Courts and Tribunals Judiciary

Transparency & Open Justice: Opportunities and challenges

Newcastle-upon-Tyne Law Society Annual Lecture 2024

9 May 2024, Newcastle Law School

Mr Justice Nicklin:

Chair of the Judiciary's Transparency & Open Justice Board

1. President, Members of the Newcastle-upon-Tyne Law Society, staff and students of Newcastle University, distinguished guests, it is a real pleasure to return to Tyneside and an honour to be asked to give your 2024 Annual Lecture. As a graduate of this University, it has a distinct feeling of coming home, particularly addressing you in this lecture theatre. I have very many happy memories of this great city and my time studying here.

2. When I graduated in 1992, I was awarded the prize for Trusts and Equitable Doctrines. The prize was provided by the Newcastle Law Society. Winning it came as something of a surprise to me, and my tutor, as it was not a subject to which I had naturally warmed. I had spent most of the year remorselessly deconstructing the subject with my newly honed jurisprudence skills – a subject I really did enjoy. Indeed, deployment of my black-belt jurisprudence on the presumption of advancement in a seminar led to my being summoned to a meeting with my tutor. He asked me to limit my interventions as they were unsettling other students in my seminar group.

3. Returning to Newcastle as a Judge, I am delighted to see the city and the North-East continuing to thrive as an important legal hub, including with the expansion of the Business and Property Courts and the Newcastle Circuit Commercial Court. Next year, I note, the Society will be celebrating 200 years of supporting those who do so much to support the administration of justice in Newcastle and beyond.

4. Given a completely free hand by your President as to the topic of the lecture, I settled upon Transparency and Open Justice: opportunities and challenges.[1] Although this is an area very familiar to me, both in practice as a barrister and since appointment in my career as a High Court Judge, it was particularly timely.

5. Just over a week ago, at the Society of Editors Conference in London, the Lady Chief Justice of England & Wales, Baroness Carr, gave the Keynote Speech.[2] She announced the creation of a new Transparency & Open Justice Board. The new Board will examine and seek to modernise the judiciary's approach to open justice. It will set objectives for all Courts and Tribunals, focussing on timely and effective access in terms of listing,

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[1] I acknowledge – and thank – High Court Judicial Assistant, Andrew Burrell for his assistance in researching the history of open justice and the common law.

[2] https://www.judiciary.uk/keynote-speech-by-the-lady-chief-justice-at-the-society-of-editors-25th-anniversary-conference/

documents and public hearings. To do so, the Board intends to engage fully with a wide range of interested parties to make sure that these objectives properly reflect what should be delivered by a modern justice system. It is a great privilege for me to have been asked by the Lady Chief Justice to Chair this new Board.

6. I should perhaps start by making clear, at the outset, that in delivering improvements to open justice and greater transparency, the judiciary cannot act alone. Many areas, that are critical for the success of the initiative, depend on collaboration with HMCTS and the Ministry of Justice.

7. In this lecture, I should like to consider what I believe the judiciary can offer in seeking to modernise the delivery of transparency and open justice in our Courts and Tribunals. Before turning to the future, and to understand what I think the judiciary can contribute, I think it is important to look back at the history of open justice. It is a history that shows, in my view very clearly, that over centuries, it has been the judiciary that has steadfastly recognised the importance of open justice and judges who have worked consistently to articulate its principles and promote its objectives.

8. Although the Strasbourg jurisprudence has made an undoubted and valuable contribution to the articulation and defence of open justice, the core responsibility for doing so has remained the responsibility of common law judges in England & Wales and throughout the commonwealth. This is because open justice is, first and foremost, a constitutional principle grounded in common law: one that over centuries the judiciary have defined, applied and defended.

9. The centrality of open justice to the proper administration of justice is now recognised in the Sixth Amendment to the US Constitution, Article 6 of the European Convention of Human Rights and Article 14 of the International Covenant on Civil and Political Rights. It has been adopted, expressly, in the constitutions of Commonwealth countries, for instance, in article 21 of the Constitution of India, article 50 of the Constitution of Kenya and article 36 of the Constitution of Nigeria. These important constitutional protections for open justice were not ground-breaking, they reflected a principle already well-established in the common law.

10. Indeed, Sir James Munby, former President of the Family Division, said of Article 6 that:

> "… the legal historian may quibble with the assertion that English procedural law in this respect reflects Article 6 – more correctly, it might be thought, Article 6 in this respect reflects the English common law … — but the key point remains. In this respect, English procedural law and the Convention march hand-in-hand."[3]

11. Certainly, the negotiating history of the Convention reveals that, in 1956, the UK was the driving force behind defining what exceptions to public hearings would be included in Article 6.[4] In 2011, the then Master of the Rolls, Lord Neuberger of

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[3] *R (Zai Corporate Finance Ltd) -v- AIM Disciplinary Committee of the London Stock Exchange plc* [2017] Bus LR 2139 [31].

[4] Council of Europe, "*Preparatory work on Article 6 of the European Convention on Human Rights*" (1956) DH(56)11, available at https://www.echr.coe.int/documents/d/echr/echrtravaux-art6-dh-56-11-en1338886, pp.22-23. Children and other family proceedings were added to the list of circumstances where a hearing could be in private, at the UK's request, better to reflect the position in English law.

Abbotsbury, suggested that Article 6 was "*specifically drafted*" to reflect the common law of England & Wales.[5]

12. It is therefore, perhaps, unsurprising that the UK has a strong track record on protecting open justice before the Strasbourg court. A cursory search of the European Court of Human Rights' HUDOC database suggests that the Court has only once held that the UK has violated the right to a public hearing in Article 6. That was the 1999 case of *Scarth*[6] in which the Court held that a requirement in the old County Court Rules that small value claims must go to arbitration, conducted in private, denied claimants their right to a public hearing.[7]

13. In his book "*Liberty intact: Human Rights in English Law*", Sir Michael Tugendhat, former High Court Judge and a predecessor of mine in the role of Judge in Charge of the Media & Communications List, argued that, in some areas the common law may provide "*greater protection to a right*" than provided by Convention Rights. The example he gave was the principle of open justice, which he argued, "*the common law sets a higher standard than ECHR Article 6*".[8]

14. Whilst today we think of open justice as being permissive - the opportunity to attend and observe proceedings of courts and tribunals – in Anglo-Saxon times, at least where criminal proceedings were concerned, public attendance was for a time compulsory. Freemen were required to attend monthly open-air meetings of their local hundred court.[9] After the Norman Conquest, all subjects were required to attend twice-yearly meetings of the sheriff's tourn. In practice, only some did, and the Statute of Marlborough 1267 finally exempted the nobility, clergy and women from having to attend.[10] Yet they were never banned from attending: rather they would be "*left to their own liberty to do so*".[11]

15. From an early stage, judges recognised the importance to the justice system itself of public attendance at court hearings. When the King's Judges went on circuit in Kent, in 1313-1314, an estimated 1,500 people attended court either to litigate or in answer to a summons.[12] Sir Hervey de Stanton said of those attending that the:

> "… reason of their coming [… was] that justice should be ministered indifferently to rich as to poor; and for the better accomplishing of this, he prayed the community of the

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5 Judicial Studies Board Annual Lecture, "*Open Justice Unbound?*" (16 March 2011) at para 3, available at http://netk.net.au/judges/neuberger2.pdf.

6 (1999) 27 EHRR CD37.

7 There are other domestic cases that suggest that the Human Rights Act has played a role in extending open justice beyond what the common law required at the time. For example, it may have encouraged the opening of more quasi-judicial proceedings, such as professional disciplinary tribunals, to greater public scrutiny: see the comments in *R -v- General Medical Council ex p Toth* [2000] 1 WLR 2209 [15].

8 Oxford University Press, 2017, p.202. An example would be the common law's insistence that interim hearings (which do not determine civil rights and obligations) should be subject to the same open justice regime: see Lewison J in *ABC Ltd -v- Y* [2012] 1 WLR 532 [33]

9 F. Pollock, "*English Law before the Norman Conquest*", in *Select Essays in Anglo-American Legal History* (Little, Brown and Co., 1907), available at https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2081/LegalHistory_1433.01_Bk.pdf, p.91.

10 W. S. Holdsworth, "*A History of English Law*" vol. 1 (3rd edn, Methuen & Co, 1923), available at https://archive.org/details/in.ernet.dli.2015.32453, p.79.

11 Lord Coke, "*Institutes of the Laws of England*" (1681), as quoted in *Richmond Newspapers Inc. -v- Virginia* (1980) 448 US 555, 565.

12 The nobility, clergy, freeholders and representatives of each township and borough would be summoned to attend the court.

> county by their attendance there to, lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare."[13]

In other words, the belief that enabling the public to see that justice was being done, was more likely to ensure that the justice would be longer lasting.

16. Sir Thomas Smith, writing in 1565, noted that the English court's use of oral evidence would seem strange those used to the civil law of continental Europe.[14] Save for the written indictment,

> "… all the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide."

17. Before its abolition by the Long Parliament in 1641, the Court of Star Chamber had become notorious. Used by Charles I to enforce unpopular political and ecclesiastical policies, it became a symbol of oppression to the parliamentary and Puritan opponents of the King and Archbishop William Laud.

18. It is a widely held misconception the Star Chamber sat in private. That is incorrect. Parts of its proceedings were, in fact, conducted in public. Observers sometimes queued from as early as 3am to join the public gallery, though it is reported you could pay the usher to bag a front row seat. Indeed, it was precisely the public nature of the proceedings that contributed to its popularity with the monarch and privy councillors. The publicity garnered by proceedings in the Star Chamber meant that high profile cases sent there would usually ensure that the defendant's misdemeanours were widely publicised.[15]

19. Yet there was much about the Star Chamber that was secretive: very little of the trial actually took place in public. There was no jury, and defendants and witnesses were liable to be questioned privately by court officials.[16]

20. Any review of the modern history of open justice almost invariably starts with the 1913 decision of the House of Lords in *Scott -v- Scott*.[17] This seminal case arose on unusual facts. The appellant, Ms Morgan, was granted a divorce from her husband by the High Court on the grounds of his impotence. The case was heard in private but, following the hearing, Ms Morgan sent copies of the court transcript to, among others, her now ex-father-in-law and sister-in-law. Presumably unhappy that the court's findings about his sex life had been circulated among his family, the ex-husband brought proceedings for contempt of court.

21. In their decision, the Law Lords did not focus on what seemed to be the immediate question for the court, namely, whether Ms Morgan was liable for publishing

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13 Holdsworth, "*A History of English Law*" – see footnote 10 above – p.268.

14 "*De republica Anglorum*" (Henrie Midleton, 1583), pp.81-82, available at https://name.umdl.umich.edu/A12533.0001.001.

15 E. Cheyney, "*The Court of Star Chamber*", (1913) 18(4) The American Historical Review, available at https://www.jstor.org/stable/1834768, p.731.

16 Cheyney, pp.737-739.

17 *Scott -v-* Scott [1913] AC 417.

information relating to hearing in private. Rather, they focused their ire on the lower court's decision to sit in private at all.

22. There are countless quotable passages from the decision. The Lord Chancellor, Viscount Haldane said that the court would only sit in private if there was "*some other and overriding principle*".[18] He identified three: where the case concerned children, people lacking mental capacity,[19] or where "*justice could not be done at all if it had to be done in public*".[20] He included trade secrets within this final category, but said that the burden on a party to fit a case in this group was onerous, requiring them to satisfy the court that "*by nothing short of the exclusion of the public can justice be done*".[21]

23. Lord Atkinson noted:[22]

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."[23]

24. Perhaps the most forthright defence of transparency – and rejection of secret justice – came in the speech of Lord Shaw of Dunfermline. He considered that the Court's decision to be "*a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security*" and accused the Court below of having delivered "*exactly the same result which would have been achieved under … despotism*".[24]

25. *Scott* is also important because it is the first case in this potted history that takes us away from open justice being solely about public attendance at court. Instead, it raises questions about how court proceedings can be communicated and reported to others. It reminds us that open justice is a multifaceted principle that embraces several important aspects.

26. A century ago, the Lord Chief Justice, Lord Hewart stated that "*it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*"[25] With a simplicity of language, Lord Hewart captured two of the essential aspects of open justice. First, the need for the Courts to do justice, which must be the overriding objective, and then for the administration of justice to be open. In a small number of cases, achieving the

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[18] *Scott* at 435.

[19] Viscount Haldane LC's justification for the first two exceptions was that the court was acting *parens patriae*, so these cases were not in "*relation to the public administration of justice at all*".

[20] *Scott* at 437.

[21] *Scott* at 438.

[22] *Scott* at 463.

[23] Later authorities have returned to this point – particularly in the context of applications for anonymity and reporting restrictions prohibiting the identification of parties or witnesses. See e.g. *R -v- Evesham Justices ex p McDonagh* [1988] QB 553, 562A-C; *In re Trinity Mirror plc* [2008] QB 770 [32]-[33] and particularly *Khuja -v- Times Newspapers Ltd* [2019] AC 161 [34(2)] in which Lord Sumption explained: "*the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*".

[24] *Scott* at 476-477.

[25] *R -v- Sussex Justices ex p McCarthy* [1924] 1 KB 256 at 259.

former can necessitate incursions into the latter. For example, not every part of proceedings involving trade secrets could be held in open court, for that would "*destroy that very protection which the subject seeks*".[26]

27. The importance of *seeing* justice done is an essential foundation of our democracy. In most Courts, judges give detailed reasons in public. Sir Michael Tugendhat argued[27] that this was:

> "… in part to persuade the public that the decisions the judges have made are the right decisions. They have to be unelected to be independent, but they account to the public by administering justice in public. One purpose of open justice (as Shakespeare put into the mouth of the King in the *Winter's Tale*) is to put judges on trial. Criticisms of those decisions by the public and in the media would be even more helpful to the public, if the critics reported (or gave hyperlinks to) the reasons that judges give for their decisions…"

To do so, of course, the critics (and others) need to have ready access to those public judgments.

28. To my mind, open justice has four fundamental components:[28]

    a. **open courts**: that the public (including representatives of the media) can access court hearings – this includes physical access to court buildings and (where the facilities are available) remote access to hearings;

    b. **open reporting**: that the public and media can freely report on proceedings held in open court[29], and that any restrictions imposed by the court preventing (or postponing) reports of proceedings (including anonymity orders) must (1) have a statutory basis[30]; and (2) fulfil a legitimate aim, be necessary, proportionate, and convincingly established by clear and cogent evidence:[31]

    c. **open judgments**: that the court's decision (and the reasons for it) should be publicly available;[32] - on this point the interesting issue of 'courts of record' may well need to be considered; and

    d. **open documents**: that the evidence and submissions communicated to the court is available to the public so that they can make sense of proceedings and

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[26] *Scott* at 483, *per* Lord Shaw of Dunfermline.

[27] "*Liberty intact: Human Rights in English Law*" – see footnote 8 above – p.208.

[28] Drawing upon *R (D) -v- Parole Board for England and Wales* [2019] QB 285 [170].

[29] *In re Trinity Mirror plc* [2008] QB 770 [32]-[33]; *In re S (A child)* [2005] 1 AC 593 [30]-[31], [37]; and *Khuja -v- Times Newspapers Ltd* [2019] AC 161 [16].

[30] *Khuja* [18]; and *R -v- Sarker* [2018] 1 WLR 6023 [29(i)]: "*At common law, the court has no power to make a [reporting restriction] of proceedings conducted in open court; any such power must be conferred by legislation*".

[31] *R (Rai) -v- Winchester Crown Court* [2021] EMLR 21 [23]; and *R (Marandi) -v- Westminster Magistrates' Court* [2023] 2 CrAppR 15 [17].

[32] Even where proceedings are held in private, the court's judgment (or at least part of it) can often be published: see e.g. *R (Mohamed) -v- Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2011] QB 218.

the decision of the Court or Tribunal.[33] The importance of this factor is greater in modern litigation because of the increased reliance, in many jurisdictions, upon written witness statements (often standing in place of a witness's oral evidence) and written submissions. As I observed in a case in 2022: "*The availability of skeleton arguments, and witness statements, deployed in open court hearings is essential to any meaningful concept of open justice*".[34]

29. None of these principles is absolute. As noted already, where a sufficiently weighty countervailing factor is convincingly established, Courts and Tribunals may be required to derogate from open justice. There is no doubt that doing justice always has to come first. There is already statutory recognition of the particular vulnerability of children involved in court proceedings in the regimes for reporting restrictions for children and young persons.[35]

30. The former Lord Chief Justice, Lord Burnett, identified several reasons why open justice is important:[36]

> "On a practical level, the public nature of court hearings (and media reports of them) fulfils several objectives: (1) it enables the public to know that justice is being administered impartially; (2) it can lead to evidence becoming available which would not have been forthcoming if reports are not published until after the trial has completed or not at all; (3) it reduces the likelihood of uninformed or inaccurate comment about the proceedings, and (4) it deters inappropriate behaviour on the part of the court (and, we would add, others participating in the proceedings): *R -v- Legal Aid Board, ex p Kaim Todner* [1999] QB 966, 977E–G, *per* Lord Woolf MR."

31. And it is the judges who have continued to develop the common law in relation to open justice. In just the last decade, I can identify five cases – three in the Supreme Court – where the Courts have extended the scope of open justice.

    a. In *Kennedy -v- The Charity Commission*, a majority of the Supreme Court held that open justice applies as equally to quasi-judicial inquiries and hearings as it does to court proceedings.[37] Journalists, and the public, can request documents from inquiries, and if the inquiry refuses, its reasons for doing so can be tested by judicial review.

    b. In *R (CPRE Kent) -v- Dover District Council*, the Supreme Court cited open justice as one of the reasons why a local planning authority must give reasons for its decision to grant planning permission.[38]

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33 In civil proceedings, CPR 5.4C governs the availability of documents from the records of the Court to non-parties. In *R (Guardian News and Media Ltd) -v- City of Westminster Magistrates' Court* [2013] QB 618, a newspaper was successful in appealing its failed application for copies of affidavits and witness statements in two extradition proceedings. The documents had been referred to, but not read out, in open court. The Civil Procedure Rule Committee is currently consulting on changes the CPR in relation to access to documents: "*Revised proposal for new drafting of CPR Rule 5.4C* (2024)", https://assets.publishing.service.gov.uk/media/65ce03a51305490011867aaa/court-documents-consultation.pdf

34 *Hayden -v- Associated Newspapers Ltd* [2022] EWHC 2693 (KB) [32].

35 s.39 Children & Young Persons Act 1933; s.45 Youth Justice & Criminal Evidence Act 1999.

36 *R -v- Sarker* [29(iv)].

37 [2015] AC 455 [124].

38 [2018] 1 WLR 108 [55].

c. In *R (D) -v- Parole Board*, the Divisional Court held that the statutory rule that information about Parole Board proceedings must not be made public was *ultra vires*.[39] The Court held that the Parole Board "*exercises the judicial powers of the state*" and, although its proceedings were conducted in private, the open justice principle required it to release into the public domain at least some information about its proceedings.[40]

d. In *Cape Intermediate Holdings Ltd -v- Dring*, the Supreme Court considered the application of the open justice to requests by third parties for access to documents held as part of the records of the court in civil proceedings.[41] The default position was that – beyond the documents to which a non-party was entitled – the inherent jurisdiction permitted the Court to grant access to skeleton arguments and other documents placed before the court.[42]

e. Finally, last year in *R (Maher) -v- First Tier Tribunal (Mental Health)*, the Administrative Court found that the First Tier Tribunal had acted unlawfully in failing to give public reasons for its decision to discharge a patient from a hospital order.[43] Stacey J said that the tribunal should not "*[jump] straight to the presumption contained in the FTT rules*" that, in the interests of patient privacy, mental health hearings should be held in private. The judge held[44] that Tribunal judges must properly:

> "… engage with the purpose of the open justice principle which is to both assist in justice being done through transparency and also to enable the public to have confidence in the system… The reasons for and against rebutting the presumption of privacy in mental health cases needed to be weighed against the open justice principle as a proportionality exercise for the FTT to undertake when considering whether to exercise its discretion. Without having set out the rationale for the open justice principle the exercise becomes unbalanced.*"*.

32. So, in answer to my original question of what judges can offer in seeking to modernise the delivery of transparency and open justice in our Courts and Tribunals, I think I have demonstrated the judiciary's proven track record for not only shaping and defending open justice in our Courts and Tribunals, as part of upholding the rule of law, but as part of the common law, adapting it for changing circumstances.

33. A specific area in which I think the judiciary can lead on change is the whole approach to transparency and open justice. The Lady Chief Justice and the Board want to move away from regarding transparency and open justice as a 'bolt on'; something to be regarded as additional to the administration of justice. We need a recalibration: to make openness and transparency an essential feature of delivering justice. Many already do so, but every Judge, Magistrate and Tribunal Member should be thinking about the ways in which s/he can promote transparency and open justice when sitting. That can be as simple as ensuring that those people who are watching the proceedings

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[39] [2019] QB 285.
[40] *ibid* [171] and [175].
[41] [2020] AC 629.
[42] *ibid* [44], applying *R (Guardian News and Media Ltd) -v- City of Westminster Magistrates' Court* [2013] QB 618.
[43] [2023] EWHC 34 (Admin).
[44] *ibid* [114] and [116].

can actually hear them, that they have the skeleton arguments to which reference is being made, and can find out the result of the case.

34. We are all familiar, in whatever jurisdiction we practise, with the overriding objective. In each jurisdiction, it represents a touchstone in the delivery of justice.[45] It is, to me, remarkable that in each jurisdiction that I have looked at, the overriding objective is silent on open justice. For example, under the Civil Procedure Rules, except for provision of documents from the Court's records under CPR 5.4C, it is not until you get to Part 39 that you have the first real mention of open justice. It might be thought that this does not properly reflect the importance of open justice. A simple change, but important and symbolic nevertheless, might be to recognise that dealing with cases justly includes dealing with them openly and transparently (subject of course to restrictions that are necessarily and proportionately imposed). These will all be matters that the Board will look at.

35. But I recognise that I am vulnerable to the charge that 'talk is cheap'. It is easy for judges to talk loftily about the importance of transparency and open justice. There is no room for complacency. Each day, on the ground in our Courts and Tribunals, delivery of open justice matters.

36. In October 2022, the Justice Committee of the House of Commons published a report "*Open Justice: court reporting in the digital age*".[46] It is essential reading for anyone interested in understanding threats to the practical delivery of open justice in our courts. The Committee identified several barriers to open justice, including evidence of problems with accessing hearings, including attending hearings remotely.[47]

37. The pandemic transformed the ways in which the Courts were able to conduct hearings. Use of video platforms – whether MS Teams or the Cloud Video Platform – were adopted by the Courts of necessity during the lockdown periods. One of the legacy benefits of the pandemic is that the technology to support remote attendance at Court hearings is now much more readily available in Courts and Tribunals than it was before. Facilities to enable remote attendance offer significant open justice benefits. The evidence submitted to the Justice Committee showed that use of CVP has enabled journalists, and others, to attend and report upon multiple hearings in a way that would have been impossible if they had been required physically to attend court.

38. However, there are several more fundamental problems. First, the technology that we are using in most Courts and Tribunals to support remote attendance by parties and witnesses was never designed to provide a platform effectively to broadcast the proceedings to a large number of observers. The judiciary and HMCTS have been doing their best to harness CVP to enable those who want to observe court proceedings remotely to do so. On a smaller scale, this has generally been successful. But there have been some high-profile cases where the sheer number of people wanting to attend has led to problems. This is frustrating for all involved.

39. Put bluntly, many of these issues stem from the fact that the Courts and Tribunals have never been set up to 'broadcast' their proceedings. They lack suitable equipment to do

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45 e.g. Civil Procedure Rules, Criminal Procedure Rules, Family Procedure Rules, Employment Tribunal Rules, etc.

46 https://committees.parliament.uk/publications/31426/documents/176229/default/

47 Paragraphs 35-49.

so effectively, and it should not be forgotten that there remain statutory prohibitions on such general broadcasting.[48] What we are able to deliver now owes more to emergency measures deployed during the pandemic than to any planned open justice initiative.

40. Finally, even facilitating a handful of people to attend proceedings remotely has resource implications both in terms of availability of the necessary equipment and the HMCTS staff needed to process the requests for remote attendance (which under the current legislation requires approval of the judge[49]). HMCTS staff have many responsibilities to ensure the Courts and Tribunals function properly. It is a matter of record that staff numbers have been decreasing, year on year. Arrangements for remote hearings are an entirely new stream of work for both HMCTS staff and judges. Access to remote hearings and extending any further broadcasting of the Courts are good examples of areas where the judiciary can only work in partnership with HMCTS and the MoJ to deliver better outcomes.

41. Echoing a theme of the Lady Chief Justice's speech at the Society of Editors last week, the Committee noted the decline of traditional court reporting and its effects. Historically, a very important dimension of open justice was enabling the conventional media, through reports of proceedings, to discharge their role as the eyes and ears of the public. The decline in traditional court reporting poses a threat to that. But open justice was never limited to journalists; every citizen is entitled to the same access to proceedings in open court. Developments in society, and in communications, mean that where journalists once sat in Courts, now sit a new breed of court reporters. Often representing or reflecting particular interests, they are providing welcome additional eyes and ears of the public in reporting what takes place in our Courts and Tribunals.

42. I have seen – and I welcome – the hugely valuable contribution to real-time understanding of Court proceedings that can come from someone simply Tweeting or blogging from Court. When we talk about delivering transparency and open justice in our Courts and Tribunals, we must take account of this important new development in the reporting of court proceedings. And it doesn't stop there. Open justice – because it is the right of all citizens – goes wider still than those who want to report on the courts. It embraces all of those who are interested in the work of Courts and Tribunals, including academics and researchers.

43. The Justice Committee noted the suggestions of several of those who had provided evidence:[50]

> "The Public Law Project's evidence says that remote observers need to be able to access the same court documents that they would at an in-person hearing. The Incorporated Council of Law Report for England and Wales suggests that for online hearings it is important that either documents are made available electronically or they are displayed visually online. ICLR submit that online filing would enable better access for reporters, including law reporters, to court documents and skeleton arguments for forthcoming

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[48] s.41 Criminal Justice Act 1925; and s.9 Contempt of Court Act 1981. The broadcasting of the Court of Appeal and sentencing hearings in certain Crown Court takes place as a result of specific authorisation by statutory instrument: see The Court of Appeal (Recording and Broadcasting) Order 2013 and The Crown Court (Recording and Broadcasting) Order 2020.

[49] s.85A Courts Act 2003; The Remote Observation and Recording (Courts and Tribunals) Regulations 2022 (SI 2022/705).

[50] Paragraph 70.

and ongoing hearings. Jonathan Hall KC submits that it should be possible to establish a record of what documents are before a court, so that the media is able to request access to them, whether or not they are referred to in open court."

44. As a matter of principle, it is difficult to argue against any of those proposals. But implementing them would require a step-change in the current approach adopted in Courts and Tribunals. Delivery of such changes would have very significant resource implications. First, as a matter of practicality, not all Courts and Tribunals have digital case management systems. The County Court, for example, is only partly digitised. Second, although some of the rules in this area may well shortly change[51], at the moment the Civil Procedure Rules do not require the parties to file with the Court copies of their skeleton arguments, written submissions or trial witness statements. Unless the Court makes a specific order requiring them to do so, it is up to the parties whether they do file these documents with the Court.[52] Arguably, it should not be a matter of chance whether the Court happens to retain copies of what might be regarded as key documents in a case.

45. Overall, the Justice Committee Report paints a not altogether happy picture of the current delivery of open justice, and I recognise that. In some areas, and on some days, there have been failures to make open justice a reality. For the most part, we get it right, but as the Lady Chief Justice said last week: "*The greatest threat comes not from direct attack on the principle [of open justice], but rather from careless – sometimes inadvertent – failures to protect its ideals.*" She has promised that the judiciary will "*step up, continuing to play our important constitutional role of protecting and promoting open justice as an essential element of the rule of law*".

46. The issues that have been identified show that we must be realistic about what will be required to deliver change in several areas of transparency and open justice. But I am optimistic because there appears to be a large amount of common ground about where there are problems.

47. Following the Justice Committee's Report, in May 2023, the Ministry of Justice published a response: "*Open Justice: the way forward*". It was a call for evidence with a deadline of September last year. It looked at many of the issues identified by the Justice Committee. The Government's response on the call for evidence is awaited, but it is likely to be an important step in the area of transparency and open justice. As the Lady Chief Justice has said, the judiciary looks forward to playing its role in this important work.

48. Consideration of extending broadcasting of Courts and Tribunals will form part of the Board's remit. Currently, any extension of broadcasting to new Courts and Tribunals would require a change in the law.[53] It will be a matter for discussion and engagement, and ultimately it is a matter for Parliament, but one of the things that the Board will be considering is whether the current limitations on broadcasting that apply to Courts and Tribunals the hearings are now an impediment to increased openness and transparency.

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51 See footnote 48 above.

52 *Hayden -v- Associated Newspapers Ltd* [2022] EWHC 2693 (KB) [33].

53 See footnote 33 above regarding the Civil Procedure Rule Committee consultation on changes to CPR 5.4C.

49. Nevertheless, any expansion in broadcasting must be approached carefully. It will be necessary to consider the effect that expansion would have on the parties to proceedings and, particularly, on any adverse impact it could have on the administration of justice, public trust, and confidence in the courts. Proceedings in the Crown Court are very unlikely to be suitable for any significant extension in what can be broadcast. This is simply because the protection of the integrity of trial by jury must be paramount.

50. Increased broadcasting is another area where partnership is required. In her speech last week, the Lady Chief Justice explained:

> "Greater broadcasting of Courts and Tribunals cannot be achieved by the judiciary alone. Changes in legislation, which are of course always a matter for Parliament, will be required and there will be resource implications. This is just one area where investment in the justice system is required, together with long-term planning – a topic that I have not been afraid to raise with government. Whether it be the estate, staffing and resourcing, digitisation and more."

51. Broadcasting is also an area where it will be illuminating and beneficial to consider the experience of other jurisdictions.

52. Some reaction, following the Lady Chief Justice's announcement of the new Transparency & Open Justice Board, was critical that the Board was made up only of members of the judiciary. To that, I say, "*I hear you, but bear with us*". It is not actually correct that the Board is comprised only of judges. I am delighted that a senior representative from the Ministry of Justice will be joining the Board, as observer, and officials from the Judicial Office Communications team are also members. But I accept the broad point that the Board does not yet have any external members. As is clear in the Terms of Reference, we will establish a Stakeholder Group to assist us in our work. We also intend to engage widely on setting our objectives. Finally, the membership of the Board is not fixed. I am confident that, as our work develops, more non-Judicial members will join the board.

53. There is much work to be done and the Board wants to engage fully with all of those who want to help us shape a transparent and open justice system. As I hope I have demonstrated, there are both opportunities and challenges ahead of us, but I believe that the judiciary is ideally placed to play its full role – with others – in an exciting programme of change and modernisation.