



UK OPEN
GOVERNMENT
CIVIL SOCIETY NETWORK

spotlight
on
corruption

Towards a national commitment to open justice data in the United Kingdom



Executive Summary

This report outlines steps the UK government, in partnership with civil society groups, the judiciary, and other legal experts, could take to ensure that open justice is more effectively and fairly embedded in the UK court system.

The government will make an open justice commitment within its next national action plan in the Open Government Partnership. The report explores the issues that need to be addressed when considering how to develop such a commitment and makes a series of specific recommendations about how it can be achieved. It considers the type of data that is created during court proceedings and how that data is currently made public. The report has been developed with input from a group of experts at a roundtable convened in May 2019.

Considerable resource challenges in the court system and the different jurisdictional cultures within the courts in England and Wales, as well as the need to meet data protection standards and to ensure the rehabilitation of offenders, pose significant challenges to the application of universal open justice principles. On the other hand, the current modernisation of the court system, and the creation of a new economic crime court, create real opportunities for improving the application of these principles in practice.

The report suggests that in the short term these opportunities can be maximised by:

- creating a stakeholder working group on open justice;
- commissioning an independent expert report;
- holding a public consultation on how to improve open justice;
- seeking a legal opinion on how to balance rights to privacy, a fair trial and rehabilitation with public access to information about court proceedings.

The report goes on to look at longer term options for improving open justice data including:

- creating common data standards for information generated during the justice process and ethical principles for public and media access;
- developing a database or access model for free and comprehensive judgments and sentencing remarks;
- creating a pilot database of open court data with free electronic access for the public and media, potentially using data generated by the new economic crime court;
- ensuring that the implications for access to court documents from the recent UK Supreme Court ruling in *Cape Intermediate Holdings Ltd v Dring* are addressed;
- developing a strategy for the UK Supreme Court to continue to operate as a beacon for open justice;
- improving access to primary and secondary legislation;
- increasing access to audio recordings of court cases and exploring ways to ensure court transcripts are more easily and more cheaply accessible; and
- liaising with judges to find ways to ensure the principle of open justice is more consistently applied.

1. About this project

1.1. During 2018, civil society groups including Spotlight on Corruption¹ proposed that the government make an open justice commitment in its Open Government Partnership national action plan. These plans are an opportunity for government and civil society to co-create and define ambitious commitments to foster transparency, accountability and inclusion. In November 2018, the UK government committed “*to working with the Open Government Network and civil society organisations to develop our approach on this agenda over the coming year, with the goal of co-creating a full commitment for the 2020-2022 National Action Plan.*”² Due to a delay with publishing the previous plan, the next action plan will in fact be 2021-2023. Alongside the Open Government Network, Spotlight on Corruption, as a step towards co-creating such a commitment on open justice, commissioned Dr Judith Townend,³ University of Sussex, to prepare a proposal to guide this work.

2. Background

2.1. The overall aim of this piece of work is to develop a concrete and detailed proposal to form the basis for a draft commitment on open justice in the Open Government National Action Plan 2021-2023. This proposal covers open public court data access and publication for both civil and criminal trials in England and Wales.⁴ A range of proposals were made in the first version of this report, which were presented to an expert roundtable in London on 15 May 2019. These are set out, alongside discussion points and responses, in Appendix 2. This document draws on the discussion from that roundtable.

3. Policy and practice background

3.1. The principle of open justice, fundamental to the rule of law, is well-known and developed over centuries of legal practice. Usually, this is taken to mean that courts should be open to the public to observe. Typically, the media has taken the primary reporting role, acting on the public’s behalf although usually any member of the public is also entitled to report on court proceedings, subject to automatic and discretionary reporting restrictions that may apply. However, as Lord Justice Toulson observed in 2012: “*While the broad principle and its objective are unquestionable, its practical application may need reconsideration from time to time to take account of changes in the way that society and the courts work.*”⁵ This was reflected in an important recent UK Supreme Court decision, *Cape Intermediate Holdings Ltd v Dring*, concerning public

¹ Corruption Watch’s work on open justice and anti-corruption enforcement was moved into a new legal entity, Spotlight on Corruption, on 1 September 2019.

² See: <https://www.opengovernment.org.uk/2018-2020-open-government-action-plans/>.

³ Senior lecturer in Media and Information Law, School of Law, Politics and Sociology, University of Sussex. With special thanks to Gemma McNeil-Walsh for note-taking and preparing the discussion report on which this draws, Lawrence McNamara and the University of York for academic and practical support, and all the roundtable participants listed in Appendix 3. Unless otherwise stated, all websites accessed in May 2019.

⁴ The paper describes the typical approach taken in civil and criminal courts in England and Wales; it should be noted that some courts (e.g. the family courts, Court of Protection, UK Supreme Court, as well as specialist tribunals), have a distinct approach to data publication.

⁵ *Guardian News and Media Ltd, R (on the application of) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420 (03 April 2012): 5.

access to case documents in civil proceedings. The court suggested that the bodies responsible for court rules in the UK, “*give consideration to the questions of principle and practice raised by [the case],*” such as the continuing obligation on parties to cooperate with the court in furthering the open justice principle after a trial has concluded.⁶

- 3.2. As Lord Justice Toulson further observed in 2012, there may be differences of view about the practical application of the open justice principle.⁷ That is, the way in which open justice – and the fair administration of justice – is practically achieved is open to discussion and re-evaluation. For instance, while the media has often intervened in cases to appeal restrictions prohibiting the reporting of a defendant’s name and other details, organisations representing other interests may contend that open justice can be achieved without the publication of such data (e.g. the name of a child on trial for a criminal offence)⁸ where there is a legitimate competing right requiring privacy.
- 3.3. New technology has resulted in changes in practice and where necessary, the introduction of new legal rules. For example, when journalists began to request permission to tweet from court, the Lord Chief Justice issued new guidance in 2011⁹ which eventually became part of the current Criminal Practice Directions. Generally, however, procedures that provide public and media access to the courtroom and court materials have developed in a piecemeal fashion and have not been subject to any overarching design or application of common standards. This can be explained by the disparate nature of the English courts system (and procedural differences between courts), the commercial interests of private actors which supply courts data at high cost, and the differing roles of judiciary and government in handling courts access and data.
- 3.4. Most recently, in October 2018, HMCTS published a set of materials for courts staff on “*supporting media access to courts and tribunals*”.¹⁰ Other guidance for media and courts are also available, though several resources need updating to reflect the current law and courts practice.¹¹ There is scarce guidance or support meanwhile for other types of users – e.g. NGOs, academics,¹² court users, or members of the public – on data access. In October 2019, the Legal Education Foundation published a report entitled

⁶ *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 (29 July 2019) [51].

⁷ *Guardian News and Media Ltd, R (on the application of) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420 (03 April 2012) [5].

⁸ See, for example, Harte D, ‘What’s in a Name? The Identification of Children in Trouble with the Law’ (The Standing Committee for Youth Justice (SCYJ) 2016) http://www.yjlc.uk/wp-content/uploads/2015/03/Whats-in-a-Name-FINAL-WEB_VERSION_V3.pdf. This argument can be found at p. 18 and p. 27.

⁹ <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/lbdc-guidance-dec-2011.pdf> / Criminal Practice Directions I: General matters 6C: ‘Use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting’.

¹⁰ <https://www.gov.uk/government/publications/guidance-to-staff-on-supporting-media-access-to-courts-and-tribunals>.

¹¹ e.g.: <https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>.

¹² Academics can apply for special data access, under certain conditions, but this is not relevant or a proportionate route for routine examination of public data: <https://www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers>.

Digital Justice: HMCTS data strategy and delivering access to justice, which makes 29 recommendations for tackling “digital exclusion” and ensuring the court reform programme delivers access to justice.¹³ Though different in its overall scope and focus, aspects of the work - such as the discussion concerning open data and judgment dissemination – directly overlap with the issues addressed in this report and an early draft influenced some of the recommendations presented here.

4. Scope of work

4.1. While Spotlight on Corruption is primarily concerned with court data on economic crime – concerns raised in the 2018 Corruption Watch report, *Veil of Secrecy: Is the Fight Against Corruption Being Undermined by the Lack of Open Justice?* – common issues arise in other parts of the justice system. The result is that a broader approach is needed, particularly since it would be difficult to isolate economic crime data, which is part of broader criminal and civil datasets. This proposal therefore addresses criminal and civil proceedings in the county, crown, magistrate and appellate courts in England and Wales. It does not include specialist tribunals or the family courts / Court of Protection that are subject to special restrictions. The proposal considers data which is already available to the media, and in most cases, the general public, under the common and statutory law (in principle, if not in practice).

4.2. Public data, according to a range of legislation, case law, civil and criminal procedural rules and HMCTS guidance, includes:

- Primary and secondary legislation
- Basic case listings, with party, representative and judges’ names¹⁴ and date of hearing
- Details of charge or claim
- Any plea entered
- Outcomes of cases – i.e. verdict, sentence or judge’s decision¹⁵
- Statements of case
- Orders (redacted, as appropriate)
- Written judgments
- Judgment summaries (such as those issued in the UK Supreme Court)
- Sentencing remarks (may be orally delivered)

¹³ Byrom N., ‘Digital Justice: HMCTS Data Strategy and Delivering Access to Justice’ (2019) <https://www.thelegaleducationfoundation.org/articles/the-legal-education-foundation-is-today-publishing-a-blueprint-for-digital-justice>.

¹⁴ Courts typically limit access to full listing information (such as a party’s address) to members of the media; see: [http://www.newsmediak.org/write/MediaUploads/PDF%20Docs/Protocol for Sharing Court Documents.pdf](http://www.newsmediak.org/write/MediaUploads/PDF%20Docs/Protocol%20for%20Sharing%20Court%20Documents.pdf). A guide from 2005 to the CPS’s approach to media disclosure can be found here: <https://www.cps.gov.uk/publication/publicity-and-criminal-justice-system>.

¹⁵ At the roundtable, it was noted that currently there is a disparity between the availability of data on charging and acquittals. While much of the former is in the public domain, acquittals are not consistently publicly reported.

4.3. Other data in the court file may also be accessible to the public, at the discretion of the court, though with a range of possible restrictions and differing principles, and so may not be provided automatically on request.¹⁶ This category includes:

- Skeleton arguments
- Witness statements
- Written submissions
- Transcripts

It should be noted that in some contexts, there are clear rules for the provision of documents such as skeleton arguments to the media (e.g. Civil Procedure Rules Practice Direction 52C – Appeals to the Court of Appeal, Para 33); this is not, however, consistent across court types and subject to varying practice.

4.4. Court data, as suggested at the roundtable, falls broadly into three categories – case information (e.g. listings); evidence put before the court (e.g. witness statements); and judicial rulings (i.e. judgments and sentencing remarks). Other primary materials, such as legislation, were also mentioned as being a type of justice data.

4.5. There is an important issue around when court data is made available, with a distinction between contemporaneous and historical data of the court, i.e. data that is made available at the time of a trial, and data that is available after it has concluded. In the pre-digital past, data (such as evidence heard in open court) would have been reported contemporaneously, and then accessed only via physical archives. Currently, there is a hybrid approach to the recording and dissemination of contemporaneous and historical data; data may be published contemporaneously but it then has a digital after-life, available through online sources and discoverable via search engines.

4.6. There is also a question around who should be able to access court data and when. It is useful, as one roundtable participant put it, to delineate between types of court data users who may use court data for different purposes. For instance, there is a difference between aggregated management information data (e.g. the number of people convicted for certain offences broken down by gender or ethnicity) and specific case data (e.g. names and details of parties) and it would be useful to capture data that has not been traditionally seen as relevant by the legal profession (for example, the outcomes of ‘unreported’ cases¹⁷). It was suggested that it was important to articulate, in positive terms, why it is proportionate for data to be in the public domain. There were different views about whether the correct approach (currently taken in the majority of civil and criminal trials) should assume a policy of open justice and then work out the exceptions, or alternatively, whether it should start with a question of what was proportionate to put in the public domain.

¹⁶ The right of a non-party to access such documents in the court file are discussed in *Cape Intermediate Holdings Ltd v Dring* (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38 (29 July 2019) / *Cape Intermediate Holdings Ltd v Dring* (Asbestos Victims Support Group) [2018] EWCA Civ 1795 (31 July 2018).

¹⁷ An ‘unreported’ case is a case which has not been published in a hard copy reporter series (known as Law Reports). Although it may not be significant in terms of developing the law, its contents may be interesting for other reasons – e.g. in terms of understanding the impact of legal policy, such as cuts to legal aid.

4.7. One potentially thorny issue is who should have access to contemporaneous data. Ideally, journalists and NGOs should be readily able to access material, as generally permitted by law, before and during a trial in order to fully report a case and mount a challenge to any restrictions which are illegitimately applied. There is a potential risk that this creates a selective class of people who can access ‘background material’ which undermines the principle of open justice and rights to information protected under ECHR Article 10. However, in instances where material is subject to an active reporting restriction, it is clearly in the interest of having good public interest journalism that those with a legitimate purpose in accessing and reporting a case (journalists, NGOs and academics), have access to material with an understanding that reporting restriction orders may apply. Participants at the roundtable noted that a key distinction between the public at large and other groups such as the media, is that the latter are subject to some form of regulation.¹⁸ Selective access is likely to be appropriate for checking the contents of reporting restrictions. While providing any member of the public with the details of the restriction could undermine its purpose, members of the media and other actors reporting cases need to ascertain the nature of a reporting restriction in order to comply with it, to check whether it has been lawfully granted and to assess whether there are grounds for appeal.

5. Key issues and obstacles

General issues

- 5.1. One of the overall obstacles to the systematic and consistent delivery of court data is that current systems for managing court information lead to datasets that are piecemeal and incomplete. More specifically, the following features of the status quo, along with potential obstacles to the provision of open courts data, need careful consideration.
- 5.2. While there are obstacles to opening up fully all three categories of court data identified above, digitising evidence is potentially particularly problematic, as it requires time and effort to be spent checking what can safely be made available. Some participants at the roundtable raised concerns about the resourcing of additional data processing and publication tasks when courts are currently ill-resourced in many ways.¹⁹
- 5.3. The issue is particularly problematic because redacting material potentially endangers open justice, i.e. that all that is heard in an open court should be in the public domain. This issue has arisen in the context of the provision of daily transcripts to a journalist reporting civil litigation in the High Court of England and Wales. The judge considered it was acceptable that the journalist should receive the “*daily revised*”

¹⁸ Broadcasters are regulated by Ofcom (this does not extend to their text-based online and social media content); many news and online outlets are regulated by either IPSO or Impress, but many – including several national-level titles - are not signed up to any special regulator. A voluntary scheme administered by the UK Press Card Authority does not restrict the issuing of press cards to regulated media: <http://ukpresscardauthority.co.uk/>.

¹⁹ For an account of failures within the criminal justice system and problems with case scheduling see: The Secret Barrister, *The Secret Barrister: Stories of the Law and How It's Broken*. (Picador 2018).

transcript before a “perfected” one was produced that corrected any mistakes.²⁰ The issue is not confined to digitising evidence however, and also impacts upon the court listing data where ensuring accuracy can be difficult, with changes to listings sometimes made on the day.

5.4. The various different jurisdictions in the court system also make it complex to do anything that cuts across the entire regime, with each jurisdiction subject to its own procedural rules and treatment of oral and written information. Each jurisdiction warrants individual attention in any proposals. By way of example, much information in the criminal system is not systematically recorded (e.g. reporting restrictions) or even written down (e.g. sentencing remarks), whereas more written judgments are handed down in the civil system.

5.5. Finally, an over-arching issue is that practical obstacles often frustrate the open justice objective so that data is closed not for principled, but for procedural reasons. This point was made by Mr Justice Fraser in the Post Office Group Litigation (*Bates & Ors v Post Office Ltd*) cited above; according to the daily transcript, he observed that there was a difference between a “process and timing” point and a “principled point” in deciding whether a journalist should be given access to transcripts.²¹ This can lead to a disconnect, as recognised at the roundtable, between the ‘macro’ principle of open justice and the micro realities of the courtroom.

6. Role of private and third sector

6.1. In general, as a result of evolved practice rather than design, third party providers, rather than the judiciary or government, ‘clean’ and ‘piece’ together data to make it available to the public via free or paid-for services. These include: legal information companies such as Westlaw and Lexis; private companies responsible for transcription; the charities ICLR and BAILII; and companies publishing listings data, such as Courtserve. Minimal and incomplete data is published via the judiciary and HMCTS websites. As a result, third party providers (with exceptions such as BAILII, which provides a free service) have been able to charge high fees to provide their services to public and media users.

7. Costs

7.1. Because court datasets, such as a body of judgments from a single court, are incomplete and media/public access mechanisms do not appear to be in-built features of current internal systems, there would be a cost associated with collecting and preparing data for publication and publishing this data (to a closed or open database). However, these costs need not be insurmountable and over time, once common standards are adopted and a publication platform is developed, should be minimal. It should be emphasised that previous attempts at improving media access to data have failed; plans for a reporting restrictions database in 2007 were abandoned owing to the

²⁰ In the Post Office Group litigation (*Bates & Ors v Post Office Ltd*), see: <https://www.postofficetrial.com/2018/11/application-to-make-unofficial-sound.html>.

²¹ See: <https://www.postofficetrial.com/2018/07/about-me.html>.

likely costs of a commercial service. According to those involved, it was envisaged that the mainstream media organisations should meet these costs, a proposal which they rejected.²²

- 7.2. A separate proposal by the Law Commission in 2014 – so far not adopted – recommended the introduction of an online list of orders under section 4(2) Contempt of Court 1981 in force at any given time, “*giving all prospective publishers a single easy point of reference for checking whether a court order postponing publication is in force*”. It also recommended that a publicly accessible list of orders be supplemented by an additional restricted database which would contain the terms of section 4(2) orders themselves. The report’s authors considered the additional burden for court staff of administering the basic public list should be “*small*” and that the cost of the restricted list could be covered through subscription fees.²³ Despite the modest costs involved, this proposal does not appear to have been pursued.

8. Technology

- 8.1. As the Lord Chief Justice, Lord Burnett, observed in 2018, existing technology is piecemeal and earlier opportunities to introduce court modernisation were missed over the past few decades, meaning that an overhaul and digitalisation of systems is more complex and costly than it need have been.²⁴ The current £1 billion programme of digital reform, planned to be completed by 2023, offers an ideal opportunity for media and public access to be in-built to new systems. However, even newly developed services such as the digital filing and case management system CE-File, launched in the Royal Courts of Justice in 2019, following its introduction in the business and property courts,²⁵ does not provide adequate public and media access, with significant costs attached to accessing files.²⁶ Thus far, the courts service has not yet introduced new technologies such as automated transcription and continues to be reliant on costly manual systems which are prohibitively expensive for court users.²⁷

- 8.2. New digital services, such as audio/video hearings, are gradually being introduced that could dramatically improve user experience of the courts, if appropriate safeguards are put in place (for instance, personal support for users who need additional assistance). There is scarce information, however, about the technical design of third party observer access to digital data arising from these hearings. HMCTS has said that

²² Information provided in personal communication with author; and referenced in this article: Press Gazette, ‘Law Commission Calls for Reporting Restrictions Website with Paid-for Access’ (*Press Gazette*, 26 March 2014) <https://www.pressgazette.co.uk/law-commission-calls-reporting-restrictions-website-paid-access/>.

²³ Law Commission, ‘Contempt of Court (2): Court Reporting’ (2014) LAW COM No 344 / HC 1162.

²⁴ Lord Burnett, ‘The Age of Reform’ (2018) <https://www.judiciary.uk/wp-content/uploads/2018/06/20180607-bailii-lecture-final-for-publishing-003-1.pdf>.

²⁵ <https://www.gov.uk/guidance/ce-file-system-information-and-support-advice>.

²⁶ Magrath P, ‘Weekly Notes: Legal News from ICLR — 18 March 2019’ (*ICLR*, 18 March 2019) <https://www.iclr.co.uk/blog/weekly-notes/weekly-notes-legal-news-from-iclr%e2%80%8a-%e2%80%8a18-march-2019/>.

²⁷ For example, the charity, the Centre for Criminal Appeals, was quoted £20,000 to access the transcript of a three week criminal trial. See: <https://law-tech-a2j.org/odr/a-social-enterprise-a-ministry-of-justice-and-a-failed-attempt-at-innovation/>.

there will be court-based video hubs for observing digital hearings in which the core participants are in different geographic locations but it is not clear how many, or where such hubs will be installed. It has been claimed that online dispute resolution could make the justice process more transparent but no details have been published about the means by which a member of the public or media could access records or observe proceedings conducted entirely online. In June 2019, the MOJ began publishing a daily PDF document listing partial details of Single Justice Procedure cases (in which summary-only, non-imprisonable, victimless offences can be tried and sentenced on the papers by a single magistrate without a hearing).²⁸

9. Role of Government and Judiciary

- 9.1. The current programme of reform is led by HMCTS, as an executive agency of the Ministry of Justice, in collaboration with the MOJ and senior judiciary.
- 9.2. Though judges' involvement is clearly critical to the effectiveness of the project, there is concern that their role could jeopardise their independence from the executive if they are too closely connected to the reform programme. Recently the Public and Commercial Services union (PCS), the largest trade union in the civil service, raised concerns that the involvement of the senior judiciary in the programme of reform *"undermines the fundamental constitutional principle of the separation of the powers ... the line between the executive and the judiciary is becoming blurred with the potential for what should be the fearless independence of the judiciary to be compromised."*
- 9.3. Not everyone shares this concern, however, with some roundtable participants expressing that judicial involvement and "buy-in" is essential to the success of reform and raise judicial awareness of the importance of good data practice. For example, judges would need to be encouraged to produce written judgments in order to produce a more consistent database of court judgments.
- 9.4. Joshua Rozenberg meanwhile has argued it is *"wrong in principle for court sites to be branded "GOV.UK" and hosted on a government website. In a democracy, the courts must be seen to be independent of the government."* However, new online court services for Divorce, Probate, Money Claim and Traffic Offences are hosted on Gov.uk. It is not clear whether Gov.uk will host all the new services, though it seems likely. Rozenberg reports that while he *"was told that no users had objected ... [he] "suspects that was a failure of consultation rather than a sign of approval: there is no evidence that anybody was asked to consider the advantages and disadvantages of close links to the government."*²⁹
- 9.5. Given the pre-existing level of investment in Gov.uk based services, a move to an independent platform is likely to be resisted, though arguably it would ensure better independence. If services continue to be made available via Gov.uk, it is logical that data provision services should also be made available via that platform. Participants at the roundtable however, suggested that HMCTS alone should not be responsible for the

²⁸ <https://www.gov.uk/guidance/single-justice-procedure-court-lists>.

²⁹ <https://long-reads.thelegaleducationfoundation.org/how-will-online-courts-work/>.

open justice system, and it would seem appropriate that the question should be put to full public consultation and serious consideration given to the independent hosting of court services by the judiciary.

10. Privacy and Data protection

- 10.1 The General Data Protection Regulation and Data Protection Act 2018 offer certain exemptions for the processing of judicial data; for example, exemptions from the right of access and the right of rectification provided for by the GDPR. The exemption is set out in article 23(1)(f) GDPR and section 15(2)(b) and Schedule 2, part 2, para.6; Schedule 2, part 2, para.14(2) DPA 2018. Guidance issued by the Judicial Working Group on data protection states that *“the reason for the exemption is to secure the constitutional principles of judicial independence and of the rule of law.”*³⁰
- 10.2. Further, the Information Commissioner’s Office does not have supervisory authority for the processing of personal data by courts and tribunals when they are acting judicially, or for the processing of personal data by individuals when they are acting in a judicial capacity. Complaints are considered by the Judicial Data Protection Panel, established in May 2018, the month in which the GDPR became enforceable.
- 10.3. Any proposal for access and publication of courts data must, of course, comply with the provisions of the GDPR and Data Protection Act 2018 and respect individual’s privacy-related rights under ECHR Article 8. However, the application of data protection law to court and judicial data appears relatively unexplored in regulatory decisions, case law and academic literature. Beyond brief mention in Parliamentary debate on the Data Protection Bill 2018, the topic has received scant attention.³¹
- 10.4. Different national jurisdictions take different approaches to the privacy of court participants’ names and at the European level, there is a growing trend toward anonymisation. For example, since July 2018, the Court of Justice of the European Union is replacing the names of natural persons involved in requests for preliminary rulings with initials, and any additional identifying information, in all public documents. Typically – with notable exceptions (e.g. in the family court) the reporting of names has been understood, however, as a key part of the delivery of open justice in England and Wales.³²
- 10.5. The potential for comprehensive reuse of open information needs to be anticipated and considered, and participants at the roundtable noted the risk of abuse by third parties in processing and distribution. Controls would be required. Consideration needs to be given as to whether new regulatory mechanisms are needed – something the roundtable did not have scope to discuss.

³⁰ Judicial Data Protection Panel, ‘Judicial Data Processing Complaints Handling Policy’ (2019) <https://www.judiciary.uk/wp-content/uploads/2019/04/JDPP-Request-Policy-April-2019.pdf>.

³¹ At the time of writing, the following title was forthcoming but not yet available: Jones E and Jones J, *Criminal Records, Privacy and the Criminal Justice System* (Bloomsbury Professional 2019).

³² <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180096en.pdf>

11. Rehabilitation of Offenders

11.1. Another consideration for continued and increased access to data from court proceedings is the law that protects the rehabilitation of offenders. Although civil claims have been made in challenge to the continued processing of “spent” data,³³ there is – again – relatively little literature or case law on which to draw with regard to the implication of online publication of courts data for rehabilitation of offenders.

11.2. The charity Unlock has worked with people with convictions to assist them in requesting removal of online material under the “right to be forgotten” (right to erasure) established in EU law.³⁴ The Lammy Review in 2017 on the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the criminal justice system³⁵ meanwhile brought to the fore some of the competing goals here. While, on the one hand, the report recommended the sealing of criminal records, it also recommended that all sentencing remarks should be published. The latter could lead to greater rather than lesser exposure for the same individuals wishing to expunge their public record in the interests of rehabilitation. It seems critical, therefore, that the design of a system should consider how data relating to “spent” convictions should be treated.

12. Other legal concerns

12.1. Issues around ensuring a fair trial and access to justice under ECHR Article 6 have also been raised as potential concerns, particularly with reference to the provision of contemporaneous court data. For example, if information relating to prior / concurrent proceedings was readily available, this could potentially affect future civil litigation or criminal proceedings. On the other hand, Article 6 rights could also be adversely affected when a litigant is unable to access historical case information; this has been raised an issue for former defendants wishing to appeal their case, for example.³⁶

12.2. Additionally, concerns about the need to update or check certain court documents against delivery, to reflect what was actually said in court, need to be addressed. A common example of this is where prosecution and defence counsel refuse to hand over opening statements because they do not match what was delivered in court. However, it is important that practice is guided by principle rather than practical obstacles, as noted at para 5.5. The issue could be resolved by the use of transcripts, if these were more widely available.

12.3. Finally, privacy concerns and risks of third party use of data also need to be taken into account. Privacy concerns may extend beyond criminal conviction data: for example, sensitive medical details about a named person may be detailed in public judgments,³⁷ and it is questionable whether this type of information needs to be in the public domain indefinitely. Third party use of data meanwhile could include use of the

³³ See, for example, *NT 1 & NT 2 v Google LLC* [2018] EWHC 799 (QB) (13 April 2018).

³⁴ <http://www.unlock.org.uk/policy-issues/specific-policy-issues/google-effect/>.

³⁵ <https://www.gov.uk/government/publications/lammy-review-final-report>.

³⁶ See: <http://appeal.org.uk/open-justice/>.

³⁷ See, for example, discussion in *Justyna Zeromska-Smith v United Lincolnshire Hospital Trust* [2019] EWHC 552 (QB).

data to assess ‘financial risk’ of individuals, and their access to banking and other services. In response to these concerns, it should be noted that regulation already exists through the law of contempt and computer/communications offences. Whether third party data analysis services need more effective regulation is beyond the scope of this project.

13. Ethics

13.1. Beyond establishing the legality of provisions for data access and publication, there are ethical considerations to be made. Resources on which HMCTS can draw include the Open Data Institute’s range of tools and training, including the “Data Ethics Canvas” which is “*designed to help identify potential ethical issues associated with a data project or activity*”. It promotes “*understanding and debate around the foundation, intention and potential impact of any piece of work, and helps identify the steps needed to act ethically.*”³⁸ A similar tool is the DCMS Ethics Framework for data use in the public sector, which contains seven principles that can be adapted to different contexts.³⁹

13.2. Some argue however that a “rule of law” framework could be more persuasive and better understood by members of the judicial and wider legal community. Tying an open justice commitment to concrete rule of law principles would make it harder for judges to opt out. Placing open justice principles in a rule of law framework is not incompatible with also taking an ethics-driven approach.

14. Oversight of court data collection and publication

14.1. Previous initiatives by the court to collect and analyse case data indicate the need for independent oversight. By way of example, when concern was raised about the lack of public data on anonymised privacy injunctions, a practice direction was introduced to instruct the court on submission and publication of this data.⁴⁰ This has not been wholly successful, indicating that a separate oversight mechanism is needed alongside the requirement for data collection and publication.⁴¹

14.2. One option is the creation of a state-appointed and independent “*Open Justice Advocate*” to appear and make representations in cases where a court is considering an application to depart from open justice.⁴² In the absence of such an independent role within the justice system, a body such as the Office for National Statistics could take on a data monitoring role. The issue of oversight needs further consideration.

15. Collaboration and consultation

15.1. Generating and improving access to courts data will require significant cultural change and co-operation across the system will be required. Participants at the

³⁸ <https://theodi.org/article/data-ethics-canvas/>.

³⁹ <https://www.gov.uk/government/publications/data-ethics-framework/data-ethics-framework>.

⁴⁰ Civil Procedure Rules, Practice Direction 40F: ‘Non-disclosure injunctions information collection scheme’.

⁴¹ See: <https://inform.org/2017/04/28/news-privacy-injunction-statistics-for-2016-three-applications-recorded-statistics-incomplete/>.

⁴² Bosland, J. and Townend, J. (2018). ‘Open justice, transparency and the media: representing the public interest in the physical and virtual courtroom’. *Communications Law*, 23 (4).

roundtable advised that Spotlight on Corruption (Corruption Watch)/Open Government Network should engage with the Judicial College to address the question of open justice, its practicalities and why it matters. This could include engagement with current or retired judges to discuss proposals: e.g. Mr Justice Warby, who as Judge in charge of the Media and Communications List, has been involved in open justice training; and Lord Neuberger and Lady Hale who have overseen the Supreme Court's commendable approach to open information.

- 15.2. Consultation among concerned stakeholders is vital, as well as testing of pilot schemes among different sorts of court users.

16. International comparisons

- 16.1. Hugh Tomlinson QC has observed that it is “*remarkable that no courts in the United Kingdom make written submissions publicly available. This is in stark contrast to the position in, for example, the United States, Canada or South Africa where the ‘briefs’ to the Court are freely available to the public on the internet.*”⁴³ However, access may still be prohibitively expensive to many, as is the case in the U.S.

U.S.

- 16.2. The U.S. The Public Access to Court Electronic Records (PACER) system is often cited as an enviable example of better access to legal materials. It is described on its website as:

*...an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator. PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service.*⁴⁴

- 16.3. While Pacer is clearly an invaluable resource, for which there is no comparable source of information in the UK, there are aspects of Pacer which are less desirable than others. For example, it charges significant amounts to access data. Non-profit organisations have filed a legal challenge to PACER's current fee structure; the claim, *NVLS v. United States*, is now pending on appeal before the U.S. Court of Appeals for the Federal Circuit.⁴⁵ A UK version of PACER, starting from scratch, could adapt a fairer payment model to improve access to justice materials.

⁴³ Tomlinson H, 'Towards Legal Transparency' in J Townend (ed), *Justice wide open: working papers* (Centre for Law Justice and Journalism, City University London 2012) <http://openaccess.city.ac.uk/1926/>, 35-39.

⁴⁴ <https://www.pacer.gov/>.

⁴⁵ See: <https://www.courtlistener.com/docket/8050424/nvlsp-v-united-states/>; also see: Ziegler A, 'Momentum Builds for PACER Reform and Free Public Access to Court Records' (26 February 2019) <http://etseq.law.harvard.edu/2019/02/momentum-builds-for-pacer-reform-and-free-public-access-to-court-records/>. Non-profit organisations have filed a legal challenge to PACER's current fee structure; the claim, *NVLS v. United States*, is now pending on appeal before the U.S. Court of Appeals for the Federal Circuit; also see: Hughes S, 'The Federal Courts Are Running An Online Scam' (*Politico Magazine*, 20 March 2019) <https://politi.co/2HJss6Y>.

Scotland

16.4. In its report in 2014, the Law Commission was inspired by Scotland's simple system for listing cases with active reporting restrictions. This can be viewed here: <https://www.scotcourts.gov.uk/current-business/court-notice/contempt-of-court-orders>.

EU

16.5. The EU Justice Scoreboard⁴⁶ monitors, among other factors, the performance of different member states on accessibility of justice, including: availability of online information about the judicial system for the general public; availability of electronic means; standards on information about case progress; online accessibility to published judgments to the general public; and arrangements for online publication of judgments in all instances. Since the first report in 2013, the UK has not supplied data for this exercise, meaning there is no comparison that can be made with the other participating EU members.

16.6. Various European case studies, including the UK, were explored in the EU-funded OpenLaws project 2014-2016, which recommended the publication of primary legal material in open access formats, as well as new metrics and human rights impact assessments for open legal data.⁴⁷ Though Great Britain has scored highly for its open legislation in the Global Open Data Index,⁴⁸ one founder of a legal tech company has observed that *"access to case law in particular in England & Wales – at least among modern Western democracies – is among the worst in the world."*⁴⁹

17. Ideas for the Open Government National Action Plan

17.1. HMCTS has confirmed that despite ongoing court reforms, it is not too late to make practical suggestions for ongoing court reforms, which are being developed according to an *"agile"* working model, with changes introduced incrementally and continually evaluated and improved. The Open Government National Action Plan 2021-23 therefore seems an optimal vehicle for developing the ideas and discussion relayed in this paper. An effective approach, as participants at the roundtable suggested, would be to develop mechanisms in selected sections or jurisdictions of the system to act as *"beacons"* of open justice, and provide a model for other parts of the court and tribunals system.

17.2. The following actions are suggested for Open Government Network (including NGO members such as Spotlight on Corruption), DCMS and HMCTS/MOJ to consider for

⁴⁶ 'EU Justice Scoreboard' (European Commission) https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en; for an explanation of the UK's non-participation see: Goldsmith J, 'Chris Grayling, Scourge of the EU' (*Law Society Gazette*, 23 March 2014) <https://www.lawgazette.co.uk/practice/chris-grayling-scourge-of-the-eu/5040492.article>.

⁴⁷ <https://info.openlaws.com/openlaws-eu/>; see: Marsden, Chris. (2016). openlaws.eu: Comparative country report: White paper on the openlaws.eu open innovation community

<https://zenodo.org/record/158983#.XNNJIKbTVTY>.

⁴⁸ <https://index.okfn.org/place/gb/law/>.

⁴⁹ <https://www.legaltechnology.com/latest-news/access-to-justice-and-the-urgent-need-for-a-law-tech-revolution/>.

inclusion in the next National Action Plan. These steps will help the OGN and government agree a coherent, realistic and fair commitment to open justice, that prioritises transparency and openness but also recognises legitimate interests in anonymising or time-limiting publication of data.

17.3. Please note that not all participants in the round-table necessarily agreed with the proposals but all views have helped inform the drafting of this report.

A. Short-term actions		Who is responsible?
A1	Form a stakeholder working group on open justice to decide deliverable and measurable milestones, with clear deadlines, which consider some of the options detailed in this report and the suggested milestones below.	OGN/DCMS
A2	Commission an independent report which reviews (1) the current arrangements for the provision and access of court transcripts and (2) the dissemination of judgments and sentencing remarks to the public and maps the information flows from courts to publication; and (3) suggests how an access model would deliver free and comprehensive access to judgments and sentencing remarks in a structured machine-readable format.	HMCTS with input from OGN and other stakeholder groups
A3	Hold a consultation among the general public and relevant stakeholders (including court users) on their views and experience of the practical administration of open justice in modern society, including the establishment of an open access database for judicial decisions and court listings.	HMCTS/MOJ, Judiciary
A4	Seek a pro bono legal opinion on the application of rights relating to equality, privacy (including but not limited to data protection), a fair trial and offender rehabilitation with regard to public access to data. An opinion might also be sought on what positive obligation exists for a state to provide access to legal data (e.g. judicial decisions). It could also consider the necessity of data collection for the monitoring of equalities purposes.	OGN, Spotlight on Corruption, Legal Education Foundation

B. Suggested actions and milestones for the open justice commitment		
B1	Create Common Data Standards for justice data. ⁵⁰ It is vital that new common standards inform the creation of new technological platforms, which would incorporate cost effective means of accessing the courts data to which the public is entitled. Data access methods for the media and public should be built into new technology from its inception. A core principle should also be that publication models should prioritise the public good, rather than private gain.	OGN, DCMS, HMCTS/MOJ
B2	Develop ethical principles for public and media access to courts records and publications and develop a plan to support government, civil servants and the judiciary to adopt the principles. These principles should explain the importance of open justice and why courts data and processes need to be accessible to court users, including the media and the wider public. Tools such as the DCMS Data Ethics Framework or the Open Data Institute's Data Ethics Canvas could be used for this exercise.	OGN, DCMS, HMCTS/MOJ
B3	Develop an access model, with appropriate restriction mechanisms, that delivers free and comprehensive access to judgments and sentencing remarks in a structured machine-readable format.	OGN, HMCTS/MOJ, Judiciary
B4	Create a pilot database, for a selected court or type of cases, with appropriate safeguards and access restrictions, containing several open court datasets and documents which the media and public can access electronically. A potential testing ground would be the new flagship economic crime court which is due to be completed in 2026.	OGN, DCMS, HMCTS/MOJ
B5	Address questions of principle and practice raised by the recent case of <i>Cape Intermediate Holdings v Dring</i> , such as the continuing obligation on parties to cooperate with the court in furthering the open justice principle after a trial has concluded. ⁵¹	OGN, DCMS, HMCTS/MOJ, Judiciary, Civil/Criminal Procedure Rule Committees
B6	Develop a framework and strategy for the UK Supreme Court to continue acting as a "beacon" for open justice; for example, by publishing court documents on its case pages.	Judiciary / UKSC Press Office

⁵⁰ A common data standard would achieve a standardised approach to the collection, maintenance and accessibility of data. See: <https://standards.theodi.org/introduction/types-of-open-standards-for-data/> and also, by way of example, a previous OGP commitment on election data: <https://www.opengovpartnership.org/commitment/07-elections-data>.

⁵¹ *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 (29 July 2019) [51].

Spotlight on Corruption / Open Government Network

B7	Increase open access to primary and secondary legislation. The Government should make a formal commitment to fully resourcing and regularly updating open access primary and secondary legislation.	OGN, DCMS, HMCTS/MOJ, The National Archives
B8	Increase access to audio recordings of hearing for litigants and explore the ways in which court transcripts can be made cheaper and more easily accessible. This exercise should include consideration of appropriate access models and redaction mechanisms.	OGN, Judiciary, HMCTS/MOJ
B9	Liaise with judges about how the principle and process of open justice and the centrality of the principle to the Rule of Law can be more consistently applied, including by devising training, where appropriate.	OGN, DCMS, HMCTS/MOJ, Judiciary, Judicial College

Appendix 1: Questions for roundtable discussion

NB: These questions were based on an earlier version of this report, which was updated following the discussion.

1: Do you broadly agree or disagree with the proposals made here? In particular, we are interested to know whether, in your view:

- a. this proposal and preliminary conclusions strike the correct balance between, on the one hand, open justice / the right to receive and report information; and, on the other, privacy and rehabilitation related rights
- b. there are other issues that the next draft should take into consideration

2: If you accept that courts data should be made more readily accessible to the public and media:

- a. Is the scope of this proposal correct, or do you advise further expanding / narrowing?
 - i. Which of the listed documents and which additional documents should be made available under the proposed scheme?
 - ii. What other sorts of data might fall into a special category for privileged access, as described in the sixth recommendation?
- b. Which datasets should be prioritised for standardisation and improved accessibility?
- c. What are the safeguards and technological restrictions that are needed for open court data publication?
 - i. Should any member of the public (or 'commentator') be allowed to register to access the proposed OCDA database?
 - ii. Who should be allowed to access the proposed RRODA database?
 - iii. Is any additional provision in the criminal law needed for illegitimate use of any public database (e.g. blacklisting of individuals), or is current law on communications crime and contempt sufficient to safeguard its use?
- d. What are the other obstacles and complications that need to be addressed in efforts to make courts data more accessible?
- e. Are there other examples of best practice (in different sectors, international jurisdictions) to which we could refer?

3: Overall, what common standards or principles should guide the Government and Judiciary's approach to the accessibility and publication of open courts data?

4: If you were to seek a legal opinion in this area, what would it address?

Appendix 2: Proposals and responses

Proposal	Discussion points / responses
<p>The creation of a simple and cost-effective database (Open Court Data Access - OCDA) to allow members of the public – including journalists, NGOs and academics – to verify information about cases and to follow their progress. Judgments, sentencing remarks and additional documents could be made available to members of the media and the public, following a simple registration and log-in process.</p> <p>These could include (civil and criminal courts):</p> <ul style="list-style-type: none"> • Statements of case • Skeleton arguments • Witness statements • Written submissions • Orders • Judge’s summing up • Outcome • Sentencing remarks (written) • Judgments (written)⁵² <p>In the longer term, transcripts should also be made freely available on the same database, but this will only be possible under wholesale reform of the current privately operated system for commercial production and sale of transcripts.</p> <p>Court lists with details of case number, name, subject matter, charges (if relevant), names of parties’ lawyers and forthcoming hearing dates, could be published in the online database, which any member of the public can register to access. The record should also link to past hearing information and relevant documents attached to the case. Each case should have its own</p>	<p>This would put an onus on judges to ensure that written as well as <i>ex tempore</i> / oral remarks are available (if delivered orally, they will need to review a transcript).</p> <p>Requiring a registration identifies the person making the request.</p> <p>Documents may not be appropriately redacted.</p> <p>Such a database could be costly.</p> <p>A key consideration is how long data should be stored in either restricted databases or open formats and whether third party use of the data should be time limited – or whether this could even be regulated.</p> <p>A ‘timestamp’ on data could limit how long information relating to convictions was made available. Further, timestamps might be applied differently for different purposes (not limited to rehabilitation and spent conviction concerns).</p> <p>An approach of ‘progressive redaction’ could be taken so that personal data is gradually removed from the system once it no longer needed preserving.</p> <p>Another approach would be to increasingly anonymise the names of parties in online records (c.f. approach of CJEU for preliminary ruling requests, noted above). However, the roundtable participants anticipated this approach would be at odds with the British approach and likely to be resisted by the media.</p>

⁵² These data categories are taken from a proposal made by Hugh Tomlinson in Tomlinson H, ‘Towards Legal Transparency’ in J Townend (ed), *Justice wide open: working papers* (Centre for Law Justice and Journalism, City University London 2012) <http://openaccess.city.ac.uk/1926/>.

<p>page/record with relevant documentation and showing its progress in the courts system.</p> <p>Notification of an application for a discretionary reporting restriction order or the granting of a discretionary reporting restriction could be added to the case record in the Open Court Data Access (OCDA) database. Users of the database can sign up for email alerts when such information is added.</p>	
<p>A second database (Reporting Restriction Order Data Access - RRODA) with restricted access could be accessible by members of the media, academics and NGOs ('researchers and reporters') to check the detail of reporting restrictions. In the first instance, on a pilot basis, this database could be accessible only from public computers at the courtroom, following registration for access. Legitimate 'researchers and reporters' (not restricted to accredited media) should provide a reason for wishing to access the details of the reporting restriction.</p> <p>A closed database that requires a log-in (following registration) would prohibit search engines scraping the data but allow members of the public and journalists the opportunity to access source data and report it elsewhere, within the constraints of law (including any active reporting restrictions). The reasons for restricting access to the database should be clearly stated with reference to any relevant penalties.</p>	<p>Potential objections include the costs of design and maintenance of database and difficulties of verifying legitimate purpose for access.</p> <p>The proposal is ambitious, suggesting the creation of a database covering different court types.</p> <p>It appears that additional document provision has not (yet?) been considered as part of the ongoing reform programme, so given the current delays and expense of that programme, it could be difficult to get commitment to such an initiative.</p>
<p>Civil Online Dispute Resolution (ODR) procedures under development to be designed with provision for associated documentation and an email 'alert' system for people following the case.</p>	
<p>Smaller data sets within jurisdictions could be the subject of pilot exercises. E.g. a sample of cases at a Crown Court, e.g. (1)</p>	<p>Crime cases: Potential for extending access of some data outputs currently accessible to the parties' representatives.</p>

<p>Southwark Crown Court; (2) civil cases in the High Court and Court of Appeal.</p>	<p>Civil cases: There are examples of improving practice here: for example, in the Business and Property courts, Queen’s Bench Division and Court of Appeal with regard to filing systems and harmonisation of case files. Focusing on these courts would limit the remit to England and Wales and to Civil Procedure Rules; the focus would be harmonising and synchronising datasets.</p> <p>In both cases, current internal filing systems could be adapted to have a public facing service (but likely to be complex and costly in some instances).</p>
<p>The Law Commission’s proposal for recording and reporting of Contempt of Court Act 1981 S4(2) reporting restriction orders in the Crown Court could be adopted by HMCTS (updated to reflect current practice in the courts).</p>	
<p>Some, but not all, written judgments are already published on BAILII. All written judgments (redacted where appropriate) should be sent to BAILII for publication except in exceptional and extremely rare circumstances.</p>	<p>Additional work for judges to prepare judgments for publication.</p>
<p>Over-arching practice guidance could be issued to courts and judges instructing them on increased and consistent judgment production and publication – via BAILII in the first instance. Sentencing remarks could be made available in written form. Practice guidance and amendments to the Procedural Rules in the different jurisdictions could follow as necessary.</p>	<p>Distinct differences between procedure in the different jurisdictions (criminal, civil, family, tribunals) noted that would complicate any over-arching exercise.</p>

Appendix 3: Roundtable attendees

Please note that not all attendees were in agreement with the proposals, nor necessarily endorse the final conclusions made in this report. That said, every effort has been to reflect a range of views in this report.

Paul Bowen QC	Brick Court Chambers
Anna Bradshaw	Peters & Peters Solicitors
Jude Bunting	Doughty Street Chambers
Greg Callus	5RB Chambers
Jan Clements	Freelance editorial legal advisor
Diana Czugler	Peters & Peters Solicitors
Caoilfhionn Gallagher QC	Doughty Street Chambers
Mark Hanna	University of Sheffield
Swee Leng Harris	Legal Education Foundation
Susan Hawley	Spotlight on Corruption (Corruption Watch)
Alison Levitt QC	2 Hare Court Chambers
Paul Magrath	International Council for Law Reporting for England & Wales
Lawrence McNamara	University of York & Bingham Centre for the Rule of Law
Andreas Pavlou	Involve / Open Government Network
Judith Townend	University of Sussex
Eva Van Der Merwe	International Senior Lawyers Project
Rose Zussman	Transparency International UK

Representatives from:

- HM Courts & Tribunals Service (HMCTS)
- Ministry of Justice
- Department for Digital, Culture, Media & Sport