



# Public Law Project

Ministry of Justice

Open Justice: the way forward – Call for evidence

## Public Law Project's Response

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## **Introduction**

1. Public Law Project is an independent national legal charity. We are researchers, lawyers, trainers, and public law policy experts. The aim of our work is to make sure that state decision-making is fair and lawful and that anyone can hold the state to account. For over 30 years we have represented and supported people marginalised through poverty, discrimination or disadvantage when they have been affected by unlawful state decision-making.
2. Public Law Project responds to consultations, policy proposals and legislation which have implications for public law remedies, access to justice and the rule of law. We provide evidence to inquiries, reviews, statutory bodies and parliamentary committees, and we publish independent research and guides to increase understanding of public law. Public Law Project's research and publications are available at: [www.publiclawproject.org.uk/resources-search/](http://www.publiclawproject.org.uk/resources-search/) With regard to open justice specifically, we conducted research in 2020 on the operation of judicial review during the COVID-19 pandemic and experienced some of the practical challenges of open justice accessibility.<sup>1</sup>
3. We welcome this Call for Evidence on an important issue of transparency and accountability. Public Law Project's mission is to improve public decision making, empower people to understand and apply the law, and increase access to justice. We consider that open justice is a central tenet of the rule of law which underpins these three goals.
4. The scope of the Call for Evidence is broad. We respond to the questions within this Call for Evidence that align with Public Law Project's expertise and evidence base. By not responding to the questions that are outside the scope of our specific areas of

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<sup>1</sup> Public Law Project, Judicial Review in the Administrative Court during the COVID-19 pandemic, April 2020. Available at: <https://publiclawproject.org.uk/content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>

expertise we are neither supporting or opposing the principles and proposals contained within them.

### **Questions on open justice**

**Q4. 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?**

5. PLP welcomes the Government's openness to continuing engagement on these important issues. The challenge will be making this aspiration a reality and we advance three recommendations directed to that goal, recognising that different approaches will be required for engaging each group.
6. Our first recommendation is that **the Ministry of Justice should commit to consulting where a policy materially affects open justice**. That consultation should adhere to the Government's Code of Practice on Consultations, including being carried out at a time where there is scope to influence the outcome and that the consultation should normally be 12 weeks.<sup>2</sup> This will ensure that the Government is fully aware of the implications and is able to make more informed judgements and modifications based on feedback.
7. Our second recommendation is that **the Ministry of Justice should establish an Open Justice Strategic Engagement Group** comprised of experts, the judiciary, media representatives, and independent civil society organisations to discuss issues of open justice in an ongoing way. This Group should normally meet twice a year as do comparable groups of which we are aware, such as the Administrative Court Users Group.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/100807/file47158.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf)

8. Our third recommendation is that **the Ministry of Justice and His Majesty's Courts and Tribunals Service should be more proactive in generating feedback on experiences of open justice from members of the public**, who may otherwise find it challenging to air their views to Ministers and the judiciary. For example, HMCTS could affix posters in physical court buildings asking members of the public to text or email in comments about ease of accessing courts and tribunals, or explain that some hearings can also be viewed virtually and explaining how.

### **Questions on remote observation and livestreaming**

**Q14. 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?**

9. The potential benefits of allowing for remote observation and livestreaming of open court proceedings are significant. It could support the principle of open justice by increasing the range of people who can observe court proceedings, as well as improving the accessibility of court observation for those who already engage in court observations.
10. The risks of allowing for remote observation and livestreaming of open court proceedings involve both risks to the security of proceedings and their participants, as well as risks to open justice itself. Firstly, there are concerns that there will be observers to proceedings that are not known to the court or who disseminate material from proceedings to a wider audience. Secondly, remote observation and livestreaming can also present risks to open justice itself. There may be a 'chilling effect' produced by privacy concerns, or open justice may not be transferred across to a remote context with sufficient safeguards to maintain open justice principles.
11. As well as these common benefits and risk, we consider that livestreaming open court proceedings presents additional risks compared to remote observation, due to

the more limited means available to ascertain who is observing. We consider that this may have implications for the relationship between lawyers' and their clients and may compromise the ability of lawyers to build trust in court proceedings if livestreaming was introduced in more jurisdictions. We recommend that the **livestreaming of Supreme Court proceedings should be independently evaluated to understand the practice's impact on open justice**. Whilst the Supreme Court represents a very specific court environment, understanding how open justice has operated in this context would be a useful first step to understanding the influence of livestreaming more broadly.

**Q15. Do you think that all members of the public should be allowed to observe open court and tribunal hearings remotely?**

**Q16. Do you think that the media should be able to attend all open court proceedings remotely?**

12. The Judicial College defines open justice as involving three key principles, specifically that 'the administration of justice must be done in public, the public and the media have a right to attend all court hearings in person, and the media is able to report those proceedings fully and contemporaneously'.<sup>3</sup> An important part of this understanding of open justice is that both the public and the media have a right to attend court hearings. There is a risk in the formulation of the consultation questions, where the public are '*allowed*' to attend court hearings but the media are '*able*' to attend court hearings, that a hierarchy is created in court observers. This would undermine the principle of open justice that the Judicial College has outlined. The **Government should take care to avoid unofficial hierarchies in policy and**

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<sup>3</sup> Judicial College, Reporting Restrictions in the Criminal Courts, September 2022, p.8. Available at: <https://www.judiciary.uk/wp-content/uploads/2022/09/Reporting-Restrictions-in-the-Criminal-Courts-September-2022.pdf>

**implementation**, whereby access for media representatives is assumed to be more important than access for the public.

13. We consider that to uphold the important principles of open justice the **default position should be that all members of the public and the media should have access to all open court proceedings through remote observation**. We accept that not all court proceedings will have either a hybrid or remote element and so in-person observation may be the only practicable option. Further, there may be case-specific reasons for excluding members of the public or media from observing court proceedings and this should be taken on a case-by-case basis by the judge.

**Q20. How could the process for gaining access to remotely observe a hearing be made easier for the public and media?**

14. In our experience of conducting court observations for research purposes,<sup>4</sup> there are several ways that the process for gaining access to remotely observe a hearing could be made easier for the public and the media. Gaining access to remote hearing links presented multiple issues as listings were only published the afternoon before a hearing was due to start and so gave a limited window of time in which to email the relevant email address and for them to respond with the hearing link. This was made more difficult by the fact that if an email address was listed, it was only a generic email address, which presumably experienced significant email traffic and resulted in delays in securing hearing links. We recommend that **email addresses are always listed on court listings, to avoid excluding lay observers without court contacts from observations, and that these email inboxes are sufficiently resourced to facilitate timely responses**.

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<sup>4</sup> See: Public Law Project, Judicial Review in the Administrative Court during the COVID-19 pandemic, April 2020. Available at: <https://publiclawproject.org.uk/content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>; Public Law Project, Written evidence from Public Law Project, Open justice: court reporting in the digital age, October 2021. Available at: <https://committees.parliament.uk/writtenevidence/40013/html/>

15. When we conducted these observations in 2020, the Royal Courts of Justice daily case list stated that: 'if a representative of the media wishes to attend a remote hearing they should contact the listing office', which we considered may dissuade members of the public from seeking access to a hearing. We note that this wording is still in use currently for Administrative Court listings, although other courts use different wording. For example, the Family Division use '[a]ccredited members of the press, legal bloggers or members of the public'. We recommend that **court listings use inclusive language** to avoid excluding potential court observers who have a right to observe court proceedings.

### **Questions on data access and reuse**

**Q52. How can we support access and the responsible re-use of data derived from the justice system?**

**Q54. What is the biggest barrier to accessing data and enabling its reuse?**

16. The Centre for Public Data revealed that 40% of Parliamentary Questions directed to the Ministry of Justice could not be answered due to lack of data.<sup>5</sup> This indicates significant issues with the collection and accessibility of justice system data. In the first instance, we would welcome seeing all of **Dr Natalie Byrom's recommendations in her report, 'Digital Justice: HMCTS data strategy and delivering access to justice'**<sup>6</sup> **implemented in full**. We note that the focus in these recommendations on embedded data collection practices and involvement of relevant experts would make considerable headway into supporting the access and responsible re-use of data derived from the justice system.

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<sup>5</sup> Legal Education Foundation, Written evidence from The Legal Education Foundation, Open justice: court reporting in the digital age, October 2021. Available at: <https://committees.parliament.uk/writtenevidence/41210/html/>

<sup>6</sup> Natalie Byrom, Digital Justice: HMCTS data strategy and delivering access to justice, The Legal Education Foundation. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/835778/DigitalJusticeFINAL.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF)

17. In our work at Public Law Project, the biggest barriers to accessing data and enabling its reuse to support our research and casework stem from often inadequate data collection practices by the Ministry of Justice. We frequently submit Freedom of Information requests that receive responses to say that the data cannot be supplied because to gather it into a shareable format would exceed the cost limit and invoke the exemption in Section 12 of the Freedom of Information Act. **Timely publication of data, including evaluations**, would further assist and reduce the need for Freedom of Information requests.

**Q57. 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?**

18. Public Law Project's work in the area of AI focusses on ensuring that public authorities operate AI, specifically within automated decision-making (ADM) systems, transparently, reliably, lawfully, fairly, in a non-discriminatory way, and with adequate authorisation in law for their use. We suggest that the government's current approach to the regulation of AI, as set out in its AI regulation white paper, misses a vital opportunity to ensure that fundamental rights and democratic values are protected.<sup>7</sup>

19. We consider that the general principles Public Law Project and other civil society organisations outline in our '**Key Principles for an Alternative AI White Paper**'<sup>8</sup> apply across all uses of AI and its regulation, including in the legal setting. These principles are:

- a. Transparency must be mandatory.
- b. There must be clear mechanisms for accountability at every stage.

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<sup>7</sup> Public Law Project, Public Law Project response to the AI White Paper consultation, June 2023. Available at: <https://publiclawproject.org.uk/content/uploads/2023/06/Public-Law-Project-AI-white-paper-consultation-response.pdf>

<sup>8</sup> Public Law Project *et al*, Key principles for an alternative AI white paper, June 2023. Available at: <https://publiclawproject.org.uk/content/uploads/2023/06/AI-alternative-white-paper-in-template.pdf>



- c. The public should be consulted about new automated decision-making (ADM) tools before they are deployed by government.
  - d. There must be a specialist regulator<sup>9</sup> to enforce the regulatory regime and ensure people can seek redress when things go wrong.
  - e. Uses of AI that threaten fundamental rights should be prohibited.
20. With regard to whether guidance should be provided by the Government or legal services regulator, we suggest that the **government is best placed to provide this guidance with sector-specific input**, including from legal services regulators. Beyond guidance, we suggest that the use of AI in all contexts must be carefully regulated on a statutory footing and that a centralised **specialist AI regulator** would be the best body to do this.

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<sup>9</sup> This specialist regulator should be a specialist in AI and be a cross-sector AI regulator.