Written evidence from Guardian News & Media (GNM)

About Guardian News & Media

Guardian News & Media (GNM)is the publisher of theguardian.com and the Guardian and Observer newspapers, both of which have received global acclaim for investigations, including the Paradise Papers and Panama Papers, the 2018 Windrush scandal, Cambridge Analytica, and the recent Pandora Papers revelations. GNM is part of Guardian Media Group (GMG), one of the UK's leading commercial media organisations and a British-owned, independent, news media business. As well as being the UK's largest quality news brand, the Guardian has pioneered a highly distinctive, open approach to publishing on the web and it has achieved significant global audience growth over the past 20 years. Our endowment fund and portfolio of other holdings exist to support the Guardian's journalism by providing financial returns.

Introduction

GNM welcomes the opportunity to respond to the Justice Committee's inquiry into open justice: court reporting in the digital age. The reporting of court proceedings provides crucial insight into the workings of the UK's justice system. Continued access to the courts system is vital to ensure that justice is seen to be done, and that injustices can be challenged.

Court reporting is a resource intensive aspect of news production, requiring journalists to have a deep understanding of court rules and procedures, as well as the experience of dealing with court staff in order to understand how and when cases can be heard. Academic research, published in 2019, found that during one week at a magistrates court, of 240 cases heard, just three articles were published by one journalist attending court, leaving hundreds of potential stories untold[1]. This is perhaps unsurprising in a sector that continues to be challenged by systemic challenges to the funding of journalism[2].

While steps to level the playing field in the digital economy are outside of the scope of this Committee, we do believe that there are a number of steps that can be taken to make it easier for journalists to cover the courts system, including by:

1. Improving the responsible reporting of courts by providing a centralised repository of reporting restriction orders for media organisations to access.
2. We understand that a piece of software, "Courtsdesk", is being trialled to provide journalists with information prior to trials taking place. It is vital that the Ministry of Justice leads this modernisation programme to enable a centralised repository of court lists (and associated court documents) based on the model of the successful Companies House website.
3. The Ministry of Justice should ensure that every court across the UK makes use of digital technology to enable access to documents before and during hearings without a court fee (such as by way of e-filing). Documents should be provided in electronic form or displayed on screens that the media can access (as occurred in the recent

[1] https://journals.sagepub.com/doi/full/10.1177/1464884919868049

[2] See for example, the CMA's online platforms report, which details issues of market concentration in the digital economy that require remediation by a proposed Digital Markets Unit. https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report

Fishmonger Hall inquests). The Ministry should also reemphasise to courts that requests from accredited journalists should be promptly determined and granted, and should establish a system to track delays in legitimate requests, seeking to resolve stalled requests where necessary.

4. Maintenance of court reporting rules is essential to ensure the fair administration of justice, but educating people on the rules - and how they apply in relation to publication on social media - is also vital to enable fairer and more comprehensible coverage of court cases.
5. Without a clear exemption for news publishers, the draft Online Safety Bill risks platforms introducing blunt algorithms that inadvertently block journalistic coverage from local and national courts.
6. The provision of remote access to court is no substitute for journalists gaining physical access to the hearings themselves - it is essential that physical space for accredited journalists is provided in actual court rooms.
7. In controversial cases, quick access to transcripts of proceedings is crucial to ensure accurate reporting of complex legal cases. Where transcripts are produced for the parties contemporaneously it would be appropriate, and would involve little expense, to make those documents available at the same time to the journalists reporting.

Specific inquiry questions

- *How the media's coverage of courts has changed, and what the implications are for open justice;*

There has been a marked decline in the number of journalists at all levels of the media (from local newspapers[3] to large media organisations[4]) who are able to attend court to report on cases. In a news media market that is suffering ongoing and sustained financial turmoil, particularly at a local level, this lack of reporters in court may in part be the result of the time required to attend court cases, and therefore the costs of doing so which, for many media organisations, can be prohibitively expensive[5].

There is a danger that the reduced presence of journalists in court, and therefore the reduced interaction between journalists, court staff and members of the judiciary, could have a negative impact on open justice. As we note below, court officials unused to dealing with journalists (as they may have become because of the decline in the numbers attending court), may be more restrictive and less willing to assist journalists because of their concern about getting it wrong and allowing too much access. In our experience, this is a particular problem in relation to courts outside of London, including in major cities like Birmingham.

There is a danger that if parties do not see cases similar to their own being covered by the press, that they may assume that they should also enjoy a greater privacy in the courts than is actually the case. A lack of regular contact may also create a vicious cycle, whereby the lack of media coverage of the courts creates an expectation, on behalf of the parties, that media coverage of their case should not be allowed. This may lead to the parties requesting

[3] https://www.lawgazette.co.uk/commentary-and-opinion/dead-in-a-decade-the-collapse-of-our-local-press-undermines-the-rule-of-law/5060191.article

[4] https://www.theguardian.com/media/greenslade/2016/oct/28/new-studies-suggest-continuing-decrease-in-court-reporting

[5] See for instance http://www.transparencyproject.org.uk/crisis-in-our-courts-and-how-to-solve-it/

unwarranted restrictions on reporting, in response to which, court officials may decide to take an increasingly conservative approach.

- *What could be done to make information on court cases more transparent and accessible;*

When alerted to the imposition of reporting restrictions, the press has often performed a public service role in questioning those restrictions. Such action, however, can itself be costly (with potential costs penalties if unsuccessful) and frequently depends upon the media receiving adequate information in a timely fashion before the imposition of the reporting restrictions commences. **To make it easier to challenge such restrictions, the Ministry of Justice could immediately improve the responsible reporting of courts by providing a centralised repository of reporting restriction orders for media organisations to access.**

Court reporting is a skilled role, requiring specific training to do it properly, in order to ensure that journalists do not infringe any of the plethora of rules (restrictions on identifying some witnesses, reporting the deliberations of the jury, disclosing evidence from preliminary hearings, reporting the contents of applications heard in the absence of the jury, reporting restrictions, contempt of court considerations etc). The fewer journalists who media organisations can afford to send into court on a regular basis the more risky it becomes for media organisations to send less experienced journalists to cover court cases - with the potential to create a vicious cycle, whereby news organisations produce less original reporting, and send fewer people to report court hearings.

The consequence of this for society is that, over time, the general public will become less well informed about court processes. The presumption that someone is innocent until proven guilty is increasingly being questioned[6] by the public. Media organisations have faced privacy actions and defamation actions simply for reporting arrests, when previously the public may have better understood that an arrest was not synonymous with guilt.[7] The inability to report on criminal cases from the start of the investigation through to arrest to conviction, without the threat of criminal and civil legal sanctions, is a further threat to the reporting of the justice system.

Open justice is not just a principle of law[8], but it is also vital to the effective operation of the courts[9]. The public needs to see that the process of justice is being conducted: that the actions of individual citizens have consequences, and that crimes are subject to punishment. At a time when few lay people have the opportunity or the ability to attend court cases in person,

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[6] https://www.theguardian.com/commentisfree/2011/sep/11/presumption-of-innocence-reporting-arrests, https://www.theguardian.com/law/2013/apr/10/secret-arrests-not-answer

[7] In Richard v BBC, for example, Mann J said at para 248 that, "*If the presumption of innocence were perfectly understood and given effect to, and if the general public were universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not. This was acknowledged in* ***Khuja -v- Times Newspapers Ltd****... The trial judge had acknowledged that some members of the public would equate suspicion with guilt, but he considered that members of the public generally would know the difference between those two things: see [32]. Lord Sumption JSC was not so hopeful. He observed, at [34]: 'Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial.' ...*

[8] Which is enshrined in common law (see Scott v Scott (1913 AC) and the European Convention of Human Rights

[9] See for example the speech that the then Master of the Rolls Lord Dyson gave on the subject in 2013 https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-hong-kong-lecture-18102013.pdf who quoted Professor Andrews in his book 'Principles of Civil Procedure 'Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest guard against improbity. It keeps the judge himself, while trying, under trial.'

the public depends on media representatives to be their eyes and ears on the ground in order to keep them informed.

It is important that the courts themselves are not cut off from news coverage so that judges, lawyers and the police are all subject to scrutiny. Ultimately, courts are charged with making decisions about the fundamental right to liberty of the individual, and the public resolution of disputes between parties about the retention or gaining of custody of children. These are all vital issues for which the court system should be held accountable, therefore it is important that complex court procedures and costs do not get in the way of media reporting.

- *What barriers there are to the media obtaining information from the courts;*

Reporting on the courts can be difficult and is extremely time consuming. Reporters covering court cases have to be prepared, before entering the court, to be able to understand the proceedings in front of them. Court cases can continue for many months, even years, involving vast numbers of documents and complicated issues as to law and fact. It is vital, therefore, that these documents are provided to journalists as soon as practicable, before the hearing commences.

Journalists also have to travel to the courts all over the country, sometimes encountering difficulties getting into hearings, due to not initially being aware of orders which affect what they can report safely. If court hearings are increasingly going to use digital technology, it will be vital for these hearings to be made accessible to media organisations on a routine basis, together with the provision of lists of the cases to be heard in this way.

We understand that a piece of software, "Courtsdesk", is currently being trialled with a view to providing more information to journalists prior to trials taking place. The success of this software will, however, ultimately depend on the extent to which each individual court engages with it. It is vital that the Ministry of Justice leads this modernisation programme to provide a centralised repository of court lists (and associated court documents) to accredited media. The Companies House website provides a successful template as to how a publicly accessible and easily searchable database could work in practice. Such a model has the potential to bring real public benefit for both journalism and the fair running of business.

Access to case information and documents

GNM journalistic colleagues have explained how court staff, and some judges, appear not to understand the Ministry of Justice's own guidance in relation to the right of the media to information and access court documents.

Swift access to documents and information placed with the court can provide important insight into cases that would otherwise remain undisclosed. The result of such insight is to lead to public authorities making better decisions in the public interest in future. There are examples of where courts have overruled public authorities to provide such access[10], but the courts' approach to open justice is, at best, inconsistent.

The courts have been clear that, where documents have been placed before a judge and referred to in the course of proceedings, the default position should be that access should be

[10] https://www.theguardian.com/membership/2018/dec/08/rogue-landlords-tenants-uk-housing-exposing

permitted on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong.[11] This ruling reflects the reality of modern court proceedings. Without access to the documents before the court, proceedings can quickly become meaningless to journalists. Oral argument is frequently based on references to documents (such as skeleton arguments, witness statements, and documentary exhibits). Unless the press can see such documents, oral argument is impossible to follow.

Despite the clarity of this ruling, and the importance of such material to court reporters, it is practically difficult and expensive to obtain such material from courts. It is the experience of GNM colleagues that:

- Such documents are rarely provided in advance, with the result that it is necessary to try to obtain them during breaks or after court hearings are finished. There are rare examples of good practice, such as the Undercover Policing Inquiry, which recently made the document bundle available for inquiry hearings in advance of the hearings commencing.
- Although the parties should provide such materials promptly, it is frequently necessary to make a formal application to court (with the associated expense) and even to attend contested court hearings to resolve such applications. Such hearings are often not even listed until many months after a hearing. First-instance courts can often misunderstand this area of the law and take an unduly narrow approach to the provision of material.
- It is possible for systems to be established that enable journalists to search for information electronically. In London, for example, journalists are able to access hundreds of bankruptcy cases directly on their screens[12].
- While the government has published guidance which makes clear that courts outside London should assist with media enquiries in relation to documents before the court, our experience is that this guidance is not adopted consistently[13].
- Access to documents is particularly challenging where those documents are before a court outside of London. We would be happy to provide examples of such challenges to the Committee on a confidential basis.

Attempts to seemingly stall and obfuscate basic journalistic requests for information about cases before the courts, combined with the costs involved with filing formal requests for documents, inevitably inhibit the flow of information from the courts system to the media. Even if such applications succeed, courts outside of London rarely have a system in place for documents to be physically provided to journalists. Some courts charge high sums of money for access to photocopiers; in other instances, journalists are required to ask the parties' lawyers to provide electronic copies.

It's vital that the Ministry of Justice ensures that **every** court across the UK makes full and effective use of digital technology to enable access to documents before and during hearings without a court fee (such as by way of e-filing). Documents should be provided in electronic form or displayed on screens that the media can access (as occurred in the recent Fishmonger Hall inquests). The Ministry should also reemphasise to courts that requests from accredited

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[11] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, Toulson LJ, as he then was, §85; endorsed by the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2020] AC 629, §§38 and 44.

[12] https://www.gov.uk/apply-to-bankrupt-someone/check-for-other-bankruptcy-petitions

[13] see CPR 5.4c https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05#5.4C

journalists should be promptly determined and granted, and should establish a system to report and track delays in legitimate requests, seeking to resolve stalled requests where necessary. The Ministry could consider publishing a statistics bulletin, similar to the bulletin published by the Cabinet Office in relation to Government departmental responses to Freedom of Information requests[14], as a way to highlight any systemic issues with delays at specific courts.

The implications of social media for court reporting and open justice

For a good number of UK citizens, social media has become the primary channel through which they receive news and information. Ofcom data on news consumption, for example, suggests that 47% of 16-24 years olds use Facebook for news nowadays, while 8% of the population more broadly, says that Facebook is their single most important source of news.[15] The creative use of social media by journalists - within the boundaries of rules set by the court - can help to communicate the workings of the justice system to citizens who may not otherwise consume court reporting via other established media channels.

Social media coverage of court cases can appear less inhibited by the rules that are imposed than established news media organisations, as users can be unaware of court rules in a range of areas, including:

- strict liability contempt (relating to issues not brought to the attention of the jury for instance if they are ruled inadmissible);
- the identification of victims and witnesses;
- the identification of jury members or previous convictions.

The violation of these rules is rarely pursued by the courts either because of jurisdictional issues or because those publishing these details have limited audiences. While individuals who post content on social media may reach a limited audience, the impact of the disparity of detail provided by social media bloggers, versus news media organisations that understand and comply with the rules, can be to perpetuate conspiracy theories that conventional media organisations are for some unknown reason 'concealing the truth' about certain prosecutions. The prosecution of Stephen Yaxley-Leonard, for example, for contempt of court for live broadcasting a highly sensitive trial of a number of men accused of running a child sex ring at Leeds Crown Court, was justified by the defendant on the basis of a *"perception that the mainstream media were ignoring such cases and that he was providing a valuable public service."*[16]

In addition to responsible media organisations not publishing articles where reporting restrictions are in place, many news organisations will not post articles about active legal cases on social media sites - from which many citizens get their news - because they have no ability to moderate comments posted on those sites. This is due to the fact that media organisations can currently be held liable for comments posted underneath articles published on third party social media websites which infringe the law[17]. By contrast, in terms of

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[14] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892708/foi-statistics-q1-2020-bulletin__1_.pdf

[15] https://www.ofcom.org.uk/__data/assets/pdf_file/0013/201316/news-consumption-2020-report.pdf

[16] https://journals.sagepub.com/doi/full/10.1177/1464884919868049

[17] See for instance the case of R v F & D [2015] in which a jury was discharged as a result of prejudicial comments posted on Facebook under newspaper articles. See also para 2.2 and para 3.2 of AG's Response to the Call for Evidence on the Impact of Social Media on the Administration of Justice Marc 2019

individual users posting comments on court cases directly to social media sites, despite social media websites having the tools to moderate such pages, they have been free to continue to publish those contemptuous comments, without sanction from the courts[18].

We are not in favour of abolishing all of the rules set out above, many of which are necessary for the administration of justice. We are in favour of a better system of educating people of the rules that are in place in particular court cases. We believe that stronger enforcement of the rules, for example, requesting that social media platforms geo-block content in locations that relate to particular court cases, and that those platforms are held responsible for infringement of specific orders by users on their platform, would result in fairer and more comprehensible coverage of court cases.

The former Attorney-General[19] warned, in June 2021, of the potential for social media commentary to prejudice court proceedings. While there is a small risk of social media commentary prejudicing a case, we do not believe the answer to that risk is to further restrict the ability of the media to report proceedings openly. Indeed, we believe the imposition of further such restrictions would be highly counterproductive. In a society in which conspiracy theories and low levels of trust in key institutions of our democracy are increasingly prevalent, increasing understanding of these basic principles of justice, and reporting of the process of justice being done, is essential. A more productive objective should be to facilitate responsible court reporting on social media, and stronger use of existing enforcement powers against individuals who break the law.

There is already in existence the Director of Public Prosecutions's guidelines on prosecuting cases involving communications sent via social media[20], which is helpful in assessing when individuals should be prosecuted, balanced against the danger of criminalizing speech. Consideration could also be given, in less severe instances, to the implementation of an internet awareness course (along the lines used for speeding offences where a chance to take a speed awareness course is offered) which could avoid disproportionate criminalisation, while enabling better education and awareness among adults. To the extent that bringing more prosecutions would require additional public funding for law enforcement, we support ongoing national, European and global efforts to create a tax regime that ensures that online platforms pay their fair share of tax.

There is also a question, potentially within scope of the Online Safety Bill, as to how social media companies should be encouraged to regulate user posts that breach court restrictions. In the same way as newspapers and broadcasters regulate comment pages on their websites, social media websites may be able to deploy solutions to identify commentary on ongoing court cases, and to temporarily geo-block certain postings which might have breached Court rules. Again, the ability for social media companies to identify such posts is likely to be aided by the provision of a centralised list of court cases to which reporting restrictions apply.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783628/Call_For_Evidence_05.03.2019_v2.pdf

18 https://www.lep.co.uk/news/crime/heres-how-comments-social-media-comments-can-hinder-court-cases-126676

19 https://www.gov.uk/government/news/attorney-general-launches-new-campaign-to-combat-contempt-of-court-online

20 https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media

At the same time, the Committee should also be mindful that without a clear exemption for news publishers, the draft Online Safety Bill risks pushing key online platforms to introduce blunt algorithms that inadvertently block or takedown journalistic coverage from local and national courts, potentially undermining the objective of open justice. Suggested amendments to the draft Bill have been submitted to the Joint Bill Committee by Guardian Media Group[21] and the News Media Association[22].

- *The effect of court reform and remote hearings on open justice.*

Remote hearings could potentially reduce the resources required for journalists to attend court cases if journalists can gain efficient and effective access to those proceedings from home or from the office. Remote hearings enable journalists to access court hearings during the day without having to travel or wait around. Such hearings are only viable or accessible, however, if there are adequate lists of the cases being heard, the times that they are being heard and the links required to access them remotely[23]. In our experience hearings conducted over video calls were more effective than those over the telephone which are harder to follow. Again, all the documentation which might otherwise be accessible to journalists from the court in hard copy must be made available by digital means to enable the court hearings to be comprehensible.

The provision of remote access to court must not be seen, however, as a substitute for journalists gaining physical access to the hearings themselves. In parallel with digital access to court hearing, it is essential that physical space is provided in actual court rooms whenever possible.

In particularly controversial cases it is important that journalists can, if necessary, gain efficient and quick access to transcripts of the proceedings so that they can report the content of complex legal cases accurately. **If such transcripts are produced of public court cases for the parties contemporaneously it would be appropriate, and would involve little expense, for them to be made available at the same time to the journalists reporting such cases.** At present it can take a long time for transcripts to be produced, and access to those transcripts can be prohibitively expensive. Bearing in mind the complexity of some of the cases that appear before the courts, and the importance of the media getting the details of those cases right first time, it is important that reporters should be able to access court transcripts in order to report on cases accurately.

To aid continued reporting of the courts system, the Ministry of Justice should seek to make it easier for court reporters to follow proceedings and gain access to the orders that may affect their reporting of those trials. The UK Supreme Court does provide a helpful starting point in terms of making available a summary and further details of current cases.[24] This is a potential model that could be rolled at more widely, perhaps starting with principal English & Welsh Courts.

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[21] https://committees.parliament.uk/writtenevidence/39413/html/

[22] https://committees.parliament.uk/writtenevidence/39265/html/

[23] See section 7 of 'The Impact of the Covid 19 measures on the Civil Justice System produced by the Civil Justice Council' https://research.thelegaleducationfoundation.org/wp-content/uploads/2020/06/FINAL-REPORT-CJC-4-June-2020-v2.pdf

[24] https://www.supremecourt.uk/current-cases/

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