Written evidence from The Legal Education Foundation

Open justice: court reporting in the digital age

1 Overview

1.1 We are grateful to the Justice Select Committee for launching this inquiry which could not be more timely or more necessary. The absence of basic, authoritative data on both the operation of the justice system and the experience of individuals who rely on it constitutes an overwhelming and existential threat to the successful delivery of the goals of open justice. The present lack of data undermines informed debate, impedes democratic accountability, and threatens to erode public trust. Changes to both the media landscape and the way in which court cases are determined only serve to underscore the urgency of addressing systemic issues with the way in which data and information about the courts and tribunals is collected, stored and made available to media and the public.

1.2 The ongoing programme of court reform and the settlement secured by the Ministry of Justice through the 2021 Spending Review provide the catalyst, infrastructure and resource to address these issues- securing the goals of open justice as we move increasingly to digital and virtual methods of hearing cases and determining disputes[1]. If action to improve data collection, sharing and governance is not now expedited the opportunity will be lost- perhaps for good. The cost of retrofitting digital systems once built is likely to prove decisive. As such, it is vital that the Ministry of Justice and HMCTS expedite the resourcing and implementation of their commitments to improve the way data and information generated by the courts is collected, stored, governed and shared[2].

2 What is open justice and why is it important?

2.1 A leading expression of the principle of open justice can be found in *Scott v Scott* ([1913] AC417), which affirms that the administration of justice, subject to certain narrowly defined exceptions, must be conducted in open court. In addition, the principle of open justice mandates both that evidence must not be concealed from

[1] Following measures proposed through the Police, Crime Sentencing and Courts Bill and the Judicial Review and Courts Bill

[2] See: https://www.gov.uk/government/news/hmcts-response-and-progress-update-on-dr-natalie-byrom-report

members of the public who are present in court and further, that what happens in court must be able to be communicated to the public outside court- by the media and others.

2.2 Open justice is a means to an end, not an end in itself. It is a vital component of the rule of law in any democratic society, and exists to secure a number of important goals, including:

2.2.1 **Public legal education**: ensuring that the public are accurately informed about what is happening in the courts; and are able follow the way that law is applied and developed. This is vital to support effective scrutiny and debate of existing legal frameworks and processes;

2.2.2 **Judicial accountability:** assuring that the law is being applied correctly by the courts, and to guard against the exercise of arbitrary or partial decision making;

2.2.3 **Democratic accountability:** facilitating the accountability of parties to the public, especially where the matter is between the executive and the citizen;

2.2.4 **Promoting public trust and confidence:** in the administration of justice and the authority of the judiciary. [3]

3 Challenges to open justice in the digital age

Missing data

3.1 The biggest threat to ongoing delivery of the goals of open justice both now, and as the process of court digitisation moves to completion is the lack of basic, authoritative data about the operation of the courts and tribunals. The lacuna of data about the experience of individuals in the justice system and the outcomes they secure from both existing and digitised processes, makes it impossible to effectively scrutinise the law and how it is applied. Analysis by the Centre for Public Data of written Parliamentary Questions submitted in 2019/2020 revealed that a staggering 40% of questions directed to Ministers in the Ministry of Justice could not be answered due to lack of data- creating a democratic deficit[4].

3.2 Acknowledged data gaps include basic operational data- such as accurate figures for the number of judges who sat during COVID-19 or the number of remote hearings that

[3] See R(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 6
[4] Centre for Public Data, 2021- analysis available on request.

took place. HMCTS does not have robust data on the nature of the case backlog, whether the measures to address it are working, and the broader impact of those measures. Parliamentarians have therefore no way of knowing whether the £142m investment in court recovery is being spent effectively[5].

3.3 Throughout 2020 the government worked with senior judges to introduce a series of measures aimed at protecting tenants affected by COVID-19. Despite assuring the Housing, Communities and Local Government Select Committee that these measures were protecting renters[6], HMCTS and the Ministry of Justice collected next to no data to assess whether they were actually working as intended. Instead it was left to journalists from The Bureau of Investigative Journalism, arguing their way into court rooms to manually fill basic gaps, such as how many tenants actually attend hearings to contest their eviction[7].

3.4 The lack of data to support informed discussions about the treatment and experience of victims, witnesses and parties from different backgrounds presents an ongoing threat to public trust and confidence in the justice system. In 2017, the first recommendation of the Lammy review called for urgent action to improve the data that is collected on ethnicity across the criminal justice system[8]. These issues are mirrored in civil justice- the Race Disparity Audit only returned ethnicity data on one tribunal (the employment tribunal) and even that was woefully out of date[9]. Most recently a report published by the National Audit Office found no evidence that the Ministry of Justice and HMCTS have: "any data on users ethnicity to carry out meaningful analysis on whether ethnic minority groups have been disadvantaged by the pandemic or the recovery programme. The Ministry is therefore unable to assure itself that it is meeting its objective to "build back fairer"[10].

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[5] See: https://questions-statements.parliament.uk/written-questions/detail/2020-12-16/hl11556 The absence of data to assess whether changes to the justice system are likely to prove cost effective is not a new problem- In 2014, the National Audit Office criticised the MoJ for failing to address issues regarding the data it holds on litigants in person- issues that were first raised in 2010- this data was held to be critical to accurately forecasting the cost implications of changes to legal aid.

[6] https://committees.parliament.uk/publications/6023/documents/68086/default/

[7] See evidence to this inquiry submitted by The Bureau of Investigative Journalism.

[8] See for example: Lammy, D (2017) "The Lammy Review: An independent review into the treatment of, and outcomes for, Black. Asian and Minority Ethnic individuals in the Criminal Justice System"

[9] See: https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/courts-sentencing-and-tribunals/employment-tribunal-claims/latest . The latest available data here dates from 2012.

[10] Comptroller and Auditor General (2021): "Reducing the backlog in criminal courts" Session 2021-2022 22

3.5 Lack of data on the experience of court users who are vulnerable further threatens public trust and impedes accurate assessment of the extent to which existing processes support equal access to justice. In 2019 the Civil Justice Council highlighted the "data desert" at the heart of the civil justice system, which stymied attempts to recommend effective approaches to supporting vulnerable users[11]. In 2020 the Chief Executive of the Family Justice Observatory argued that the absence of data on the outcomes of decisions made in the family courts was akin to: "surgeons, deciding never to find out how their operations went"[12]. The National Audit Office report referenced in paragraph 3.4 above was similarly critical of progress to collect data to ensure that users who are vulnerable because of their age, mental disorder or physical impairment are not adversely affected by remote access to justice.

3.6 The declining ability of the media to report on a broad range of cases makes it all the more vital that representative, authoritative data is captured and published. The absence of representative data to contextualise those cases that are reported by the media may result in misconceptions that undermine public trust in the courts. The absence of representative data also undermines effective debate. For example- in summer 2021 a Channel 4 documentary[13] called attention to the way in which some domestic abusers are using allegations of "parental alienation" to encourage courts to remove their partners' access to their children. The reaction on social media was immediate and the documentary makers were bombarded with complaints of apparent bias[14]. As limited data is collected on cases involving domestic abuse[15], and no data is collected on the number of cases where parental alienation is alleged, it is impossible to assess the

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[11] Reported in Fouzder, M : " Data desert on vulnerable individuals in civil justice system" 20 February 2020 available at: https://www.lawgazette.co.uk/news/data-desert-on-vulnerable-individuals-in-civil-justice-system/5103153.article

[12] https://www.theguardian.com/society/2020/jun/02/lisa-harker-family-court-hearings-justice-failed-coronavirus-crisis

[13] https://candour.tv/films/torn-apart

[14] https://www.thesun.co.uk/tv/15723006/channel-4-dispatches-complaints-dads/ Case selection was in fact determined by the very strict reporting rules.

[15] See findings of the recent report from the Domestic Abuse Commissioner and Victims Commissioner (2021) "Improving the family court response to domestic abuse: Proposal for a mechanism to monitor and report on domestic abuse in private law childrens proceedings" https://domesticabusecommissioner.uk/wp-content/uploads/2021/11/Improving-the-Family-Court-Response-to-Domestic-Abuse-final.pdf pp13

extent to which the documentary presented an accurate picture of practice across the family justice system[16].

3.7 In addition, the creation and expansion of end- to-end digital justice processes (such as the Single Justice Procedure) underscore the vital importance of accurate data to deliver the goals of open justice and ensure that decisions made through this mechanism (and others like it) are subject to appropriate scrutiny[17].

3.8 Finally, legacy contracts with data hosting companies act as an impediment to accessing what data does exist from current case management systems. These contracts should be reviewed to ensure that any barriers that currently exist are not replicated in the transfer to new digital reformed systems.

Missing judgments and decisions

3.9 Judgments and decisions are a vital record of operation of the courts and tribunals. As such they have a critical function in delivering the goals of open justice. However, successive reports have raised concerns about the lack of publicly available information about the decisions that are made by the courts.

3.10 This lack of transparency is a function of the opaque and ad-hoc arrangements that have developed over time to support the dissemination of information from the courts to the public. Historic under-investment in a publicly funded system for storing judgments and decisions and making them available for research and publication has led to the development of inefficient, manual workarounds. BAILII, the leading provider of free access to case law in the UK, has been forced to rely on direct feeds of information from individual judges and courts. In the absence of a complete record of decisions, with agreed criteria for determining publication, arrangements for providing free public access have necessarily privileged publishing only those judgments that are legally significant or deemed by judges to be of particular interest. As a consequence,

[16] The President of the Family Division has recognised the vital role for compulsory data collection in improving transparency- including this as a key recommendation of his recent report: "In confidence and confidentiality: Transparency in the Family Courts"
[17] See evidence submitted to this inquiry by Tristan Kirk

a report published by the European Commission in 2018 placed the UK bottom of a table ranking EU countries in terms of public access to judgments online.

3.11 These arrangements have also led to growing concerns about disparities in coverage between free to access publishers and subscription only services. An article published in 2018 analysing the coverage provided by different publishers stated: "For anyone out there under the impression that there is any semblance of symmetry between the quantity of judgments available in the open and those accessible behind a paywall, the numbers point emphatically the other way."[18] This disparity matters at a fundamental level because it means that those who are able to pay to access subscription-only services are able to access more complete and accurate information about the law and how it operates- threatening key principles of open justice.

3.12 In this context, the announcement[19]in June 2021 of the creation of a new repository and publication service for judgments, hosted by The National Archives, is of vital significance. The truly radical potential of the transfer of responsibility for the retention and publication of judgments to The National Archives lies in the opportunity that it provides to create an agreed, complete record of judgments and decisions made in courts and tribunals across England and Wales. A complete agreed record is vital to support informed debate and ensure democratic accountability. One example of the negative impact of the absence of this complete record can be found in debates surrounding the introduction of the Judicial Review and Courts Bill. The lack of agreed, accurate data on the success rate of Cart judicial reviews led to five different statistics being put forward and prompted intervention from the statistics regulator[20].

3.13 The decision by the previous Lord Chancellor to create a new repository for the publication of judgments hosted by The National Archives provides a solid foundation for open justice, but there is more to be done. The Ministry of Justice must work with the judiciary to ensure that the transfer leads to comprehensive coverage of judgments and decisions, available in one place for the purposes of research. It must reduce the costs of accessing transcripts for those that need them, and reform existing transcription

[18] http://carrefax.com/articles-blog/2018/5/9/part-2-open-access-to-english-case-law-knackered-plumbing
[19] https://www.gov.uk/government/news/boost-for-open-justice-as-court-judgments-get-new-home
[20] https://www.theguardian.com/law/2021/jul/21/law-society-sounds-warning-against-judicial-review-bill

contracts to ensure that copies of judgments delivered orally are sent to the new repository. It must also take steps towards the publication of sentencing remarks to support a holistic understanding of the decisions made by the courts.

Decision making and governance

3.14 One of the key challenges in ensuring that information and data policy supports the delivery of open justice in the digital age is the underdeveloped governance structures for taking decisions about whether and how data and information should be shared with the media and the public.

3.15 Much of the data and information relevant to delivering the goals of open justice is generated by the courts acting judicially and stored by the court service, whilst policy is developed by the Ministry of Justice (in consultation with the senior judiciary). The existing framework agreement[21] which sets out the aims and objectives of the court service, and crucially, who is responsible for decision making (between the Judiciary, Ministry of Justice and HMCTS) is silent on issues of data and information flows. This can lead to decisions on data sharing with repercussions for open justice being taken in a piecemeal and uncoordinated fashion. In addition, decisions which have a direct bearing on the availability of documents and data relevant to the delivery of open justice goals (such as the cost of transcripts, and the terms of their supply to publishers) are siloed. There is a need to review the way decisions are taken as part of a coherent data strategy which is jointly owned by the Ministry of Justice and the Judiciary and executed by HMCTS.

3.16 The lack of clarity regarding responsibility for taking decisions on data and information sharing creates issues for stakeholders, who find it difficult to identify a single point of contact to raise issues as they affect open justice. The proliferation of stakeholder forums which meet irregularly and do not publish minutes further complicate matters[22].

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[21] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf

[22] https://www.gov.uk/guidance/hm-courts-and-tribunals-service-engagement-groups

3.17 Digital publication of documents and data generated by the court system creates challenges for the way in which the balance between individual privacy and open justice has traditionally been achieved. Growing commercial interest in data held by the courts service adds a further dimension of complexity- making information available for commercial innovation could lead to the development of new and innovative service models that enhance open justice, but this is a new and largely untested area. National and international experience, both in justice and other fields, suggests that strengthening governance and developing a public mandate for data sharing is critical to support innovation, prevent costly mistakes, and protect both the public and the reputation of the justice system. The recent experience of GPDPR[23] and the Ofqual exam grading scandal of last summer shows the dangers of moving beyond public acceptability. In order to maintain public trust and confidence in the decisions that are taken it is vital that that investment is made in robust governance.

3.18 In 2020, a new Senior Data Governance Panel[24] was created to advise the Lord Chancellor and Lord Chief Justice on "novel or contentious" applications to access and use data held by the courts. This governance panel is based on models developed in the health context (such as the Confidentiality Advisory Group). Confidentiality Advisory Group [25]model was recommended because there are parallels between the data held by the courts and those held by health agencies- the justice system interacts with people at their most vulnerable and gathers data that is personal (in both the legal and colloquial sense). However, there are significant differences- the principles of open justice require that some kinds of data are public, courts acting judicially are exempt from GDPR and FOI. Critically, unlike in health, the Senior Data Governance Panel has not been placed on a statutory footing- the Confidentiality Advisory Group on which the panel is based provides advice to NHS Digital on the role of data sharing as part of its duty to: "promote public health". There is, at present, no analogous framework for the Senior Data Governance Panel to provide advice on data sharing: "in the interests of promoting the effective administration and access to the justice system". It is now vital that the Senior Data Governance Panel is formalised, ideally placed on a statutory footing, and that new members are appointed via a public appointments process.

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[23] https://www.newstatesman.com/science-tech/2021/06/nhs-data-grab-shows-rise-tech-authoritarianism
[24] https://www.gov.uk/guidance/access-hmcts-data-for-research
[25] https://www.hra.nhs.uk/approvals-amendments/what-approvals-do-i-need/confidentiality-advisory-group/

Conclusion

3.19 In the 2021 Spending Review the Ministry of Justice received a 'windfall' settlement[26] of 4.1% real terms increase in day-to-day spending (£1.7bn in cash terms). It is now vital that small proportion of this settlement is invested in (i) creating the infrastructure to close critical data gaps; (ii) ensuring a complete record of judgements, (including extempore judgements), is retained and made available through the National Archives and (iii) improving governance by putting the Senior Data Governance Panel on a statutory footing. Urgent action on these steps is vital to secure open justice- both now and in the future.

[26] https://www.lawgazette.co.uk/news/budget-21-moj-set-for-windfall-with-41-real-terms-increase-by-2025/5110300.article