainant in a case of sexual assault, modern slavery, and FGM.

One way in which the public, including the media, can be given readier access to legal proceedings is by the unmediated, unedited broadcast or livestreaming of proceedings. In this way, public access can be obtained remotely without the need to go to a court building. But there are long-standing statutory bans on filming, photography and audio recording of court proceedings. Members of the public are prohibited from publishing video and audio recordings and can only make audio recordings with permission.

Broadcasts made and controlled by the Court are an exception. Broadcasting is now a well-established process in the Supreme Court, which has its own online video channel, and in the Court of Appeal, where some civil and family hearings are livestreamed on YouTube and available to view thereafter. In appeal proceedings, which do not involve witnesses, this is a satisfactory system. The number of such cases is a minute fraction of the total number of cases dealt with in the courts every day, and the resource implications for the judiciary and HMCTS of making such arrangements and “policing” them, are correspondingly limited. Arrangements for livestreaming of sentencing remarks in the most serious criminal cases are also in place, though their implementation has been delayed by the pandemic.

The judiciary now has a great deal of experience of a different form of remote access to court hearings. When the pandemic made physical attendance impossible or at best undesirable, the judiciary swiftly embraced the opportunity to conduct a wide variety of hearings remotely, using video or audio methods only.

The Coronavirus Act 2020 authorised remote access by members of the public in some cases falling outside the general bans on recording and transmission. The judiciary and HMCTS responded rapidly to the move to remote hearings, introducing a flexible system of remote hearings by phone or video conferencing, and recognising the importance of maintaining the principle of open justice. That said, enabling remote observation of hearings placed considerable demands on resources and, as we explain later, experience has shown that this way of giving access to court proceedings can pose some fresh challenges.

Media access to information/transparency

Technology has made it easier to provide access to information. Court lists are nowadays made readily accessible online. Recent decisions have enlarged the scope of what can be

obtained from court files, to support the open justice principle. The advent of electronic filing has made media and public access easier in practice. The judiciary continues to invest time and resources to supporting court reporters. A new edition of the Judicial College Guide to reporting the criminal courts is in the final stages of preparation and will be publicly accessible online for all to read.

Many civil and appellant judgments are published on www.bailii.org, and are to be made available via the National Archive. The most newsworthy judgments are published on the judiciary website. All of this takes place very shortly after the judgment has been handed down.

Sentencing remarks in many serious criminal cases are published on that website as well. For instance, the sentencing remarks of Lord Justice Fulford in the recent *Couzens* case, were online within minutes after they had been delivered. Sentencing remarks in the most serious cases are generally written down and can be made available to reporters. But this is not the norm and is not practicable in many cases because of the impact it would have on the pace of work in the Crown Court. Moreover, sentencing remarks will often contain information which cannot be published, for example material that would identify the victim of a sexual crime. The provision of transcripts would require the devotion of significant additional resources, to make sure the public record was a precise verbatim record. It is common for transcripts when first produced to contain significant errors and omissions.

Court reform and remote hearings

As already mentioned, the move to provide remote access to hearings during the pandemic was a great success. For example, large numbers of accredited journalists from this jurisdiction and abroad were given remote access to hearings in the *Duchess of Sussex v Associated Newspapers* case, without adverse incident. The judiciary was also able to provide a high level of media access to in-court hearings that attracted an exceptional degree of public interest, such as *Johnny Depp v News Group*.

That said, the success of these arrangements was due to very careful preparation, clear legal warnings about the proprieties of reporting and, in the case of *Depp* the provision of a great deal of additional courtroom space; and making these arrangements placed very significant demands on court staff and the judges concerned. These are extreme examples but facilitating remote access has placed additional demands on the judiciary and its support staff in a wide range of circumstances. All of this is resource-intensive in a way quite different from the pre-pandemic norm. Remote access to hearings has been facilitated in countless thousands of cases during the covid pandemic for parties, witnesses or press. It has been a struggle even with the additional recruitment of staff by HMCTS. Remote access by the media will be constrained in practical terms unless government makes the financial resources available to have a sufficient number of staff to provide the time needed to make the arrangements.

Remote access will clearly be an important aspect of open justice in future. Provisions in the Police, Crime, Sentencing and Courts Bill will enable the Lord Chancellor (with the concurrence of the Lord Chief Justice) to widen opportunities for remote observation of

proceedings in courts and tribunals. These additional powers will be welcome, and so will the extra flexibility that comes with them.

The challenge for judges will be to ensure that they use these new powers to enhance open justice without compromising the essential aims of the justice system, and the integrity of the process. There are two main areas of concern and which require especial attention.

One is the impact of additional, remote observation on participants, and in particular witnesses. Judges want witnesses to give the best evidence they can. It is notorious that giving evidence in public is a stressful process for most. Many vulnerable witnesses have to give evidence of painful events in their lives, and many are very reluctant to do so. Doing this under the eyes of innumerable unseen remote observers is liable to exacerbate the stress, and perhaps deter the witness from giving evidence altogether. There are established ways of mitigating stress for witnesses in traditional in-court hearings, by “special measures”, but these may not be enough or as easy to deploy in a case where there is a “virtual public gallery”. Pre-recording of evidence may well not be enough to reassure a witness, if she has to contemplate the prospect that her evidence will be seen not only by those in the courtroom but also by any member of the public who chooses to attend remotely.

The second issue is the risk of misconduct in the virtual public gallery, in the form of interruption, disruption, or unauthorised recording and broadcasting. In the traditional courtroom setting, all observers can be seen and heard by the judge, and observers know this. Disruption is rare, and when it occurs the wrongdoer is easily identified and can if necessary be dealt with on the spot. Unauthorised filming and broadcasting are not unknown, but also rare, and it is almost unheard of for this to be done without identification of the infringer. All is different when it comes to remote observers, who may not give their proper names and who cannot in practice be observed or controlled.

Disruption by intervention has occurred during the pandemic. Technical means of muting observers will be needed. Unauthorised recording and broadcasting is a bigger concern. It is capable of seriously undermining the administration of justice, disrupting or prejudicing a trial in a variety of ways, for example by someone publishing a photograph of a vulnerable witness, or the details of legal argument heard in the absence of the jury. The risk that exists, even with experienced reporters, is increased when persons with no media training or responsibilities are allowed remote access.

There do not seem to be technological means of preventing this. Once you allow remote observation the court’s ability to control what is done with images and sounds from proceedings is removed. Identification of observers, provided for in the Bill, seems essential if control is to be maintained. The mechanisms for implementing this, and ensuring accuracy, will need to be determined. If those responsible are outside the court’s jurisdiction it is hard to see what can be done after the event even if the wrongdoers are identifiable.

3 November 2021

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