SCL SOCIETY OF CONSERVATIVE LAWYERS

OPEN JUSTICE

A RESPONSE TO THE CALL FOR EVIDENCE "OPEN JUSTICE: THE WAY FORWARD"

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About the authors

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INTRODUCTION

1. Open Justice is the general rule that hearings are carried out in, and judgments and orders made in, public. It is a fundamental principle of the common law.[1] Its purpose is to allow scrutiny of the exercise of justice and, thereby, to act as a check on judicial power, and the operation of the justice system and the law in general.[2] An importance consequence is that the public retain trust in the institution and administration of justice. Derogations from that principle are justified only in the exceptional circumstances where they are needed to ensure justice.[3] A party seeking to curtail that principle must meet a strict test that "by nothing short of the exclusion of the public can justice be done".[4] The mere fact that public hearings may cause pain, humiliation or be so indecent as to injure public morals are not sufficient to override the principle which is the "best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."[5]

2. With this statement of the principle, its importance, and its role, we agree. The importance of open justice in securing public support for the judicial process was demonstrated in *R v The Prime Minister* [2019] UKSC 41[6]. The highly contentious issues surrounding the consequences of the Brexit Referendum manifested in a dispute over the power of the Prime Minister to prorogue Parliament. The fact that the arguments of the parties and the decision of the Court was aired in a public hearing available by video link ensured that, whatever the view of the judgment, the process was understood and seen to be fair.

3. However, for the reasons we set out below, we submit that there remain important further steps that might be taken in support of the principle of Open Justice and its purposes. We are concerned that the wood is not missed for the trees.

a. First, the sheer number of decisions now generated is a barrier, in and of itself, to public access and understanding of the law. We propose that the current National Archives Find Case Law database, ("FCL"), be modified to improve accessibility.

b. Second, we consider that the focus on public airing of individual cases obscures the important dissemination of the overall picture. High profile cases, with sensational and provocative facts, obtain undue prominence in the mind of the public. The effect of the availability heuristic, which gives prominence to those matters most easily recalled, results in a distorted understanding on the part of the public as to what is going on in the justice system. Three matters exaggerate that effect: First, priority is given within the limited resources of the justice system to high profile cases. Second, constraints on media resources result in a prioritisation of high-profile cases. Third, the lack of any consistent or established method for collating and aggregating data means that there is no basis for generating a clear analysis of the overall picture that might act as a counterpoint. In what follows, we propose mechanisms that seek to address those three distorting factors.

c. Third, we consider an area of particular importance is public understanding of sentencing. Surveys of the public reveal both misunderstanding of the process and mistrust of sentencing decisions.

4. In respect of each of these three issues:

a. We propose that the current National Archives Find Case Law database, ("FCL"), be modified to improve accessibility. This would be achieved by the incorporation of more granular search functionality and facilitated by requiring decisions to be coded with keywords when the decision is issued. The Intellectual Property

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1 *DE v AB* [2014] EWCA Civ 1064, [21]

2 *Gallagher v Gallagher (No. 1) (Reporting Restrictions)* [2022] EWFC 52, [11] to [14].

3 Master of the Rolls' Practice Guidance on Interim Non-Disclosure Orders of 2011 [2012] 1 WLR 1003, [10]

4 *Guardian News and Media Ltd & Ors v R. & Incedal* [2016] EWCA Crime 11, [49]-[50]

5 *Scott v Scott* [1913] AC 417 at 463

6 Often referred to as "Miller 2".

Office, ("IPO"), trade mark decisions database provides a model.

b. We propose that academic and policy bodies be allowed to analyse the full decision database. The existence of agreed coding/keywords would make analysis of aggregate outcomes easier.

c. We propose a mechanism whereby sentencing remarks may be made consistently available in all Crown Court cases. To overcome logistical obstacles we propose the development of a general sentencing template to guide sentencing remarks. The sentencing template would be formatted to capture important data on characteristics of those sentenced, sentence and reasons for sentencing. The template would improve judicial efficiency in sentencing as well as allowing better analysis of sentencing decisions in aggregate.

5. This Response does not seek directly to address every one of the 65 questions posed in the Call for Evidence[7] but some of the Responses have indirect applicability to the unaddressed queries.

7 www.gov.uk/government/consultations/open-justice-the-way-forward/call-for-evidence-document-open-justice-the-way-forward

QUESTIONS ON OPEN JUSTICE

Q1 Please explain what you think the principle of open justice means.

6. We have set out our understanding in the opening paragraph of the Introduction to this Response.

Q2 Please explain whether you feel independent judicial powers are made clear to the public and any other views you have on these powers.

7. Sentencing Council research suggests that even though the public believe they understand the sentencing process, the actual level of understanding was limited.[8] For example, in the question of remote access to judgements, it is not widely known or understood that courts retain discretion on remote access subject to tests: can it be done technically, and is it in the interests of justice. We proceed on this basis, shown in other research, that there is a limited understanding of the factors that are taken into account by the judiciary.

Q3 What is your view on how open and transparent the justice system currently is?

8. Our submission is that, in relation to individual cases, the justice system effectively meets the principle of Open Justice. However, it fails to achieve the purposes of Open Justice in aggregate. Only by ensuring that the public understands the picture as it relates to judicial decisions as a whole, and not just in relation to individual cases, is it possible to ensure that the necessary checks on the administration of justice are achieved.

Q4 Are there specific policy matters within open justice that we should prioritise engaging the public on?

9. It is essential that the public have faith in the criminal justice system. The evidence reveals a consistent mismatch between the public's perception of the leniency/severity of judicial sentencing and that sentencing's reflection of Sentencing Guidelines.

10. A good indication of the mismatch is the tension between public perception that sentences are too lenient[9] and the fact that average custodial sentence length in months has risen over the last

8 Sentencing Council: Public knowledge of and confidence in the criminal justice system and sentencing: 2022 research, ("Sentencing Council 2022 Report")

9 Sentencing Council 2022 Report:"When asked in the online survey about their attitudes towards sentencing in general, almost two-thirds (64%) of respondents said that they think sentences are too lenient, while roughly a fifth (22%) said that they think they are 'about right' and only 8% that they are too tough. These figures are consistent with the 2018 survey".

ten years[10] from under 15 months to over 20 months.[11] Although the population of prisoners serving sentences dropped during the pandemic it is now rising again and is consistent with the pre-pandemic both in trend and absolute numbers and higher than was in 2009.[12]

11. The evidence also reveals concerns about bias within the criminal justice system, including judicial bias, over matters of race, gender, and other characteristics. There is an absence of data that permits those concerns properly to be considered.

12. We suggest that sentencing is a core area to prioritise public engagement. We advance a proposal for doing so in response to question 40 below.

10 Up to December 2022

11 https://data.justice.gov.uk/cjs-statistics/cjs-sentence-types Final Chart

12 www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2023/offender-management-statistics-quarterly-january-to-march-2023

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?

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?

Q17 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?

Q18 Do you think that there are any types of buildings that would be particularly useful to make a designated livestreaming premises?

13. Remote observation and live-streaming of open court proceedings demonstrated its value during the Covid Pandemic. It allowed court proceedings to be observed without the requirement for physical attendance. This faculty offers general benefits:

a. First, it allows access to court proceedings by those with disabilities that might otherwise prevent or impede attendance. The inherent use of technology may assist those with sensory disabilities to engage with court proceedings through technology more effectively, for example, using automatically generated subtitles for the hard of hearing.

b. Second, it allows access to court proceedings by those abroad. This has potential benefits for the UK as an international court centre where corporate litigants, for example, may be able to attend remotely without the expense and difficulty of attending in person.

c. Third, it allows better use of Court resources by accommodating trials with large numbers of parties in smaller physical court spaces by permitting remote attendance.

14. These benefits come at a cost to the Court in physical equipment and staff management. However, such costs should be seen as part of a general pattern of increased use of technology within the Court system, accelerated by the pandemic. Those costs should not be viewed in isolation: There may be increased costs associated in providing CVP ("Cloud Video Platform") access for defendants from prison, for example. However, there are also costs[13] for physical attendance from prison and the former ought to be understood in the context of the latter.

15. It might be thought that there is no difference between physical and remote access to court

13 We observe that these are not only the monetary costs attributable to staffing and transport. Attendance at Court is a key security vulnerability for prisoners. Remote participation removes the opportunity for escape and, more prevalently, for the transmission of contraband.

proceedings such that, if the former are permitted automatically, the latter ought also to be permitted automatically. We disagree. Remote access also creates difficulties for those in charge of the proceedings because they no longer have full awareness of who is present and whether the proceedings are being recorded. It is not difficult to anticipate circumstances in which there is misuse of access.[14] For example, in criminal proceedings, the recording and dissemination of arguments and decisions about the admission of evidence during trial might result in unfair proceedings if they came to the attention – directly or indirectly – of jurors. Even without deliberate misconduct, inadvertent errors as to what is shown, should be limited in their exposure to known participants so that the consequences can be addressed by the court.[15] Accordingly, remote access by the public ought not to be automatic but, as presently,[16] by application.

16. The ability to attend Court remotely would allow the media to engage with court proceedings more efficiently. For example, by allowing the same reporter to attend proceedings in different court centres on the same day that would otherwise have been impossible. Or by allowing the reporter to be productively engaged while waiting for court proceedings to commence. Having regard to the constraints on media resources and the desirability of media coverage of court proceedings, remote attendance should be facilitated where possible. In that regard we agree with the observation made in *A v BBC* [2014] UKSC 25; [2015] A.C. 588, [26] *per* Lord Reed, "the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings".

17. Currently *The Remote Observation and Recording (Courts and Tribunals) Regulations 2022* require the Court to be satisfied of two matters before directing remote access or live-streaming:

3(a) it would be in the interests of justice to make the direction; and

(b) there is capacity and technological capability to enable transmission, and giving effect to the direction would not create an unreasonable administrative burden.

We suggest that, as regards accredited members of the media, there should be an assumption in favour of the test in regulation 3(a) being met. We note that this assumption, if confined to accredited members of the media, is unlikely to conflict with the concerns expressed in the June 2022 *Practice Direction on Remote Observation* at paragraph 20:

"For example, a witness might be reluctant to give evidence under remote observation by an unknown number of unseen persons, or the quality of the evidence might be impaired by the prospect. Remote observers may be more likely than someone watching in a court room to breach a reporting restriction or the ban on filming or photography or to engage in witness intimidation. They may be harder to observe, identify and hold to account if they do."

Accrediting the media?

18. Question 16 is silent on the issue of the identification of the "media". However, there needs to be a process of accreditation for any "media" that might be given automatic remote access to ensure responsible use of that remote access. It would be for UK media.[17] Such a system as that already in place in the Family Courts is suitable.[18] Automatic access for such accredited media would ensure that the courts are not overburdened by considering access requests while ensuring confidence that there would be responsible use.

14 They are effectively anticipated by section 85B of the Courts Act 2003

15 See further our observations at 19 below.

16 See *The Remote Observation and Recording (Courts and Tribunals) Regulations 2022* and the June 2022 *Practice Direction*

17 Thus meeting another concern expressed in the June 2022 *Practice Direction* at paragraph 20: "For observers outside the jurisdiction these risks may be greater, and it is unlikely that sanctions for disobedience could in practice be imposed"

18 See January 2017 *Family Court Procedure Rules Practice Direction* 27b paragraph 4.2

QUESTIONS ON BROADCASTING

Q24 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?

19. A general prohibition on photography and recording is still valuable. It is easy to anticipate misuse of both video and audio recordings. It is not simply that both mediums provide a more direct and vivid means of conveying information than verbal report.[19] Both mediums also allow the rapid, uncontrolled dissemination of information.

19 See the observations in *Campbell v MGN* [2004] 2 AC 457 – "In general photographs of people contain more information than textual description. That is why they are more vivid." Per Lord Nicholls of Birkenhead. And "It may be a more vivid form of information than the written word ("a picture is worth a thousand words"). That has to be taken into account in deciding whether its publication infringes the right to privacy of personal information. The publication of a photograph cannot necessarily be justifed by saying that one would be entitled to publish a verbal description of the scene: see *Douglas v Hello! Ltd* [2001] QB 967." Per Lord Hoffman

QUESTIONS ON PUBLIC ACCESS TO JUDGMENTS

Q27 In your experience, have the court judgments or tribunal decisions you need been publicly available online? Please give examples in your response.

20. Until the introduction of the National Archives Case-law database the principal source of publicly available decisions was BAILII.[20] The Government website continues to link to BAILII, see for example the Court of Appeal Criminal Division list of "previous decisions".[21] The use of BAILII was and is in addition to the provision of judgments via the judiciary's own website.[22] The lack of a single website, the duplicative nature of the other sources for judgments, all created uncertainty and confusion.

21. In our view the introduction of the National Archives database was a much-needed government intervention. The system of law in England & Wales depends on precedent and a public archive of judicial decisions is necessary to allow access for those who cannot afford or do not need a professional database service like Westlaw or Lexis Nexis.

22. The absence of such a database stood in stark contrast to the availability of EU decisions via the Court of Justice of the European Union website: Curia.[23]

23. It also stood in contrast to the availability of Trade Mark tribunal decisions from the Intellectual Property Office. These are first instance and appellate decisions in relation to application to invalidate trade marks or to oppose the registration of new trade marks. These are available from the IPO's website – ipo.gov.uk. This is now accessible from the gov.uk domain. The tribunal decisions portal is worth detailed consideration because it provides functionality that we suggest should be adopted by the National Archive for the Find Case Law site.

24. The FCL site allows searching by keyword and further filtering by neutral citation, court, date, party name and judge name. These are all valuable options for narrowing the search. However, by their nature, they assume that the searcher knows what they are looking for and is simply seeking to identify it within the database. However, if one wants to know the latest judgment on a particular topic or if one is not familiar with the area of law in

20 www.bailii.org

21 www.gov.uk/courts-tribunals/court-of-appeal-criminal-division

22 www.judiciary.uk/judgments

23 https://curia.europa.eu/jcms/jcms/j_6/en

the first place and is looking to find the most recent or most authoritative judgment on the topic these search options are insufficient.

25. For example, if – at the time of writing – one searches for the keyword PATENT the first two judgments generated[24] are not patent disputes but rather a contract dispute where the subject matter is a patent and a judgment on costs orders that merely references an authority that was itself concerned with a patent dispute. Nor is there any way to specify that you wish to be shown cases that are part of the Intellectual Property list of the Business and Property Courts of England & Wales. It is only possible to specify the Chancery Division, too broad, or the Intellectual Property Enterprise Court, too narrow.

26. In contrast, the IPO decisions database allows searching in terms equivalent to that offered by the Find Case Law database. However, it also allows searching by reference to the legal grounds that were raised in the case. That means that a party can look for decisions that are directly related to the issues that are relevant to their own concerns. It also provides a concise list of key cases from the Court of Justice of the European Union that are of central importance to the authorities. We suggest that both aspects are innovations that would be well introduced to the FCL database.

Provision of further details

27. The key to the effective implementation of this system is tagging by members of the judiciary at the time of the creation of their judgment. There is already a template for judicial decisions in the High Court. All that is required is to include in the template a list of agreed keyword tags that may apply to the decision. Such tagging is already implicit in the identification given of the court and the nature of the decision.[25] The list of agreed keywords could be set by the National Archives in consultation with the senior judiciary. It could be set at various levels of granularity: for example, #CONTRACT or #CONTRACT:FORMATION, #CONTRACT:BREACH, etc. It should include tagging that indicated the outcome of the decision: for example, #CLAIMANT:SUCCESS, #CLAIMANT:PARTSUCCESS, etc It would then simply be a matter of getting the decision maker to include the appropriate keywords from the agreed list into the decision. If this were done going forward then it would lead to a position where it was possible to search, rapidly, for the most recent cases in a particular topic area on the publicly available database. It would also allow for analysis of the outcomes of cases by reference to agreed coding which was applied by the decision maker.

Provision of key cases

28. The Judiciary already provide lists of "Frequently Cited Cases" in certain areas of law such as Extradition[26] and before the Court of Appeal Criminal Division.[27] The provision of such lists not only assists the Court by preventing the unnecessary provision of already familiar authorities, but it also serves as an indicator of key cases on important topics. That for Extradition sub-divides the cases into topic areas: "Warrants", "section 12AA (decision to charge/try)", etc. Encouragement to do so for all areas of the law is advisable. Not only would it serve to indicate what authorities are well-known to the decision makers in any case, it would also allow those accessing public databases to efficiently hunt through the haystack to find the relevant legal needle. Again, this is a task that might be accomplished at minimal cost and effort by co-operation between the judiciary and the National Archives.

Q28 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

24 [2023] EWHC 1523 (Comm) and [2023] EWHC 2031 (Ch)

25 For example at https://www.judiciary.uk/judgments judgments are identified as "Court of Appeal Civil Division", "Judgment"; or "Court of Appeal Civil Division", "Family", "Family Court", "Judgment"

26 www.judiciary.uk/wp-content/uploads/2023/06/Extradition-frequently-cited-cases.pdf

27 www.judiciary.uk/guidance-and-resources/list-of-frequently-cited-authorities

subject to FCL's licensing system. The other government sites would then be closed. Do you have any views regarding this?

29. It would be essential to replicate on the FCL site the functionality available at the existing sites. As we indicate above, incorporation of that functionality into the FCL site would assist with Open Justice principles and purposes.

Q29 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.

30. In addition to the publication of Crown Court Sentencing Remarks, discussed further at question 40, we consider that the other area where there is a public interest in the publication of decisions are those of Inquests. As with sentencing for criminals, there is a considerable interest in ensuring public confidence in the decisions of Coroners and their reasoning.

Q32 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?

31. We do not have experience of this.

QUESTIONS ON TRIBUNAL DECISIONS PUBLISHED ON GOV.UK

Q37 Have you searched for tribunal decisions online and if you have, what was your experience, and for what was your reason for searching?

Q38 Do you think tribunal decisions should appear in online search engines like Google?

Q39 What information is necessary for inclusion in a published decisions register? What safeguards would be necessary?

32. We have addressed these questions by reference to the Intellectual Property Office decisions database above. Our submission is that it provides a model for additional information necessary to make the sheer number of decisions generated in the modern era manageable.

33. We do not consider that it is necessary to make those decisions searchable by Google or other online search engines if there can be a meaningful and granular search of the National Archives database.

QUESTIONS ON PUBLIC ACCESS TO SENTENCING REMARKS

Q40 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.

34. As we set out above, the sentencing of offenders is an area of considerable concern to the public and where they believe the justice system to be failing because it imposes sentences that are perceived to be too lenient. Even where the public professes to understand the basis for sentencing, probing of that understanding suggests that it is tenuous or non-existent.

35. The link between public understanding of the sentencing process and their trust in the judicial system was reaffirmed in the Sentencing Council's 2022 Report:8

"awareness of the existence of sentencing guidelines, in general, improves people's confidence in the fairness of sentencing."

The provision of an explanation for the basis of sentence in all cases in the Crown Court would serve to increase understanding of the process of

sentencing and thus trust in the sentencing exercise.[28]

36. The provision of an explanation for the basis of sentence would also meet one of the purposes of Open Justice, namely, to allow for a check on both the judiciary and the process. A comprehensive data set of Crown Court sentencing decisions would make it possible to investigate whether there is bias in sentencing decisions due to ethnicity, gender or other characteristic. In this regard what we suggest is not a new proposal: The Lammy Report[29] expressly sought that, "all sentencing remarks should be published in both audio and written form" on the basis that, "publishing sentencing remarks would be an important step to a more comprehensible and trusted system." It also recommended extension and updating of the Open Justice initiative so that it was, "possible to view sentences for individual offences at individual courts, broken down by demographic characteristics including gender and ethnicity."

37. The obstacle to implementation of this step has been the logistical burden on the judiciary. Lord Burnett of Malden, the Lord Chief Justice, provided a written submission, jointly with the Senior President of Tribunals, to the Justice Select Committee in relation to open justice and court reporting in the digital age in November 2021.[30] As part of that submission, he stated:

"Sentencing remarks in many serious criminal cases are published on that website[31] as well. … Sentencing remarks in the most serious cases are generally written down and can be made available to reporters. But this is not the norm and is not practicable in many cases because of the impact it would have on the pace of work in the Crown Court. Moreover, sentencing remarks will often contain information which cannot be published, for example material that would identify the victim of a sexual crime. The provision of transcripts would require the devotion of significant additional resources, to make sure the public record was a precise verbatim record. It is common for transcripts when first produced to contain significant errors and omissions.

38. Three logistical obstacles are identified: First, that the publication of sentencing remarks would take too long in the ordinary pace of work in the Crown Court. Second, that in some cases they would contain information that cannot be published and so would have to be reviewed. Third, it would not be possible to ensure accurate transcription of sentencing remarks.

An interactive form recording matters relevant to sentencing

39. We suggest all three of these logistical obstacles can be overcome and in a way that streamlines the workflow of Crown Court judges who are engaged in sentencing. The approach is modelled on the existing Pre-Trial Preparation Hearing, ("PTPH"), Form. At present, cases that arrive at the Crown Court must go through a hearing that determines case management matters. It is an opportunity for defendants to plead and, if there is a guilty plea, to be sentenced. The

28 This is consistent with the finding in the *Sentencing Council 2022 Report* survey: "…respondents reported that awareness of the existence of sentencing guidelines in general improved their confidence in the fairness of sentencing; over two thirds of respondents who were aware of the existence of sentencing guidelines (67%) said that knowing that the guidelines existed improved their confidence in the fairness of sentencing at least 'a little'. Understanding of specific cases and considerations for sentencing does appear to have an impact on respondents' perceptions."

Although note that this research also showed inconsistent evidence for whether an understanding of the Sentencing Guidelines and their role in setting sentences led respondents to view the sentence as fair: "While the majority of both respondents overall (67%) and those with some involvement with the CJS (69%), said that the existence of sentencing guidelines improved their confidence in the fairness of sentencing at least 'a little', when they were presented with high level information about guidelines relating to specific scenarios, as can be seen in the questionnaire in Annex 3, the information did not markedly change their views about whether a sentence is too lenient, too tough or 'about right'."

29 www.gov.uk/government/publications/lammy-review-final-report 2017

30 https://committees.parliament.uk/writtenevidence/40680/html

31 Footnote added – the reference is to the Judiciary website

preparation for a PTPH is facilitated by an editable PDF form available on the DCS, ("Digital Case System"). This form is partly filled in by the advocates instructed on the case and then reviewed by the Court at the hearing. That process ensures that all the necessary issues have been canvassed and provides a valuable check on such matters as whether the defendant has been warned of the effect of the timing of any guilty plea. What we propose is that a similar form should be developed for sentencing.

40. At present there are occasionally "Notes on Sentence" prepared by counsel for the Crown in advance of sentence. These set out the basic facts of the offender, the offending, and any sentencing guidelines applicable. They are an extremely valuable aid to the judge engaged in the sentencing exercise although they do not replace judicial reasoning on sentence. In producing the appropriate sentence the judge will apply both the overarching guidelines on sentencing given by the Sentencing Council[32] and any specific guidelines applicable to the sentences. The impact of these guidelines on sentence can be complicated, particularly where there are multiple offences, where the issue of totality must be considered by reference to other defendants, where there is a delay between offence and sentence that materially affects matters such as the defendant's age, and where there are related offences of breach of existing sentences. There are tools on the Sentencing Council website intended to act as support to ensure that the judge weaves through these thickets correctly such as Sentencing Ace, an online form that automatically indicates applicable considerations.[33] In short, both counsel and software tools are used intermittently and inconsistently in the sentencing process to assist judges in coming to their sentence.

41. Instead of the existing approach, we suggest that the development of an interactive form, similar to that generated for PTPH hearings, be developed for sentencing. It would be the duty of counsel in the case to assist in populating it with relevant information. This could be done initially by the CPS and confirmed to be accurate by the defendant or their representative. This information is already provided on the system but in separate documents, for example in the Summary of the Case on sending from the magistrates' court and in the output of previous convictions. It is perfectly conceivable that these could be digitally scraped for relevant information with the right software tool and then manually checked. The form would also seek to incorporate data as to the personal characteristics of both the defendant and the complainant for the purpose of subsequent analysis. The identification of the offences would allow linking to specific guidelines from the Sentencing Council.

42. The final part of the form would be for notation of judicial reasoning. This could be assisted by providing direct reference to the Sentencing Council guidelines. These indicate factors that might be considered when determining harm and culpability. This process would, itself, provide a check on judicial reasoning without constraining it. It is a process that has been gone through recently by Crown Court judges when responding to Sentencing Council research on sentencing decisions for certain offences. The process would also allow direct incorporation of tools like Sentencing Ace, which again provides a rapid check on issues that arise in sentencing such as the impact of the age of the offender and calculation of the appropriate reduction in sentence depending on the timing of any guilty plea. None of it, however, arrogates any part of the actual sentencing decision. It simply assists the judge by collating the relevant information and presenting it in an accessible way.

43. The result will be two forms of output. One will be a complete record of the decision on sentence including data that may be of value for analysis as to issues of the personal characteristics of those sentenced. The other will be a short form note of the factors that have gone into the sentence together with the result.

32 www.sentencingcouncil.org.uk/crown-court

33 www.sentencingcouncil.org.uk/ace

44. In our view that process, for a small initial cost in setting up the form, will overcome the three logistical objections raised to the provision of sentencing remarks in all Crown Court cases:

a. First, this form will assist the sentencing process by delegating some of the information gathering work to others whilst ensuring that all relevant matters have come under consideration. It adds no additional steps and instead automates output.

b. Second, it is a simple matter to ensure that part of the form indicates whether the output of the sentencing remarks includes confidential or otherwise protected information. The automated output could be programmed to redact names or other information where the form is so marked. (In this regard, we note that it might also be possible to provide for a confidential indication that the sentence was modified due to the assistance provided by the defendant to the Crown; with such information only accessible to the Court of Appeal Criminal Division.)

c. Third, the output would not purport to be the judicial sentencing remarks but rather a summary of the factors that featured in the judge's reasoning in giving sentence. Accordingly, there would be no need for the additional step of transcribing the remarks made in court or checking their accuracy. The form would contain the complete official record of the factors that contributed to the sentence and the remarks in court could, therefore, concentrate on key points and on ensuring that the reasoning is given in a form fully comprehensible to the defendant, complainant and interested others.

45. The consequence of the routine capture of this information would be to allow accurate and complete analysis of judicial reasoning in relation to sentence for the most serious offences, namely those made in the Crown Court. It would be a welcome step to assessing if there are any issues of bias in sentencing. It would be an important counterpoint to the focus that sensational cases can obtain because they result in the publication of sentencing remarks when others do not.

46. We submit that this captured sentencing information should be published on the FCL service with the potential to work in tandem with our proposal for a granular search capability. The underlying data sets can be made available to the Office of National Statistics and by request to accredited academics and policy institutes.

47. We suggest that an additional benefit of this aggregated sentencing data will be the impact it has on reporting of cases. As highlighted in the Sentencing Council 2022 Report and discussed in the introduction, media reporting distorts the public view of the sentencing process because they are most likely to report on exceptional cases:

"The most common spontaneous description of sentencing in discussion groups was 'inconsistent', and when probed, this was felt to be rooted in media coverage. It was recognised that the media are most likely to report on exceptional cases – mostly those where sentencing was perceived to be disproportionately lenient – and therefore, these were the examples that came most easily to mind."

48. The summary of sentence will include the facts that the Judge considers particularly pertinent to the sentence. This will even enable the media to understand the particulars of minor sentences within the context of the crown court. Thereby decreasing the distortion that reported cases have had on perceptions of sentencing outcomes.

49. We would expect the impact of these sentencing information reforms to be apparent via the sentencing councils continued surveying.

QUESTIONS ON ACCESS TO COURT DOCUMENTS

Q47 At a minimum, what material provided to the court by parties to proceedings should be accessible to non-parties?

50. In almost all modern civil proceedings it is a requirement on the parties to provide written submissions in advance of the hearing in the form of a skeleton argument.[34] It is a particular requirement to do so on appeal.[35] These Skeleton Arguments provide the basis of the arguments advanced to the Court and provide an invaluable guide for understanding how the parties put their case to the Court. An informed understanding of contentious decisions of the Court is given by understanding how the argument was put and what matters the parties brought to the Court's attention. It is for that reason that precedence is given to the citation of the Official Law Reports because, (emphasis added), "These are the most authoritative reports; *they contain a summary of the argument*."[36]

51. There should be presumption in favour of automatic access to these written submissions. Two matters of concern would arise:

a. First, if these written submissions contained confidential material that should not be disseminated. That may be addressed by a rule of court requiring the parties (a) to identify the presence of confidential material and (b) to provide versions of their argument in redacted form that may be generally disseminated.

b. Second, these written submissions are the intellectual property of those drafting them and ought not to be copied or re-used. That may be addressed by providing an automatic notification of copyright status and limited license to re-use the material only for permitted purposes.[37]

34 See for example Chancery Guide June 2023 at [12.48]

35 See CPR Practice Direction 52C 3(3)(g)

36 *Practice Direction: Citation of Authorities* (2012), [6]

37 *See Exceptions to Copyright* for an overview of the permitted uses

QUESTIONS ON DATA ACCESS AND REUSE

Q51 For what purposes should data derived from the justice system be shared and reused by the public?

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

Q53 Which types of data reuse should we be encouraging? Please provide examples.

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

52. As indicated in our primary submission, data from the justice system needs to be made available in a format that allows the wealth of that data to be analysed. Providing the data under license permits reasonable control over the re-use of the data – ensuring that is used for purposes such as academic study, analysis for policy development and legal education.

53. By increasing the level at which there is granularity to the data, re-use of that data for the purpose of monitoring on the operation of the justice system becomes possible. To ensure that it is used at the system level, rather than as, say, a tool for attack on individual judges or court centres, the license could provide for its use only in aggregate or anonymised form.

QUESTIONS ON PUBLIC LEGAL EDUCATION

Q58 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.

54. The justice system is necessarily complex. It seeks to give nuanced decisions and the ability to be nuanced requires complexity. It is not, therefore, practical to aim for full understanding of the justice system by the public. What is, however, necessary is that they should understand enough not to accidentally interfere with the operation of the justice system.

55. The obvious area where this accidental interference may arise is in the context of criminal cases and public comment thereon. The key message is that a criminal decision should be the result of the evidence and argument presented to the jury in the court room. That this message is not well understood by the public is apparent from the fact that (a) it must be explained to every jury at the outset of trial[38] and, despite this being done, even jury members still breach it.[39] We consider that a greater focus on this specific aspect of the justice system would address a key area where public uncertainty as to the scope, but also crucially the justification, for the rule is lacking.

56. The surveys conducted by the Sentencing Council bear out this perception.[40]

Q60 What do you think are the main knowledge gaps in the public's understanding of the justice system?

57. As we have indicated above, our primary focus is on the public's understanding of sentencing. Not only is this a crucial topic of public concern but it functions as a sometimes inadequate means for understanding the rest of the system. Through a better understanding of the sentencing process, particular sentencing decisions and the overall sentencing practice as represented by aggregated data the public will appreciate that there are limits on judicial freedom of decision, that there is a basis for decisions with which they might otherwise have disagreed or misunderstood, and that particular decisions must be seen in the light of the overall functioning of the justice system. Since sentencing decisions touch on the most fundamental exercise of power by the State over its citizens, namely the liberty of the person, it is the obvious and most important focus for the public.

Q61 Do you think there is currently sufficient information available to help the public navigate the justice system/seek justice?

58. Our submission is that it is not the sufficiency of the information that is lacking: there are ample sources of information available to the public. Currently, the sheer amount of information, the way in which it is ordered and may be accessed, is a barrier to all but professionals and those with access to detailed, professional databases that permit the necessary granular sorting of information.

Q63 Do you think the government is best placed to increase knowledge around the justice system? Please explain the reasons for your answer.

59. The government is the only body able to increase knowledge around the justice system. The media has better and more effective access to the public than the government but is not incentivised to act as a neutral educator of the public on the operation of the justice system. The

38 See for example Crown Court Compendium Part 1 – www.judiciary.uk/wp-content/uploads/2023/06/Crown-Court-Compendium-Part-I.pdf at page 2-4: "Because a jury must decide the case only on the evidence given in court, it is essential that no one on the jury has any personal connection with, or personal knowledge of, the case or anyone associated with it."

39 www.gov.uk/government/news/two-jurors-found-guilty-of-contempt-of-court

40 "The high levels of confidence in understanding of sentencing terminology is consistent with 2018 survey findings. However, qualitative discussions in 2018 found that understanding was far more limited in reality."

judiciary, which is incentivised to do so, is constrained by its requirement to remain, and appear to remain impartial, as well as by its logistical constraints in taking on this role alongside its other functions. In our view, it is part of the responsibility of government, reflected in the oath taken by the Lord Chancellor to protect the Rule of Law, to ensure that the public understands not only what the decision was in any case but also how that decision sits within the body of decisions.

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