CBA Response to Ministry of Justice Consultation:

"Open Justice – The Way Forward"

The Criminal Bar Association

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System ('CJS') owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Introduction

4. Our responses to this consultation are informed by the overarching principle of open justice.

5. John Lilburne first articulated 'Justice must be seen to be done' in 1649. He was the Leveller leader who described himself as "*a lover of his country and sufferer for the common liberty*", when Cromwell's judges tried him for treason. They accepted his submission that 'the first and fundamental liberty of an Englishman' is that 'no man whatsoever ought to be tried in holes and corners, or in any place where the gates are shut and barred'[1].

6. Jeremy Bentham famously expressed open justice in this way:[2]

> *"Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial".*[3]*and* [4]

7. Open justice serves three important functions: (1) it assists in the search for truth and plays an important role in educating the public by permitting access to and dissemination of accurate information;[5] (2) it ensures and enhances judicial accountability, deterring misconduct by judges, police officers and prosecutors;

[1] http://www.constitution.org/trials/lilburne/lilburne1.htm

[2] Bowling (ed) Works of Jeremy Bentham (1843) Vol 4 at 316-317.

[3] Quoted in A.G. (Nova Scotia) v. MacIntrye, [1982] 1 S.C.R. 175 at 183, per Dickson J. (as he was then).

[4] See article by Kirsty Brimelow KC in Supreme Court Yearbook 2016 "Into the dark. Rights, Security and the Courtroom."

[5] S.E. Harding "Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms" (1995-1996) 69 S Cal. L. Rev 827 at 8454

and (3) it performs a therapeutic function by permitting the community to see that justice is done.[6]

8. The CBA summarises that open justice brings transparency to the work of the courts and promotes public understanding of the criminal justice system. At the same time, the interests of vulnerable witnesses, complainants and defendants who directly engage with the criminal justice system remain paramount. Above all, nothing must compromise the primacy of a fair trial at the heart of justice.

9. Reporting of legal proceedings is essential to democracy and the rule of law. However, such reporting, by whatever medium, must not undermine the adversarial system of prosecution and defence or the burden of proof remaining on the prosecution and reliant on the evidence that is examined in court; with the defendant being not guilty until proven to be to a high standard of making the jury (or magistrates) sure.

Outline of CBA Position

10. In summary, the CBA's positions on the central issues in this consultation are as follows:

a. Remote Observation / Livestreaming criminal proceedings.

The CBA supports permitting accredited reporters to observe proceedings by remote links. There is a need for a simpler system to allow journalists to

[6] Richmond Newspapers Inc v Virginia 448 U.S. 555 (1980)

identify themselves to the court staff as accredited journalists to facilitate easier access to online hearings.

The CBA supports the use of livestreaming to supervised locations (such as other courts) where this is necessary for families and other interested parties to observe proceedings.

The CBA further suggests that this livestreaming might be utilized in cases where vulnerable witnesses/those entitled to special measures wish to watch the remainder of the trial and where sitting in the public gallery would place them in the view of the defendant.

The CBA opposes unrestricted livestreaming, whether on an open access basis or to unsupervised sites.

b. Extension of broadcasting of criminal proceedings.

The CBA opposes the broadcasting of criminal trials and preliminary hearings.

The CBA continues to support the broadcasting of Judge's sentencing remarks in the Crown Court. We support the extension of the provisions to cover proceedings before any Judge sitting in the Crown Court. However, any proposed extension to include the broadcasting of sentencing openings or mitigating speeches would require careful evaluation to ensure that there is appropriate balance so that both are broadcast as well as regard to editing of private information.

c. Permitting photography in the courtroom.

The CBA opposes any relaxation on the general prohibition of photographing criminal proceedings.

d. Publication of sentencing results and sentencing remarks.

The CBA sees no need for any change to current arrangements.

The CBA opposes the creation of an open-ended database of sentencing results or sentencing remarks. In any event, we believe that there is an issue as to legality without imposing a strict time-limit.

e. Single Justice Procedure.

The CBA supports initiatives to permit reporting of SJP cases. The CBA former Chair 2022-2023, Kirsty Brimelow KC, has raised concerns about the inaccessibility of the SJP[7] and its process before select committees and in the media[8] The CBA points to the excellent journalism on this process by Tristan Kirk of the Evening Standard.[9]

f. Promoting Open Justice in the future.

The CBA would support the creation of a standing committee to monitor and promote the delivery of Open Justice within the Criminal Courts.

[7] https://www.standard.co.uk/news/crime/single-justice-procedure-unfair-court-system-justice-b1100752.html

[8] https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/1364/136409.htm

[9] https://www.standard.co.uk/news/crime/secret-single-justice-procedure-prosecutions-covid-lockdown-fines-b1104910.html

Achieving Open Justice in the Criminal Courts –Overarching Considerations

11. The CBA welcomes the MoJ's consultation on Open Justice. We recognise and endorse the importance of public scrutiny of the work of the criminal courts, and in particular the need to promote better public understanding.

12. The criminal courts have a long and proud tradition of public access and reporting. With rare exceptions, reporting of criminal cases in the mainstream media is responsible and accurate. Members of the bar enjoy good working relationships with court reporters. The routine, daily reporting of criminal cases helps promote best practice. Long-form and investigative reporting has also helped correct miscarriages of justice.

13. The principle of Open Justice is widely recognised and respected in the criminal courts. It was encapsulated by Gross LJ in Re Guardian News and others [2014] EWCA Crim 1861 [para 4]:

> *"The rule of law is a priceless asset of our country and a foundation of our Constitution. One aspect of the rule of law—a hallmark and a safeguard—is open justice, which includes criminal trials being held in public and the publication of the names of defendants. Open justice is both a fundamental principle of the common law and a means of ensuring public confidence in our legal system; exceptions are rare and must be justified on the facts. Any such exceptions must be necessary and proportionate. No more than the minimum departure from open justice will be countenanced."*

The Open Justice principle is already enshrined within the Criminal Procedure Rules ('CrimPR'). Rule 6.2 requires Courts when taking decisions relating to the conduct of proceedings to have regard to the importance of dealing with criminal cases in public and allowing a public hearing to be reported to the public.

14. Open Justice is an important principle, but it is not an overriding consideration. The right to a fair trial is, by contrast, an absolute right. There are therefore boundaries to the Open Justice principle, and it will always be necessary for individual Courts to retain a discretion to control proceedings and the dissemination of information. There are also other competing rights which have to be weighed in the balance, including the rights of complainants, families of victims, witnesses, defendants and jurors. In some cases, there are considerations of national security.

15. Whilst ease of access to information is desirable in principle, the right to a fair trial is absolute. The courts must retain ultimate control over access to information such as the release of documents which have been served on the court. Resources are also a very important consideration in the criminal courts as elsewhere. At a time when limited resources are impacting on the delivery of justice, including long delays in bringing cases on for trial, the resource implications of providing facilities for broadcast-quality video or audio recording, or speedier access to case materials, are a major consideration.

16. The work of the Crown Courts and Magistrates Courts is fundamentally different from civil and family courts and Tribunals. This response addresses the application of the consultation questions to the criminal courts only. There are many legal and public policy considerations which are unique to the criminal courts and militate against wider broadcasting in this jurisdiction. Recent reforms which have already addressed these issues.

17. In the criminal courts, many of the concerns raised by the consultation have already been addressed in detail by the Criminal Practice Directions 2023 ('CrimPD'), which came into force on 29th May 2023 [10]. Part 2 of the CrimPD is

[10] The Criminal Practice Directions contain detailed guidance which supplements the framework of the Criminal Procedure Rules. The CrimPD has binding effect: see Rule 1.2 CrimPR.

dedicated to the topic of Open Justice, providing practical and accessible guidance to the Courts and practitioners. The issues covered by Part 2 CrimPD include:

- Rights of public access to court hearings and limitations which may be imposed.

- The right of accredited journalists to transmit live text-based communications.

- Access to documentary material held by the Court, including detailed guidance on categories of material which may be made available.

- Provision of written decisions.

- Access to transcripts of proceedings.

18. The published guidance on the application of the Open Justice principle in criminal proceedings is up-to-date, comprehensive and accessible. Key guidance documents include the following:

a. Guidance on Remote Observation of Hearings in Criminal Proceedings issued by Dame Victoria Sharpe, President of the King's Bench Division, in July 2022. This document is based on a careful consideration of the practical implications of permitting remote observation of proceedings. The guidance also addresses 'transmission directions' permitting proceedings to be broadcast to a remote location. The guidance is based on the practical experience of Judges in the criminal courts in balancing Open Justice against the risks to a fair trial.

b. Reporting Restrictions in the Crown Court, published by the Judicial College in September 2022. This is drafted a guidance to the judiciary,

but it is publicly accessible. It brings together the various statutory restrictions on reporting. It sets out a structured approach to decision making and emphasises the importance of the Open Justice principle.

c. The Reporters' Charter 2022 published by HMCTS provides clear guidance on what accredited journalists are entitled to expect of the criminal courts.

d. HMCTS has also published up-to-date guidance to court staff on support for media access, including the jurisdictional guidance: Criminal Courts Guide on Media Access 2022[11].

19. These are all clear and accessible documents. They are useful reference points when applications are made to a Judge or member of court staff either for information or facilities.

20. Our answer to several of the questions below is therefore that in the criminal courts no change is required. That is not because we seek to limit Open Justice, but because we believe that Part 2 CrimPD and the guidance documents referred to above have already provided a modern and comprehensive framework for the practical application of the Open Justice principle in criminal proceedings. At the very least, this new framework should be allowed to operate for several years in order to evaluate whether it sufficiently delivers Open Justice without derogating from the right to a fair trial.

[11] The suite of guidance documents also includes relevant cross-jurisdictional guidance on Managing High Profile Cases and Sharing Court Lists, Registers and Documents with the Media.

Overarching considerations in the criminal courts

21. In the context of the criminal courts, the following are unique and important considerations:

a. **Trial by jury.** Serious cases are tried in the Crown Court by juries selected at random from the general public. Considerable efforts have to be made to ensure that jurors are not influenced by news reports, broadcasts or online material relating to the case which they are deciding.

b. **The prohibition on reporting of legal arguments**. Because of the need to protect the integrity of the trial process, there are automatic reporting restrictions relating to pre-trial legal arguments in criminal proceedings[12]. Very often, the legal arguments concern the admissibility of evidence or other allegations before the jury. Also, there can be arguments about the directions of law which are to be given to the jury, or issues concerning the conduct of the jury themselves.

c. **Rights and interests of complainants and witnesses**. Many criminal cases involve complainants, other witnesses, and victims of alleged criminal offences who are ordinary members of the public. Some are eager to support a prosecution, but others are hesitant. Often, they are vulnerable by reason of age or disability. Our prosecution agencies act independently in the public interest. Unlike other jurisdictions, complainants and other witnesses are not legally represented. There is a relationship of trust and cooperation between complainants and other witnesses and prosecution agencies. Changes to the current model of reporting may affect the relationship between the

[12] In the Crown Court, these are set out in Section 41 of the Criminal Procedure and Investigations Act 1996. The effect is to postpone reporting until the conclusion of the proceedings. The Court has the discretion to disapply the provisions. There are corresponding provisions in Section 8A of the Magistrates' Courts Act 1980.

complainant and the prosecutor. Care should be taken not to undermine the criminal justice process by exposing complainants, other witnesses and any victims of crime to intrusive reporting.

d. **The presumption of innocence.** Defendants in criminal proceedings are presumed innocent until proven guilty. So far as possible, material should not be published which undermines that presumption and exposes them to unfair public opprobrium. For example, we believe that publishing photographs or broadcasting images of defendants in the dock or within Court buildings would be manifestly unfair.

e. **Lack of anonymity**. Allied with the previous point is the lack of anonymity in criminal proceedings. Other than children and young persons, the identities of defendants in criminal proceedings are almost always published. Likewise, other than for sexual offences, the identities of complainants are published. By contrast, in other jurisdictions (e.g., the family courts, Immigration and Asylum tribunals and HESC tribunals) the identities of parties are confidential.

f. **Rehabilitation of Offenders**. It is in the public interest that convicted defendants have the opportunity to rehabilitate themselves and return to a law-abiding life. The Rehabilitation of Offenders Act 1974 provides that a criminal conviction will over time become 'spent', unless it resulted in a sentence of imprisonment of 4 years, or a further offence is committed[13]. This is now viewed as an aspect of privacy law and the 'right to be forgotten'[14]. This important public interest could be undermined by the creation of a national database of sentences or sentencing remarks. In any event, the open-ended

[13] For example, the rehabilitation period for a Community Order or a Fine is 1 year. The rehabilitation period for a sentence of imprisonment of up to 2½ years is 4 years.

[1414] See: NT1 v Google [2018] EWHC 799 (QB) and the ECJ decision in Google Spain SL v AEPD [2014] (Case C-131/12).

retention of a public record of criminal case outcomes would be unlawful[15]. Any such database has to be justified as in accordance with law, made in furtherance of a legitimate policy aim, necessary and proportionate; the period of retention of information on the database would therefore have to be limited and proportionate.

g. **The role of police, CPS and other public authorities in assisting the media**. Unlike most civil and family proceedings, in criminal cases there is an alternative means by which information can be obtained by reporters. Most prosecuting authorities (including the police and CPS) have dedicated press teams who are used to dealing with media inquiries and providing relevant case materials. They are able to consult with complainants and witnesses, and to take those interests into account in deciding whether materials should be provided and if so in what form. The ACPO-CPS-Media Protocol 2005 on media access to prosecution materials provides a clear statement of this process and the matters which fall to be considered by a prosecuting authority. HMCTS does not have such resources.

Court reporting within the new media landscape

22. The right to report Court proceedings is enshrined in Section 4(1) of the Contempt of Court Act 1981. This permits *"fair and accurate reporting of legal proceedings held in public, published contemporaneously and in good faith"*.

23. This requirement of fairness requires **balanced** reporting. Court proceedings are adversarial in nature, allowing prosecution and defence to advance competing evidence and argument. With few exceptions, newspapers and broadcasters

[15] MM v United Kingdom [2012] 24029/07; WL 6774591

continue to abide by the requirement to report in a fair and balanced way, respecting in particular the rights of the accused. However, new digital platforms have encouraged the dissemination of news in very different ways, sometimes reduced to nothing more than a few words or images, or a video clip lasting a few seconds. 'Citizen journalism' published via social media by untrained members of the public can lead to intrusive and inappropriate reporting, as exemplified by some of the reporting surrounding the death of Nicola Bulley in January 2023 and by the conduct of Stephen Yaxley-Lennon (aka Tommy Robinson) leading to his committal to prison for contempt of court in 2018[16].

24. Any decision on providing greater access to material for publication, such as broadcast footage, audio recordings of the proceedings, or photographs taken in Court, should consider very carefully the ways in which material might be disseminated in the new digital age. A responsible broadcaster might broadcast a two-minute report of an ongoing case providing a fair, accurate and balanced account of proceedings. However, there is a real risk that others will then take a short clip or still image from that balanced report and disseminate it on social media in a manner which is partisan.

Response to Consultation Questions

Questions on open justice

1/. Please explain what you think the principle of open justice means.

Please see the discussion above and in particular the concise definition in Rule 6.2 CrimPR.

[16] See In Re Stephen Yaxley-Lennon [2018] EWCA Crim 1856.

2/. Please explain whether you feel independent judicial powers are made clear to the public and any other views you have on these powers.

Our judges are independent of the state and of private interests. The protection of that independence is paramount to justice and the rule of law. Equally important is the maintenance of public understanding, acceptance, and respect for that independence. In court, Judges are required to avoid not only bias but the appearance of bias.

The MoJ has an important role to play in explaining the role of the judiciary in the media and protecting the reputation of the courts. It is important that politicians recognise the importance of maintaining public respect for the justice system.

3/. What is your view on how open and transparent the justice system currently is?

The importance of the Open Justice principle is well recognised in the criminal courts and firmly established in law. Importantly, the current legal framework upholds the overriding importance of the right to a fair trial and the need to balance competing rights of complainants, other witnesses, victims of alleged crimes, defendants and jurors. The CBA therefore do not consider there to be any excessive or unnecessary legal restrictions on Open Justice within the criminal courts.

In criminal cases, providing automatic access to materials such as applications, skeleton arguments and other digital material would give rise to risks to the fair administration of justice and to the rights of complainants and witnesses. The present framework rightly maintains judicial control over the release of such

information, whilst recognising that decisions should take account of the Open Justice principle.

The CBA share the concern that the court process is not always sufficiently understood by the public.

4/. How can we best continue to engage with the public and experts on the development and operation of open justice policy following the conclusion of this call for evidence?

The CBA would support the creation of a standing committee of interested parties (including the judiciary, HMCTS, CPS, legal professionals and media representatives) to monitor and promote the delivery of Open Justice within the Criminal Courts.

5/. Are there specific policy matters within open justice that we should prioritise engaging the public on?

Public understanding of the work of the criminal courts, including the roles and responsibilities of the different participants.

Questions 6. to 11.

No comment to make.

Questions on accessing courts and tribunals.

12/. Are you aware that the FaCT service helps you find the correct contact details to individual courts and tribunals?

n/a

13/. Is there anything more that digital services such as FaCT could offer to help you access court and tribunals?

n/a

Questions on remote observation and livestreaming

14/. What are your overarching views of the benefits and risks of allowing for remote observation and livestreaming of open court proceedings and what could it be used for in future?

The CBA see no need for any changes to the existing provisions in criminal courts.

The CBA supports the continuation of the current guidance on remote observation and livestreaming, as set out in the President's Guidance dated July 2022. This is up-to-date guidance which takes account of practical experience of the operation criminal courts and protects the accused's right to a fair trial.

In appropriate circumstances, transmission directions permitting observation of a trial at a remote and appropriately supervised location can provide an important facility in particular to complainants and families of victims who are unable to attend a trial in person[17]. This power already exists and no legal or policy change is required. However, resource limitations mean that in practice this will apply only to a very small number of cases.

[17] For example, cases arising out of a major disaster such as Hillsborough or the Manchester Arena Bombing involve large numbers of victims and/or family members who would not be able to attend in person.

15/. Do you think that all members of the public should be allowed to observe open court and tribunal hearings remotely?

No.

Unrestricted access would give rise to risks to a fair trial. It is important that there should be safeguards to prevent the remote recording of proceedings and other abuses such as allowing witnesses who are due to give evidence to view the testimony of others. Unrestricted access would be contrary to the interests of, jurors, complainants, other witnesses and the accused.

16/. Do you think that the media should be able to attend all open court proceedings remotely?

Subject to the discretion of the Court and the maintenance of relevant safeguards, the CBA agree that **accredited** reporters should be able to attend open court proceedings remotely.

It is now not uncommon for journalists to be permitted access by these means, particularly in 'high-profile' cases. However, CBA members have witnessed the decline in court reporting in other, more routine cases. Resources plainly no longer allow so many dedicated court reporters to be physically present at court on a daily basis.

The CBA agrees that there is scope to reduce some of the administrative burden. We are aware that some reporters have experienced delays in obtaining permission for remote access, and likewise we care conscious of the burdens on already busy court staff. A clearer, universally recognised system of registration and accreditation would assist in promoting easier access whilst ensuring that

monitoring and responsible reporting are maintained. We believe that this could be achieved without a significant cost burden on the MoJ.

17/. Do you think that all open court hearings should allow for livestreaming and remote observation? Would you exclude any types of court hearings from livestreaming and remote observations?

No.

As a general rule, livestreaming and remote observation should remain restricted to participants, their legal representatives and accredited reporters. In limited circumstances, live transmission to a remote, supervised location may be necessary to allow interested parties to observe the proceedings. This may be a useful mechanism where vulnerable witnesses/those automatically granted special measures wish to watch the remainder of the trial after they have given evidence, but do not wish to sit in the public gallery in sight of the defendant.

18/. Would you impose restrictions on the reporting of court cases? If so, which cases and why?

The CBA supports the maintenance of the existing legal restrictions in criminal proceedings. These recognise the overriding obligation to ensure a fair trial, in particular in cases involving trial by jury.

19/. Do you think that there are any types of buildings that would be particularly useful to make a designated livestreaming premises?

It is essential that any live transmission of criminal trials to a remote location is subject to appropriate supervision to prevent remote recording, observation by witnesses or other abuses.

Effective supervision requires the presence of a trained person in authority, such as a court clerk, court usher or police officer. The precise nature of the building is not important (the experience of Nightingale courts has shown how to make appropriate use of other buildings). It is the effective supervision and control which is important.

20/. How could the process for gaining access to remotely observe a hearing be made easier for the public and media?

See above.

Questions on broadcasting

21/. What do you think are the benefits to the public of broadcasting court proceedings?

Greater public understanding of the work of the Courts is highly desirable. There is a need to challenge some of the myths which have developed about the CJS and legal professionals working within it. For example, a wider understanding of the adversarial system, the cab rank rule, the system of trial by jury and the rules in place in relation to the questioning of witnesses would increase public confidence in the CJS. However, whilst it is possible that public broadcasting *could* help achieve some of these aims, there are substantial risks (as identified at question 23), in particular to the right to a fair trial. There are other ways to accomplish these ends, such as education and public engagement without the detriments which would arise from broadcasting trials.

22/. Please detail the types of court proceedings you think should be broadcast and why this would be beneficial for the public? Are there any types of proceedings which should not be broadcast?

The CBA encourages appropriate initiatives to promote transparency in the work of the courts. The CBA continues to support the broadcasting of appeals before the Court of Appeal Criminal Division and the Supreme Court.

The CBA supports the broadcasting of Judge's sentencing remarks in the Crown Court. The Crown Court (Recording and Broadcasting) Order 2020 currently limits the scope to High Court Judges, Senior Judges at the Central Criminal Court and Resident Judges. This restriction has proved anomalous in practice and does not help the public understanding of sentencing in other types of case. The CBA would support the extension of the right to broadcast to all Judges sitting in the Crown Court, subject to the Court's prior permission. The Order does not permit the broadcasting of Counsel's submissions (sentence openings and pleas in mitigation). Any extension to include those parts of the proceedings would require careful evaluation.

The CBA strongly opposes the public broadcasting of criminal trials, for the following reasons:

(i) Impact on complainants, witnesses and other victims of alleged crimes

(ii) Risk of discouraging complainants from reporting crimes.

(iii) Impact on the quality of witness testimony.

(iv) Risks to the fairness of jury trials.

(v) Undermining the presumption of innocence.

(vi) Impossibility of controlling inappropriate use and distribution of clips or images on social media.

(vii) Impossibility of achieving fair, accurate and balanced reporting on social medial.

(viii) Risk of trials being treated as public entertainment, undermining confidence in the system.

The risks identified are most acute in relation to jury trials, but many of these concerns apply equally to summary trials in the Magistrates Courts. The right to a fair trial cannot be compromised. We cannot see a means by which these concerns could be satisfactorily assuaged in relation to criminal trials without potentially compromising the ability of the Court to deliver a just outcome for defendants, complainants and other witnesses alike.

In any event, more detailed research, risk assessments, and a pilot with clearly defined success and failure criteria, would in our view need to be commissioned before the current position was altered. If the broadcast of criminal proceedings was contemplated, research could usefully include a deeper understanding of how broadcasting had worked in other jurisdictions, differences between those jurisdictions and England and Wales, why it had become widespread or remained unusual in those jurisdictions, and whether any safeguards put in place addressed the risks we highlight below in relation to this jurisdiction.

23/. Do you think that there are any risks to broadcasting court proceedings?

We have grave concerns about the broadcast of criminal trials. We acknowledge the prime importance of the principle of open and public justice. We also acknowledge that for some members of the public in relation to some high-profile trials occurring far from them, there may be no practical *ability* for them to attend Court.

Currently, the general public's access to information about what is going on within the Court is largely mediated by accredited journalists who can send live text-based communications from Court (live-tweeting etc.) as well as taking traditional notes to form the basis of later broadcast or written reports. We note the concerns of the Justice Committee of the House of Commons about the decline of court reporting. We do not think that the answer to such concerns is to necessarily to promote 'citizen journalism'. As noted already, the Contempt of Court Act 1981 requires reports of Court proceedings to be *"fair and accurate"* and *"published in good faith"*. Accredited journalists have codes of conduct, tend to be answerable to an employer or broadcaster, and are sufficiently familiar with the law that the accidental reporting of matters covered by press restrictions is extremely rare. We fear that broadcasting court proceedings might provide more raw information to the general public but shorn of the context supplied by responsible journalists, and potentially manipulated in ways that would be difficult to control, such as by selective use of clips on social media. Such a step would be counter-productive in terms of achieving the Committee's aim to broaden public understanding of the work of the courts.

Our concerns about changing the current system fall into the three categories below:

- Impact on those within Court (complainants, other witnesses, victims, defendants, legal professionals)

- Impact on the outcome of trials

- Impact on the wider public.

An issue common to all three groups of concern is the issue of material being available indefinitely. Once proceedings are broadcast online, it is not possible to control whether others viewing the proceedings will record the broadcast, for example, on their phone. Even if the broadcast itself was deleted at a later date, recordings of it would be available to be viewed, edited, and uploaded.

Impact on those within Court

In terms of the impact of those within Court, we have real concerns that the possibility that proceedings may later be broadcast would discourage witnesses from coming forward or from attending Court. There is a meaningful difference between knowing that your name and a short summary of your evidence may appear in a newspaper or on television and knowing that your voice and/or image might be online and subject to further recording as set out above. Concerns about witnesses coming forwards do not emerge solely in cases involving sexual assault, but in cases of many different types, whether it be violent offending in a neighbourhood setting where people fear reprisals, or cases of fraud, where some may be reluctant to accept that they have been the victim of a scam. The prospect of being televised may be a real bar for some witnesses including complainants and victims of alleged crimes.

Unless a condition were imposed that both complainant and defendant had to consent to being filmed, we do have concerns about the balance of rights. Those

charged with criminal offences have their name, details of the allegation against them and sometimes their photograph on the steps of the Court published. The recording of their trial is significantly different. Even if recordings were to be embargoed until after verdicts were returned in a case, there is a concern that the process of being recorded as one sat in the dock would itself come to function as a form of punishment. The Rehabilitation of Offenders Act is designed to ensure that offenders can once more be an active part of society: if a recording of a trial had been taken by someone viewing the broadcast live, re-integrating into the community may become impossible for some.

We write at a time when steps are being taken by the Bar to encourage a more diverse and properly representative legal profession. We simply note that effectively making it a requirement that a barrister is content to be filmed at work *may* operate to discourage some talented individuals from pursuing this career.

Impact on the Outcome of Trials

Clearly, if we are right to be concerned about witnesses including complainants giving evidence when their evidence may later be broadcast, this will by itself impact the ability to try cases.

Jurors are entitled to anonymity. Even were it to be proposed that they were not filmed or that their faces were later obscured, the fear of being identified, even, for example, by voice when returning a verdict would be an unwelcome distraction from their important task. Jurors are now routinely told to ignore press reporting and to focus on the evidence they heard during the trial. The difficulty of doing so would be magnified considerably by the prospect of the entire broadcast being available and potentially open to manipulation by those who had made their own recordings.

The overall public interest is not served by broadcasting proceedings if the quality of justice delivered by those proceedings is jeopardised. We do also have real concerns about the possibility for misinformation to be spread by some who will record the broadcast of proceedings for their own ends, the potential for more myths to be created, and the possibility that those recorded may later be subject to harassment.

Beyond that, we recognise that there is a finite amount of time and money available to solve issues within the CJS. The court estate is in urgent need of attention and facilities for both professionals and jurors in most buildings are out-dated. In our view, reducing backlogs, modernising the court, and integrating the available technology into court are higher priorities.

Finally, it is not in the public interest for criminal justice to be trivialised or regarded as a form of entertainment, and whilst responsible broadcasters will studiously guard against this, controlling the subsequent behavior of others who may record and re-broadcast clips from the proceedings appears to be an impossibility.

24/. What is your view on the 1925 prohibition on photography and the 1981 prohibition on sound recording in court and whether they are still fit for purpose in the modern age? Are there other emerging technologies where we should consider our policy in relation to usage in court?

The CBA supports the continuation of the existing restrictions on photography and sound recording in Court.

The existing restrictions are necessary in the public interest. They preserve the dignity and solemnity of Court proceedings. The general prohibition ensure that complainants, other witnesses, defendants, and other participants are treated with dignity and respect at court and avoids causing unnecessary distress or potential interference with individual rights. The general prohibition also maintains due respect for the presumption of innocence.

Section 9 of the Contempt of Court Act 1981 contains a general prohibition on the use of sound recording instruments in Court, although it is not an absolute prohibition. The Court has a discretion to allow sound recording of proceedings based on the reasonable need of the applicant, provided that such a recording is not later published. This may be permitted in exceptional circumstances, for example to assist a participant who has a relevant disability.

Permitting audio recording and/or broadcast would be harmful to the right to a fair trial and other important public interests for precisely the same reasons as for permitting other forms of broadcast.

The ability to obtain a transcript of court proceedings means that such proceedings can still be accurately and transparently reported without concerns about the identification of witnesses via their voice or the potential for the later manipulation of such recordings.

Questions on Single Justice Procedure

25/. What do you think the government could do to enhance transparency of the SJP?

The single justice procedure accounts for more than half a million criminal cases a year. Whilst these are the least serious cases before the criminal court, the

principles of justice and transparency are just the same. The concerns are all the more acute given that most cases are dealt with by non-legally qualified justices and with limited advice from court legal advisers and involve defendants who would not normally receive any legal advice before or after the decision. Many do not even know that there is a prosecution. As a result of a parliamentary question by Alex Cunningham, the government provided a figure of 68% being the defendants who were convicted in their absence, without entering a plea. The CBA is concerned that there is little access to justice for those convicted under the SJP and submits that major reform is required to the process, beyond publishing information.

We welcome the MoJ's commitment to provide case information on such cases to accredited members of the media. We are concerned that it does not go far enough. The results of the prosecutions also need to be made accessible. Where no public hearing has taken place, the availability of written materials for inspection is a minimum. The nature of SJP cases is such that sensitive victim information does not appear.

The CBA refers to the evidence of Penelope Gibbs of Transform Justice and Appeal before the Criminal Procedure Rule Committee and adopt her recommendations (as she put to the Select Committee). They are set out below for convenience:

1) *Ask MoJ & HMCTS to conduct (and publish) research into the profile of users of SJP, their disabilities and vulnerability, why the response rate is so low and how defendants understand their rights from the form.*
2) *Ask MoJ & HMCTS to model how the vulnerability and/or disability of SJP suspects and defendants could be assessed and communicated.*
3) *Ask for a proof of receipt as well as proof of posting (of prosecution notice).*
4) *Exclude recordable offences from SJP.*
5) *Ensure that suspects can challenge the prosecution on public interest grounds by adding an additional step between being apprehended and accused of the crime and being prosecuted. This could be an initial letter setting out the evidence for the prosecution and allowing the suspect to respond.*

6) *Improve form so those believing they have a viable defence are clear that they should enter a not guilty plea and so that those who do complete the form pleading guilty can enter information about their disability.*
7) *Make HMCTS phone helpline free (as welfare benefits calls are).*
8) *Ask prosecutors to give a detailed breakdown of their costs.*
9) *Halt any expansion of SJP offences and prosecutors until effective participation is improved such that the majority of defendants are entering pleas.*
10) *Publish full lists of cases and outcomes in court and online. Provide to media in advance.*
11) *HMCTS/MoJ to publish regular data bulletins on SJP prosecutions including plea rates.*

26/. How could the current publication of SJP cases (on CaTH) be enhanced?

We refer to and support the detailed and careful journalism of Tristan Kirk of the Evening Standard, who has highlighted the inaccessibility of this procedure and exposed unlawful convictions. Kirsty Brimelow KC, former Chair of the CBA has given evidence before select committees as to the dangers to the vulnerable of the SJP. The CBA submits that a further examination of this system is required, beyond publishing a list of cases (although this is a start).[18] Journalists are better placed to address how better publication can be addressed.

Questions on public access to judgments

27/. In your experience, have the court judgments or tribunal decisions you need been publicly available online? Please give examples in your response.

No comment to make.

[18] https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/1364/136409.htm

28/. The government plans to consolidate court judgments and tribunal decisions currently published on other government sites into FCL, so that all judgments and decisions would be accessible on one service, available in machine-readable format and subject to FCL's licensing system. The other government sites would then be closed. Do you have any views regarding this?

No comment.

29/. The government is working towards publishing a complete record of court judgments and tribunal decisions. Which judgments or decisions would you most like to see published online that are not currently available? Which judgments or decisions should not be published online and only made available on request? Please explain why.

If applied to criminal proceedings in the Crown Court and Magistrates Court, this would amount to the creation of a publicly accessible, central database of criminal convictions and sentences. The CBA would **strongly oppose** the creation of such a database. In any event, the believe that it would be unlawful to create an open-ended database.

The effect of the Rehabilitation of Offenders Act 1974 is that most criminal convictions are 'spent' after a period of time. For example, a fine is spent after 1 year and a prison sentence of less than 6 months is spent after 2 years from the date of completion of the sentence. This promotes the public interest in the rehabilitation of offenders.

The creation of an open-ended database of convictions and sentences would amount to the creation of a parallel version of the Police National Computer without the safeguards which apply to information held within it. We believe that

it would be unlawful, in that it would be a disproportionate interference with the right to privacy of those referred to[19].

For the avoidance of doubt, different considerations apply to appellate judgments of the Divisional Court, Court of Appeal Criminal Division, and the Supreme Court. There is a public interest in publication as they are relied upon in legal proceedings as legal precedents.

30/. Besides court judgments and tribunal decisions, are there other court records that you think should be published online and/or available on request? If so, please explain how and why.

No comment.

31/. In your opinion, how can the publication of judgments and decisions be improved to make them more accessible to users of assistive technologies and users with limited digital capability? Please give examples in your response.

No comment.

32/. In your experience has the publication of judgments or tribunal decisions had a negative effect on either court users or wider members of the public?

No comment.

[19] MM v United Kingdom [2012] 24029/07; WL 6774591; R (QSA) v National Police Chiefs' Council [2021] EWHC 272 (Admin).

Questions on the computational reuse of judgments on Find Case Law and licencing:

33/. What new services or features based on access to court judgments and tribunal decisions are you planning to develop or are you actively developing? Who is the target audience? (For example, lawyers, businesses, court users, other consumers).

n/a

34/. Do you use judgments from other territories in the development of your services/products? Please provide details.

n/a

35/. After one year of operation, we are reviewing the Transactional Licence. In your experience, how has the Open Justice and/or the Transactional Licence supported or limited your ability to re-use court judgments or tribunal decisions. How does this compare to your experience before April 2022? Please give examples in your response.

n/a

36/. When describing uses of the Transactional Licence, we use the term 'computational analysis'. We have heard from stakeholders, however, that the term is too imprecise. What term(s) would you prefer? Please explain your response.

n/a

Questions on tribunal decisions published on GOV.UK:

37/. Have you searched for tribunal decisions online and if you have, what was your experience, and for what was your reason for searching?

n/a

38/. Do you think tribunal decisions should appear in online search engines like Google?

n/a

39/. What information is necessary for inclusion in a published decisions register? What safeguards would be necessary?

n/a

Question on public access to sentencing remarks:

40/. Do you think that judicial sentencing remarks should be published online / made available on request? If that is the case, in which format do you consider they should be available? Please explain your answer.

The CBA recommends **no change** to the current arrangements for the publication of judicial sentencing remarks, for the reasons given below.

The Criminal Practice Direction 2023 already provides for sentencing remarks to be made available on request. Paragraph 2.6.10 states that subject to reporting restrictions, sentencing remarks should usually be provided, if the judge was

reading from a prepared script which was handed out immediately afterwards; if not, then permission to obtain a transcript should usually be given.

While we recognise that in principle the publication of sentencing remarks online has the potential to support the aims of Open Justice, we are concerned about the creation of an open-ended, central database for the same reasons as was set out in answer to Question 29 above. In summary, this would have a negative impact on the public interest in the rehabilitation of offenders. In any event, we believe that the provision of an open-ended public database would be unlawful[20].

The financial implications of establishing an online space for accessing sentencing remarks may well be disproportionately burdensome given the current competing demands on the money available to the CJS.

The workload implications for court staff who would necessarily have a role in facilitating the publication of sentencing remarks may be disproportionately burdensome.

Without significant investment, there would be a risk of to the interests of complainants and other witnesses. Sentencing remarks frequently refer to material which cannot or should not be published, such as names of children and the identities of complainants. Experienced reporters are aware of these restrictions and do not include such details when publishing reports. If HMCTS was itself to become the publisher, there would have to be a system of review and redaction.

In the absence of greater scrutiny of the concerns we feel exist, it is our view that at the current time the online publication of <u>all</u> sentencing remarks should not

[20] MM v United Kingdom [2012] 24029/07; WL 6774591; R (QSA) v National Police Chiefs' Council [2021] EWHC 272 (Admin)

occur. The principle of Open Justice in relation to accessing sentencing remarks is already adequately catered for in the Practice Direction 2023.

Questions on access to court documents

41/. As a non-party to proceedings, for what purpose would you seek access to court or tribunal documents?

n/a

42/. Do you (non-party) know when you should apply to the court or tribunal for access to documents and when you should apply to other organisations?

n/a

43/. Do you (non-party) know where to look or who to contact to request access to court or tribunal documents?

n/a

44/. Do you (non-party) know what types of court or tribunal documents are typically held?

n/a

45/. What are the main problems you (non-party) have encountered when seeking access to court or tribunal documents?

n/a

46/. How can we clarify the rules and guidance for non-party requests to access material provided to the court or tribunal?

In the criminal courts, there are up-to-date rules and guidance in Part 2 of the Criminal Practice Directions 2023, Part 5 of the Criminal Procedure Rules and the guidance documents published by HMCTS. The CBA's position is that no change is required.

47/. At a minimum, what material provided to the court by parties to proceedings should be accessible to non-parties?

The CBA's position is that **no change** is required in criminal proceedings.

In Criminal cases, the automatic release of information from Court files would be extremely harmful to the interests of justice and to the rights of complainants, other witnesses, victims of alleged crimes, and defendants. Documents (such as applications and Skeleton Arguments) are filed in an unfiltered form, often including confidential personal information and material which is not admitted in evidence in the proceedings.

The current rules and guidance provide a clear judicial process which allows for objections to be raised and where appropriate redactions to be made.

48/. How can we improve public access to court documents and strengthen the processes for accessing them across the jurisdictions?

We would encourage greater publicity of the existing rules and guidance.

49/. Should there be different rules applied for requests by accredited news media, or for research and statistical purposes?

For the reasons stated above, it is appropriate to maintain judicial control over the release of information from the court file in criminal proceedings.

Accredited reporters and academic researchers are able to rely on their professional status in support of any application for the release of material. It is not necessary to have different rules.

50/. Sometimes non-party requests may be for multiple documents across many courts, how should we facilitate these types of requests and improve the bulk distribution of publicly accessible court documents?

The CBA would strongly oppose the blanket release of information in criminal cases.

Save for the limited categories of documents already provided for within the rules, it is essential to maintain judicial control over the release of material from court files. Automatic release would risk extremely harmful consequences for the interests of complainants, other witnesses, victims of alleged crimes and defendants. Each case must therefore be decided on a case-by-case basis. Participants should continue to have the right to make representations in answer to such requests.

Questions on data access and reuse

51/. For what purposes should data derived from the justice system be shared and reused by the public?

No comment.

52/. How can we support access and the responsible re-use of data derived from the justice system?

No comment.

53/. Which types of data reuse should we be encouraging? Please provide examples.

No comment.

54/. What is the biggest barrier to accessing data and enabling its reuse?

No comment.

55/. Do you have any evidence about common misconceptions of the use of data by third parties? Are there examples of how these can be mitigated?

No comment.

56/. Do you have evidence or experience to indicate how artificial intelligence (AI) is currently used in relation to justice data? Please use your own definition of the term.

No comment.

57/. Government has published sector-agnostic advice in recent years on the use of AI. What guidance would you like to see provided specifically for the legal setting? In your view, should this be provided by government or legal services regulators?

No comment.

Questions on public legal education

58/. Do you think the public has sufficient understanding of our justice system, including key issues such as contempt of court? Please explain the reasons for your answer.

The CBA would strongly support education initiatives to improve public understanding of the work of the criminal courts.

The correlation between public understanding and the proper functioning of the justice system cannot be overstated. For example, it is not uncommon for trials to be derailed by jurors conducting internet research, or by members of the public using social media in a way that amounts to contempt of court. A root cause is the lack of understanding of the reasons for the prohibition.

Support for this view can be found in the research on juries conducted by Professor Cheryl Thomas K.C. at University College London in 2017. Professor Thomas found that 12% of jurors on high profile cases were researching the case on the internet, despite judicial directions not to do so[21].

In addition, the fact that some Judges and barristers are subject to serious death threats or assaults because of who they represent, suggests members of the public do not understand the role of a Judge and/or barrister, or the importance of those roles[22].

[21] Are Juries Fair – p.43 Figure 3.23

[22] See for example the interview with James Sturman KC in The Times concerning his experience of death threats: https://www.2bedfordrow.co.uk/wp-content/uploads/2020/11/The-Times-Jim-Sturman-QC.pdf

59/. Do you think the government are successful in making the public aware when new developments or processes are made in relation to the justice system?

Public education relating to the legal system, including the criminal justice system, in the UK is generally poor compared to many other countries. The low baseline of public understanding makes the task of explaining reforms all the more difficult.

Members of the public get their information from the media (internet or television) rather than the government; so the correct portrayal of processes within the justice system in the media are particularly important. We are therefore supportive of facilitating greater media coverage of the CJS provided that it happens in a way that does not risk its effective functioning.

Finally, we consider that there is a strong argument for some information about the justice system to be included within the education syllabus so that fundamental principles are explained at an early stage.

60/. What do you think are the main knowledge gaps in the public's understanding of the justice system?

Both the CBA as an organisation and its members individually are frequently involved in discussions with members of the public and media representatives about the work of the criminal courts, either in responding to formal enquiries or in general discussion. In our experience, the principal knowledge gaps are the following:

- Understanding the work of the CPS and the independence of the prosecutor's role.

- Understanding charging decisions made by CPS and police.

- Understanding the role of a complainant as witness in the justice system

- The burden and standard of proof

- The role of Judges and barristers

- The separate functions of judge and jury

- Contempt of court, how it works and why its existence is important to a fair trial.

- Law relating to consent in rape and serious sexual offence cases.

- Law relating to defences in murder trials.

- Understanding of bail and pre-trial remands in custody

- Sentencing Guidelines

- Understanding out of court "informal" outcomes including community resolution orders

- Understanding the parole system

- **61/. Do you think there is currently sufficient information available to help the public navigate the justice system/seek justice?**

No.

HMCTS has made very significant improvements with the availability of information online to explain court processes. The information is clear and accurate. Our concern is that members of the public do not always know that the material is there or how to navigate it. HMCTS could be clearer in its summary of data, including the information in an executive summary that shows poor performance. There is an impression of constant attempts to frame a positive message through use of data rather than a neutral publication.

62/. Do you think there is a role for digital technologies in supporting PLE to help people understand and resolve their legal disputes? Please explain your answer.

Digital resolution systems are not relevant to the criminal courts.

Online resources would help public understanding. Unlike countries with a codified legal system, we do not have a single publicly accessible resource which sets out the range of criminal offences with an explanation of their elements.

63/. Do you think the government is best placed to increase knowledge around the justice system? Please explain the reasons for your answer.

Yes.

Please see comments below on public education.

64/. Who else do you think can help to increase knowledge of the justice system?

Schools, universities, professional bodies, practitioners, and the media.

65/. Which methods do you feel are most effective for increasing public knowledge of the justice system e.g., government campaigns, the school curriculum, court and tribunal open days etc.?

Public education relating to the legal system, including the criminal justice system, is the most important and effective measure. The teaching of citizenship is an element of the national curriculum in secondary schools but does not have the prominence which it has in other countries.

The 2019 UNODC/UNESCO report 'Strengthening the Rule of Law through Education' has described the importance of ensuring a baseline public understanding through education and set out the key measures which governments should take to achieve this. The CBA believes that far more could be done by the governments in England and Wales to meet these objectives.

The courts and legal professions have a role to play in this process, through supporting the work of schools.

Kirsty Brimelow KC, former Chair of the CBA (1st Sept 2022 – 31st August 2023)

Andrew Thomas KC, Lincoln House Chambers, Manchester

Mary Cowe, Guildhall Chambers, Bristol

Ros Emsley-Smith, Deans Court Chambers, Manchester

Claire Howell, Drystone Chambers, London

Tuesday 7th September 2023