OPEN JUSTICE, THE WAY FORWARD

RESPONSE TO GOVERNMENT CONSULTATION
ON BEHALF OF THE SOUTH EASTERN CIRCUIT

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1. This is a response on behalf of the South Eastern Circuit to the Government's call for evidence, published on 11 May 2023, in relation to open justice.

2. The South Eastern Circuit is the largest of the six geographical Circuits that make up the Bar of England and Wales, representing over 2,000 employed and self-employed members of the Bar with experience in all areas of practice. It is a body that has long represented the interests of members of the Bar in London and the South East of England. The origins of the Circuit system go back to the 12th century, when visiting judges would travel around the country each year on circuits to hear cases. The South Eastern Circuit stretches from Canterbury and Lewes in the South to Norwich in the North and from Ipswich in the East to Reading and Oxford in the West. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

3. This consultation response therefore reflects the experience and concerns of barristers in practice as professional users of the court system playing their own role in facilitating open justice whilst also ensuring that the legitimate intention of achieving open justice does not have the unwanted effect of interfering with or damaging the interests of justice.

PRELIMINARY OVER-ARCHING OBSERVATIONS

4. Before turning to address the specific questions posed within the consultation document, it is important to identify some overarching principles which we consider to underpin our responses to most, if not all, of the questions.

5. The South Eastern Circuit recognises and supports the fundamental importance of the concept of open justice to the legitimacy and approval of the legal system in the eyes of the public.

6. However, it must be remembered that the interests of open justice sometimes conflict with other fundamental rights and interests that are of the utmost importance to our legal system and society more widely. First and foremost of these is the interests of justice and ensuring fairness of the proceedings. There are also other important rights and interests such as the fundamental human rights of the participants of the system (ranging from their right to safety from death or harm through to the protection of their privacy).

7. As is so often the case when dealing with competing rights, the careful balancing of these rights will necessarily often be case and fact specific. Where, for example, the balance is between open justice and a risk to the safety of a participant in the system, the balance will usually weigh in favour of the safety of the participant. On the other hand, where the competing right is a relatively minor infringement of their privacy, the importance of open justice should usually prevail.

8. We consider that the point is well put by The Rt Hon the Lord Burnett of Maldon, Lord Chief Justice of England and Wales, in the foreword to the Judicial College guide to reporting restrictions in the criminal courts:[1]

[1] https://www.judiciary.uk/wp-content/uploads/2023/07/Reporting-Restrictions-in-the-Criminal-Courts-July-2023.pdf

"It is a central principle of criminal justice that the court sits in public so that the proceedings can be observed by members of the public and reported on by the media. Transparency improves the quality of justice, enhances public understanding of the process, and bolsters public confidence in the justice system. Media reporting is critical to all these public interest functions. There are occasions, however when it is necessary to make an exception to these principles, to protect the rights of children or the identities of some adult complainants for example. Such issues often arise at short notice and the law relating to the decisions that have to be made can be complex."

9. The factors and principles relevant to the proper conduct of the balancing exercise will inevitably be different in different jurisdictions. In the criminal courts, for example, it will be critically important to ensure that the desire for openness and transparency does not endanger the fairness of trials (either for complainants or defendants, either one of which could be a victim) or place the safety of participants (defendants, complainants or witnesses) at risk. In family proceedings, the interests of the child is, and must be, paramount, and openness will sometimes (arguably usually) not be in the child's long term interest.[2] This position will often be even more stark in the Court of Protection. In immigration and asylum proceedings, the publication of details of an individual's claim may place the lives of the applicant or their families at risk.[3] In civil or administrative law proceedings, where the balance is more likely to favour openness, there will inevitably be matters where open reporting might severely prejudice the public interest or the legitimate interests of the parties.

10. We therefore consider that a "one size fits all" approach to open justice is unlikely to be able to strike the appropriate balance or to serve the overall public interest. Rather, any approach must be flexible and permit decisions to be taken on a case-

[2] We note that the President of the Family Division, who is a strong advocate for greater openness in that jurisdiction, has provided helpful guidance on the subject of balancing the interests of open justice with the need to achieve justice and fairness and protection for the parties to the proceedings.
[3] Indeed, it may result in a situation where the Tribunal would have found that the applicant was not previously entitled to asylum, but the reporting of the details of their claims has now placed them at risk upon return such as to give rise to an asylum claim that previously did not exist.

specific level by the people best placed to balance those rights, namely the judiciary with conduct of the cases.

11. We consider that the present position, where decisions as to openness and reporting are taken by the Judges on the basis of the facts and circumstances of the case, is the ideal and proper approach. We note that the senior judiciary have published, and continue to review and update, helpful guidance for the judiciary (and for the media and public) in ensuring to strike the right balance. We consider that whilst there is always scope for improvement, and we address certain areas where this may be possible, we consider that any changes must be taken with the involvement of the judiciary and must leave the final decisions to the judiciary on the ground who are best placed to judge the balance in a particular case.

THE CONSULTATION QUESTIONS

12. Subject to our overarching observations above, we now turn to address the specific questions posed by the consultation document.

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

13. We consider that the principle of open justice means the public is able to see and scrutinise the justice being delivered by the Courts on its behalf. In practice, this means that the public is aware of how to obtain information about legal processes and procedures, understands its right to scrutinise those processes either by attendance in person, online or by access to written information and that, as far as possible, cases and decisions are not heard and made in private.

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

14. We consider much, if not all, of the relevant information about independent judicial powers can be gleaned from the Judiciary website, but to those unfamiliar with legal processes this may not be the first place an interested person may think or know to look. There is therefore a risk that members of the public are not aware of

what they are entitled to have access to as a matter of right and where entitlements are subject to the exercise of judicial powers. We consider that the primary remedy for this should be better public legal education (see our responses to questions 58 to 65 below).

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

15. Because it is common knowledge to the judiciary and legal practitioners where information can be found, or to which court processes access is automatically or easily available, there is a danger that it is assumed by legal practitioners that those matters are more widely known than they are.

16. Subject to our over-arching observations (see above), we welcome developments to improve transparency (for example the recent judicial guidance from the President of the Family Division). However, we consider that it is important that changes to improve and increase transparency and openness are developed by or with the judiciary, and retain a degree of judicial discretion to enable decisions to be made on a case and fact specific basis where appropriate.

17. Conversely, the Single Justice Procedure carries a significant risk that a substantial amount of legal decision making will be happening out of sight. Given that there is no compelling reason why such proceedings should not generally be open and transparent (subject, of course, to case specific circumstances) we consider this to be inimical to public confidence in the justice system if justice can't be seen to be done.

18. With the recent (and continuing) programme of court closures, ready access of many members of the public to a local court building is diminishing. This, in a basic and obvious way, makes it harder for the justice process to be scrutinised in person.

Question 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?

19. It may be helpful to revisit the consultative process on a periodic and regular basis. Potentially a website and an open justice social media presence would provide for an accessible and user-friendly way for the public to obtain information about their entitlements and rights and also to make representations as to how open justice could be improved and facilitated.

20. However, given our over-arching observations, it is perhaps helpful to note that the judicial guidance is already regularly updated and developed by the Judicial College, and that those updates/amendments are reached in consultation with the judiciary, Court user groups and the media. Many of the recent improvements to open justice and transparency have been driven by this process, and we consider that this remains the most helpful and appropriate means of ensuring that the law and policy in this area continues to develop in a balanced and proportionate way.

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

21. It is plain that an area of legal process that attracts some of the most intense media attention, and therefore public interest, is the handing down of sentences in criminal cases. In the most high-profile cases, this can now involve the filming of judges' sentencing remarks (although this is still a rarely used option). That enables the public beyond the confines of the courtroom to hear and see exactly what a judge says in passing sentence.

22. Of more practical benefit is the availability of judges' sentencing remarks in writing. We consider that it is particularly important that open justice functions effectively in the area of sentencing because it is not something that is readily understood by the public and misapprehensions about sentencing have a corrosive effect on public confidence in the criminal justice system. Whilst it is not realistic to expect judges to reduce their sentencing remarks to writing in every single case, we would encourage judges, where possible, to make written sentencing remarks available to the media (and public) as soon as possible after the sentencing hearing in high profile cases to ensure that reporting and public understanding is informed and

accurate (we address the subject of judicial sentencing remarks in more detail in response to question 40 below).

Question 6. Do you find it helpful for court and tribunal lists to be published online and what do you use this information for?

23. Yes. As professional users of the Courts, barristers need to be aware of the listings. It is useful for barristers to be able to check lists independently of their clerks, particularly when listings might be subject to last minute change. A publicly available online list reduces the scope for misunderstandings or miscommunication between courts and clerks about listings.

24. The same is also true for solicitors, defendants, witnesses and members of the public/media who have an interest in following the case. The information should not only be open to lawyers or those prepared to pay for a service. It is reasonable for participants in the legal system to know the details of cases in which they have an interest for the purposes of preparation and planning.

Question 7. Do you think that there should be any restrictions on what information should be included in these published lists (for example, identifying all parties)?

25. There will be areas where reporting restrictions are in place to protect the identity of parties, e.g. family courts, youth courts, ex parte applications, immigration and asylum cases where it would endanger parties to be named. In those circumstances the parties should not be included in the published lists. In all other circumstances they should be identified.

Question 8. Please explain whether you feel the way reporting restrictions are currently listed could be improved.

26. Members of the South Eastern Circuit are not directly affected by this issue. The purpose of properly listing reporting restrictions is to be able to notify the press, and/or anyone else who wishes to publish in relation to a case, that reporting

restrictions are in place. This places any such person on notice that restrictions apply, and therefore that they will need to clarify the terms of any such order before publication.

27. However, we note that the development and expansion in the use of social media and blogging means that reporting on legal proceedings is no longer the exclusive preserve of the accredited press, who will usually have received training in relation to reporting restrictions and contempt of court. We therefore feel that it is important that reporting restrictions are published in such a way that their effect and implications can be understood by individuals who might report/blog/tweet on a case but who do not have the level of training or understanding of the traditional press. This might be achieved by ensuring that any publication of reporting restrictions includes links to clear guidance, drafted with the lay-reader in mind.

Question 9. Are you planning to or are you actively developing new services or features based on access to the public court lists? If so, who are you providing it to and why are they interested in this data?

28. No.

Question 10. What services or features would you develop if media lists were made available (subject to appropriate licensing and any other agreements or arrangements deemed necessary by the Ministry of Justice) on the proviso that said services or features were for the sole use of accredited members of the media?

29. Not applicable to members of the South Eastern Circuit.

Question 11. If media lists were available (subject to appropriate licensing and any other agreements or arrangements deemed necessary by the Ministry of Justice) for the use of third-party organisations to use and develop services or features as they see fit, how would you use this data, who would you provide it to, and why are they interested in this data?

30. Not applicable to members of the South Eastern Circuit.

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

31. Whilst some members of the South Eastern Circuit are aware of the "Find a Court or Tribunal" service,[4] many are not. The service does no more than provide the address, contact details, opening times, how to get to the court or tribunal, the areas of law it covers, and disabled access to the building. Most of our members (and, we suspect, most members of the public) who required such details would simply use Google or an equivalent search engine.

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

32. It would be useful if there was a link to listing information as part of the FaCT service so that all information was available in one place.

Question 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?

33. The clear benefit of remote attendance would be that it increases transparency and allows those with an interest in a case to follow it more conveniently. This will particularly be the case where cases attract significant interest, and the limitations of space in the Court public gallery would limit the ability of many to follow proceedings.

34. The risks, and the extent of them, will largely be driven by the nature of the proceedings, and the circumstances of the case.

35. In the criminal courts, the risks include the following:

[4] https://www.gov.uk/find-court-tribunal

(i) The experience of our members, who prosecute and defend in criminal cases, especially cases relating to sexual offences and gang-related violence, is that the fear of publicity is already a major driver in the non-reporting of serious matters and the unwillingness of witnesses to come forward and give evidence. Effectively making proceedings visible to anyone who wanted them would inevitably result in victims of crime not coming forward and witnesses being unwilling to assist the prosecution or defence, thereby frustrating the interests of justice and wider public interest in seeing justice done.

(ii) The experience of remote access being afforded during Covid, illustrated the risk of proceedings being recorded by those observing remotely. There were instances of recordings of proceedings being placed online and/or circulated between individuals with an improper interest in the case. This increases the risk of evidence being misused and/or material not before the jury becoming known to the jury, thereby endangering the fairness of proceedings. In short, allowing remote observation makes it harder to police and enforce reporting restrictions and fair trial protections.

(iii) The ability remotely to observe (and therefore record) criminal proceedings is a particular concern for the safety and confidence of the jury.

36. It is our view that whilst remote observation of criminal proceedings can be helpful and appropriate, we consider that it should not be available on demand but rather should require application to the Court, who would be able to ensure that any remote observation did not permit observation of jurors or sensitive evidence or details (e.g. witnesses subject to special measures or evidence in the absence of the jury).

37. The risks in other jurisdictions include those addressed in our over-arching observations at §9 above (e.g. the risks to the interests of the child in family proceedings etc).

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

38. See our response to question 14 above.

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

39. We recognise that the risks identified in our response to question 14 above are likely to be lesser in respect of accredited members of the press who have the benefit of training and understanding of contempt of court and what information should not be disseminated. Moreover, we consider that there is a wider public interest in ensuring fair, informed and accurate reporting of legal proceedings.

40. As such, whilst we consider that there will be cases where the circumstances may require judicial limiting of remote access, we would certainly support greater use of remote access for the accredited media in suitable jurisdictions (which would probably include the criminal, administrative and appellate courts, although probably not, for example, the family courts, immigration & asylum tribunal and the Court of Protection).

41. Whilst we consider that applications for remote access should need to be made to the Court (in order to enable the Court to police access and ensure compliance with the appropriate standards), we consider that in appropriate tribunals it would be reasonable for there to be a presumption in favour of allowing remote access for the accredited press.

42. As noted above however, the meaning of 'Media' has expanded to include a range of individuals (bloggers, social media users etc) who report on proceedings without having any particular legal training or knowledge/understanding of what is permissible. Whilst we consider that such individuals should be afforded remote access on application in appropriate cases, we recognise that a different balance may have to be struck in relation to their access. As such, we consider that any presumption in favour of remote access should not necessarily extend to the non-accredited media.

Question 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?

43. See our responses to questions 14 and 16 above.

44. We anticipate that one of the primary drivers for offering livestreaming and remote observation will be the availability of suitable facilities. Whilst this will often be available in criminal courts, the High Court and the appellate courts, it will often not be available in other jurisdictions, and it is unlikely to be proportionate to require HMCtS to fund the provision of such facilities in many courts and tribunals in which remote observation is likely only rarely to be appropriate.

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

45. As is clear from our over-arching observations above, reporting restrictions will sometimes be necessary to protect the integrity and fairness of the proceedings and to protect the safety or other rights of the participants.

46. A clear body of judicial caselaw and guidance had developed in relation to reporting restrictions, and we can see no credible justification for departing from it. It must remain a matter for the judiciary, considering the facts and nuances of the case-specific circumstances, to ensure that there is a proper balance struck between the competing public interests of open justice and ensuring a fair hearing / protecting the parties.

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

47. We are not sure that we fully understand the premise of this question. If what is meant by “designated livestreaming premises” is effectively an “overflow court” to enable members of the press or public to attend to watch a livestreamed hearing,

then this is a concept familiar to us and is common in public inquiries (and was used extensively in criminal courts during Covid).

48. That being said, we are mindful that following extensive court closures over the last decade, the Court Service is already short of court room space and facilities for court users (including suitable waiting areas, conference rooms, advocates' facilities, refreshments etc), and we do not consider the provision of rooms specifically for livestreaming to be a sensible or proportionate use of scarce HMCTS resources save in exceptional circumstances.

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

49. It could be that FaCT, or some equivalent replacement, could provide details of how to apply for a link to attend a hearing. We note that we have already suggested that such a website should combine the details of the court with the provision of the court lists, and therefore this would be the obvious source of access/information.

Question 21. What do you think are the benefits to the public of broadcasting court proceedings?
Question 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?
Question 23. Do you think that there are any risks to broadcasting court proceedings?

50. We address questions 21, 22 and 23 together.

51. The benefits to broadcasting proceedings are the general benefits of open justice (see above) and the promotion of greater knowledge about the way the justice system and court systems work. Whilst most courts are open to the public, very few members of the public have the means, time or inclination to travel to court to watch proceedings. Broadcasting would significantly widen access and

understanding, subject to viewers watching enough to understand. The public would have direct knowledge of proceedings, rather than an impression of proceedings through a media filter. For those who watched proceedings in full, it would ameliorate the effect of inaccurate or incomplete reporting.

52. However, as outlined above in our over-arching observations, there will a significant number of jurisdictions and types of case where such broadcasting would be wholly inappropriate. It is impossible to provide a comprehensive list of the circumstances where proceedings should not be broadcast, but some of the most obvious examples include:
    (i) Any criminal trial proceedings (we do not object to the broadcasting of the passing of sentence or appellate proceedings, but there should be no broadcasting of any hearing in the presence of the jury, nor of witnesses giving evidence).
    (ii) Any closed proceedings (e.g. most Family proceedings including children, any proceedings in the Youth Court, *ex parte* applications, proceedings in the Court of Protection etc).
    (iii) Any proceedings in which the broadcast of the hearing might place a participant at risk (for example in immigration, asylum or extradition proceedings where the provision of details might place the safety of a party or a member of their family at risk).

53. In terms of the risks of allowing the broadcast of any of the above, we particularly note the following risk features which we consider outweigh any potential benefits of broadcasting:
    (i) Broadcasting is likely to create a chilling effect in respect of witnesses. The experience of giving evidence in court is already a daunting one. In criminal proceedings in particular there is a real risk that witnesses will feel intimidated. They are more likely to be named and reported on in the traditional press and on unregulated social media. We anticipate the permitting broadcasting would inevitably result in complainants and witnesses being unwilling to come forward and thus justice being denied.
    (ii) Related to point (i) above, the effect of broadcasting would make it virtually impossible effectively to police the behaviour of unknown remote viewers

in the way they do when members of the public attend courts in person. The Courts would be rendered impotent in preventing the sharing of clips on social media, WhatsApp groups etc, and would be unable to prevent witness footage from 'going viral'.

(iii) Witnesses would be put at risk of physical and emotional harm. Footage could be weaponised for the purposes of witness intimidation.

(iv) The issues identified at (i) and (ii) above could not be mitigated other than by granting anonymity for witnesses. Most civilian witnesses would presumably want to take advantage of such a measure. This would reduce transparency in criminal proceedings, not improve it.

(v) Professional court users, particularly barristers, may not wish to be broadcast. A significant number of those who responded to the South Eastern Circuit consultation indicated that they would not want to be broadcast and subject to unwanted publicity. Professionals may (and several have said they would) refuse to participate in televised proceedings. Members of the profession did not 'sign up' to be exposed in this way.

(vi) There could be a risk of trivialisation of proceedings by reducing them to a form of entertainment.

54. Crown Courts are already broadcasting and publishing sentencing remarks in cases of public importance. The Supreme Court and Court of Appeal do the same on cases involving important points of law. These cases are judicially self-selected so do not impose publicity on those who do not want it and do not involve witnesses. We consider that this strikes the right the balance.

Question 24. What is your view on the 1925 ban 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?

55. The prohibitions should remain for the reasons set out in our answer to question 23 above. Independent recording by media and members of the public, rather than recording or broadcast controlled by the court (or court endorsed media agencies),

is likely to be even more vulnerable to abuse and descent into a ‘circus’ in court. Recording or audio or video streaming should remain restricted.

56. In relation to other emerging technologies, we note that ‘Live Tweeting’ is already allowed (subject to judicial discretion) and we see real difficulty with this as it is broadly equivalent to online newspaper feeds, subject to the usual rules about contempt etc which apply.

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

57. As barristers, we have very little interaction with the SJP unless an individual enters a not guilty or equivocal plea and therefore necessitates a court hearing. Proceedings from then on are in the public domain.

58. The SJP is not in the public domain and therefore there is a well-documented lack of transparency. As with members of the public and the media, counsel are able to access the daily list of SJPs online by court. It does not appear that there is a function to view the outcome of a case, or even the existence of a case retrospectively. This prevents counsel, the media and the public from understanding how legislation is being interpreted and applied through the SJP and also prevents ensuring consistency of outcomes.

59. We recognise that the SJP is intended to deal with “low-level routine offences” for which the penalty is largely prescriptive – for example a financial penalty determined by means or imposition of a set number of penalty points. In this way, consistency in outcome is somewhat built into the procedure. However, such offences can include matters that are of the utmost importance to the individuals concerned and matters in which there is a legitimate public interest.

60. Particular concern arises where less ‘routine’ cases are dealt with in effect behind closed doors, which can be matters of high public importance and interest. For example, the enforcement of Covid-19 regulations. It may be considered not

appropriate to deal with such matters behind closed doors when public, media and legal professional have no access.

61. This is a particular concern given that the nature of the offences dealt with under the SJP are ones in which the defendant will be unrepresented (and often absent). As such, media scrutiny as to whether the Courts are properly approaching such matters is particularly important given that it may be the only way that miscarriages of justice are uncovered (as happened with the reporting over Police forces and prosecutors applying the wrong laws and therefore unlawfully prosecuting alleged Covid offenders).

62. The necessity for transparency in the SJP and the steps taken to achieve that must be balanced against resourcing and funding available in the criminal justice system. Possible mechanisms for increasing transparency could include:
    (i) A publicly available archive of daily lists from CaTH, including their outcomes.
    (ii) Publicly available data/statistics on the types of offences being dealt with by SJP alongside their outcomes.
    (iii) Controlled sample review of SJP cases by a comprised of legal professionals (counsel, solicitors, judiciary, legal advisors etc) to ensure consistency of outcomes.
    (iv) The availability of remote access for the accredited press to monitor proceedings in cases where there is no compelling reason to exclude them.

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

63. As set out above in our response to question 25, we would suggest a publicly available archive of daily lists from CaTH, including their outcomes.

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

64. As practitioners, our members will usually have access to a range of online resources to access relevant decisions and judgments. Some of these are subscription services to access law reports, and other resources are free and available to the public to access (e.g. the judiciary website, BAILII and the National Archives).

65. In our experience, there are huge gaps in the availability of judgments and decisions freely available to the public. We consider that there should be a single online repository containing all public judgments which is free for the public to access.

Question 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?

66. Our only comment in respect of this proposal is that the judgments and decisions of the courts and tribunals are essential to the promotion of open and transparent justice, and access to those judgments is essential to the public's understanding of the law that governs them and the way in which justice is conducted. In such circumstances, it is essential that the public, academics and those using the courts, should be able to access those judgments conveniently and without cost barriers to access being imposed. Our view is that the judgments should be available to the public, court users and legal academics free of charge.

Question 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.

67. Given the number of judgments and decisions made daily, we consider that this ambition is unrealistic. In particular, we note that in the vast majority of first

instance cases, judgments/decisions are given on an *ex tempore* basis and are not automatically transcribed unless subject to an appeal. We do not envisage that the cost and resource-allocation necessary to obtain and publish all such judgments is feasible or proportionate.[5]

68. In our view, we consider that priority should be given to the publication of judgments and decisions which determine points of law rather than simply decisions on facts. This is because these are the judgments and decisions which will be of relevance across a wide number of cases, and which will dictate how Courts and tribunals in subsequent cases will act. It is also likely that such judgments will be the ones of the most pressing public interest (if not always the most interest to members of the public). As such, priority should be given to publishing decisions of the appellate courts and High Court.

69. In respect of first instance judgments dealing primarily with findings of fact, we consider that the balance to be struck between open justice and the rights of the parties to a degree of privacy, mean that those cases might better be made available only on request. The same would obviously apply to cases in the Family Court, Immigration and Asylum Tribunal, Court of Protection etc, where the facts of any such case may require careful redaction prior to any publication.

Question 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.

70. We anticipate that this question relates primarily to the provision of the underlying evidence and written legal arguments in a case. In our view, these should not be published online or made available without a reasoned application to the appropriate Court. There are already detailed and helpful practice directions and Judicial College guidance published and freely available in respect of obtaining access to such material, and we consider that this already strikes the right balance

[5] The resources that would be needed to achieve this could be put to far better use within the justice system and beyond.

between openness/transparency and the need to have regard to the fairness/integrity of proceedings and the rights of participants. For the reason set out in our over-arching observations, we consider that decisions on the release of such material should properly be reserved to the judge dealing with the case, who will inevitably be best placed to strike the appropriate balance in the specific circumstances.

Question 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.

71. We do not consider that we are able meaningfully to respond to this question.

Question 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?

72. Not on the basis of the current approach, which we consider to be measured and balanced with proper judicial regard to the various competing interests. However, we consider that if the judicial gatekeeping role were diminished or removed, it is far more likely that publication would have the negative effects outlined elsewhere in this response.

Question 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).

73. Not applicable to members of the South Eastern Circuit.

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

74. Not applicable to members of the South Eastern Circuit.

Question 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.

75. Not applicable to members of the South Eastern Circuit.

Question 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.

76. Not applicable to members of the South Eastern Circuit.

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

77. Feedback from members of the South Eastern Circuit practising in Tribunals, particularly those practising in employment and immigration law, suggest that they consistently search for tribunal decisions in the preparation of legal argument and/or to advise a client of potential outcomes and processes. Many referred to using the British and Irish Legal Information Institution (bailii.org) to search by citation and access Upper Tribunal cases.

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

78. Given our response to question 37, our answer to question 38 is yes as this would assist practitioners in proper case preparation.

79. We observe that feedback from members practising in immigration law notes that First Tier Tribunal decisions were not available on Gov.uk and it was generally thought this was the correct position to balance open justice and privacy of the individuals concerned.

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

80. We received a limited response from practitioners who use the published decisions register. It was however noted that the usual safeguards which apply in respect of vulnerable individuals and children should apply to the published decisions register were necessary.

Question 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.

81. As observed above, we consider that the publication of sentencing remarks is something that should be encouraged and facilitated wherever possible, particularly in high-profile cases where there was a particular press/public interest. This is because such cases inevitably spark legitimate public debate, and it is essential that such debate is informed and based on a proper understanding of the law and how/why a particular sentence was reached. We note that the swift publication of a proper explanation of a sentence in such cases is particularly important in a social media age where misconceptions and misunderstandings as to the basis for a sentence can lead to widespread public concern and have a corrosive effect on public confidence in the criminal justice system.

82. That being said, we do not consider it to be realistic or reasonable to expect Judges to provide written sentencing remarks in all, or indeed the majority of, cases. In the vast majority of cases, Judges deliver *ex tempore* sentencing remarks having heard mitigation in Court. Court and judicial capacity makes it impossible for Judges to prepare written sentencing remarks in all cases without very substantially slowing down the Court lists. At a time of huge backlogs and lack of

Court capacity, this is clearly not in the public interest. Furthermore, the cost involved in transcribing and publishing all such sentencing decisions would be prohibitive and disproportionate.

83. As such, we consider that whilst the judiciary should be encouraged to publish written sentencing remarks to the public/media in any high-profile case, we do not consider that it would be possible or appropriate to require them in the majority of cases.

84. We do not have any particular view as to the format in which sentencing remarks should be published in cases where they are to be published, save that we note that the speed at which misconceptions can arise on social media means that they should be published as soon as possible after the decision has been handed down in Court (and ideally immediately afterwards). At present, this tends to be done via a combination of publication on the judiciary website and handing out/e-mailing via the Court Clerk to any journalists in Court.

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

85. As barristers, the only purpose for which our members are likely to wish to access court/tribunal documents in cases in which they are not parties would be in order to prepare and conduct other cases on similar issues where those documents might be helpful in terms of precedent.

86. We appreciate that this question is likely to be primarily aimed at people who are not professional court users and so may be more usefully answered by those that do not practise in courts and tribunals.

Question 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?

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

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

87. As barristers, our answers to each of questions 42 to 44 is yes. We appreciate however that these questions are likely to be primarily aimed at people who are not professional court users and so may be more usefully answered by those that do not practise in courts and tribunals.

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

88. Not applicable. We appreciate however that these questions are likely to be primarily aimed at people who are not professional court users and so may be more usefully answered by those that do not practise in courts and tribunals.

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

89. As foreshadowed above, we consider that a website dedicated to open justice in conjunction with a social media presence on the major platforms would provide a 'one stop shop' approach for making information readily accessible.

90. Likewise, if individual courts had websites (potentially accessible via FaCT or an equivalent central portal) they could stipulate for that particular court what material is automatically available and what material would be available on application.

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

91. The answer to this question will depend on the type of court/tribunal, the nature of the case and who the non-party is. As outlined above, different considerations will apply to different circumstances. Representatives of the media and academic researchers fall into a different category to general members of the public.

92. Provision of skeleton arguments in publicly accessible proceedings exemplify the kind of material that should be made available on request provided provision is not contrary to the interests of justice. This is already covered by the publicly available practice directions and judicial guidance (although these could be made more easily available to the public via the 'one-stop' portal envisaged above).

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

93. If all courts have websites as suggested above, then the public will know where to request and obtain documents.

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

94. For the reasons set out above, we consider that there should be different rules for those with a professional or public service interest in access to court documents to those with a merely private interest.

Question 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?

95. There may be a significant cost implication to these kinds of requests and making information available on a bulk basis would seem to increase the risk of documents being made available that should not be made available. It would also appear to facilitate requests such as these it would be necessary for court documents to be held on a central database. Such bulk requests will not necessarily be compatible with the judicially-conducted case-specific balancing exercise that we consider to be essential.

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

Question 52. How can we support access and the responsible re-use of data derived from the justice system?
Question 53. Which types of data reuse should we be encouraging? Please provide examples.
Question 54. What is the biggest barrier to accessing data and enabling its reuse?
Question 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?
Question 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.
Question 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?

96. Questions 51 to 57 give rise both to technical issues and questions of principle that are better addressed by bodies with wider remits and expertise. We therefore adopt the observations of the response to these questions submitted by the General Council of the Bar.

Question 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.

97. In short, we consider the answer to this question to be no.

98. Anecdotal evidence from our members, and particularly those at the criminal bar, suggests that it was clear through their interactions with members of the public with no professional knowledge of the criminal justice system (defendants, witnesses, family, friends etc) that they often had very limited understanding of the processes within the criminal justice system.

99. A common example is how criminal proceedings are brought about through charge and the misconception that a complainant "brings charges" against a defendant. Members of the public are also often unclear of the different roles with the criminal justice system – for example that of the CPS and a Judge. Another common example is the lack of understanding around sentencing procedure and the prescriptive process followed to determine sentences.

100. Whilst legal bloggers / social media commentators, such as 'The Secret Barrister', have done their best to provide explanation and insight into the justice system to the public, the public reaction to legal cases evidenced on social media demonstrates a concerning lack of public legal education and understanding.

101. In terms of the public's understanding of concepts such as contempt of court, it is perhaps best described as limited. This is evident through public commentary on social media on the justice system as a whole, for example through Twitter, Facebook and blogs. Within the commentary, it suggests a lack of understanding of issues such as contempt of court, in particular how it applies to those not within the associated press.

Question 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?

102. Regrettably, the answer to this question is no. Whether the general public become aware of new developments or processes in the justice system, appears largely governed by if and how it is reported in the media. This is particularly the case when the Government's announcement of purported changes does not necessarily accurately reflect the practical impact of those changes.[6]

103. Whilst resources such as Legislation.gov.uk and bills.parliament.uk are available to the public, they cannot be said to be particularly accessible to those

[6] It is, regrettably, sometimes the case that changes are presented by the Government in a way, whether intended to simplify for ease of understanding or to maximise political benefit, that does not accurately describe the changes or the actual/practical effects of it.

without some level of legal education. The search functions on both require foreknowledge of the specific legislation or bill to be an effective tool.

104. Legal professionals are often reliant on resource behind paywalls, such as CrimeLine, Westlaw and LexisNexis, to stay informed of developments in the justice system. These are resources the general public are very unlikely to be aware of let alone pay to use.

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

105. There is no one specific area in which public's understanding of the justice system is particularly lacking. The knowledge gaps appear to be across all areas of the justice system.

106. From a criminal perspective, the main knowledge gaps appear to be in the general process followed by the criminal courts, the role of the judiciary and the procedure for sentencing.

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

107. Whilst there is helpful information available online to assist the public to navigate the justice system, such information is only of use to members of the public if they are aware of its existence and how to access it. Outside of professional legal advice, the public appear to rely on resources provided by charities/not for profit organisations to provide them with guidance on how to navigate the justice system and seek justice, such as Citizens Advice Bureau, Advocate, Law Centres attached to universities etc. The information provided is therefore not centralised or streamlined.

108. We received feedback from one of our members practising in Family Law who described many of the rules of the Family Court as being arcane and difficult to understand for members of the public. We consider that the same could be said

of many of the processes of the criminal courts, and doubtless other courts and tribunals too.

109. We consider that the rules be available/explained to the public, including litigants in person, in a form that is easily accessible and simplified.

Question 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.

110. There may be a role for digital technologies in supporting PLE, for example through the provision of resources.

111. In terms of dispute resolution, we would be concerned by the practical and ethical implications of promoting AI, or equivalent technological solutions, to members of the public as a reliable means to resolve their legal disputes. Whilst such solutions may, in due course, be a helpful means of resolving factually and legally simple disputes, the technology is still far from being sufficiently reliable to enable users to be confident that the technology is fairly or properly answering their questions.[7]

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

112. As set out above charities already do a significant amount of work to assist individuals interacting with the justice system. In terms of increasing knowledge around the justice system, charities such as Young Citizens and Legal Experts in Schools provide opportunities for PLE as part of a child's education. Consultation with those organisations already carrying out this function would allow for the development of a centralised, streamlined PLE system.

[7] For example, recent tests with Chat GDP and other equivalent software offerings showed the AI incorrectly identifying the legal and factual issues and, on occasion, completely inventing law based on its incorrect algorithmic pattern recognition.

113. However, a sustainable and long-term improvement in public legal education will necessarily involve government in order to ensure that it is provided through schools as a part of the curriculum for all school children. It is essential that any such PLE is agreed outside from party-political and campaign group interference to ensure that the PLE is not compromised. We would recommend that a suitable curriculum be designed with the involvement of the judiciary and the non-governmental organisations which currently provide such education.

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

114. It is convenient to answer questions 64 and 65 together.

115. We consider that the basics of legal education should be part of the school curriculum utilising the charities and organisations already doing such work (Young Citizens and Legal Experts in Schools, for example). English Legal Systems & Skills forms a basic part of an LLB, and adapted version appropriate for those of school would assist in PLE. Currently the PLE of a school-aged child is reliant on individuals within the school environment seeking out forms of PLE.

116. Parliamentary campaigns may assist in PLE. The collation of resources, often already produced by legal charities, into a streamlined database accessible to the public as and when required may provide a basic PLE to adults.

117. Court & Tribunal Open Days already assist in PLE for both adults and children. For example, the Wood Green Crown Court open day during Easter of this year was very well attended and was commended by all those that attended as being informative as well as helping to improve confidence in the legal system. Such open days should not just be confined to criminal courts, but across all areas of the justice system.