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Submission to the House of Commons Justice Committee inquiry to consider the progress of the HMCTS reform programme and the implications of planned changes, particularly in relation to access to justice.

Executive summary

- Access to justice should be – for the protection of those involved as defendants or otherwise as parties in court cases, and to uphold public confidence in the justice system, and for other well-recognised ‘public interest’ rationales – access to open justice.

- It is well-recognised too – including in case law and statute - that the news media has an important role in maintaining the openness/transparency of the justice system, in that journalists when reporting court and tribunal proceedings act as the eyes and ears of the public.

- Though the HMCTS and senior judiciary have stated that proposed reforms are not intended to reduce the current level of openness/transparency of the justice system, some of the reform proposals will – if implemented as planned – definitely reduce openness/transparency, or hinder the journalism which helps underpin it, and some proposals may reduce it.

- In December 2018 the HMCTS began engagement in its Media Working Group with journalists and media organisations about their concerns that the openness of justice will or could be reduced overall by the reform programme, but because that engagement is so recent (e.g. the Group has only met once so far) and so is at an early stage, journalists/media organisations remain unsure of some key detail of the proposed reforms, and are not aware of what exactly is being discussed by key groups among the judiciary/HMCTS to ensure the openness of justice is not reduced by the reforms being planned.

- The HMCTS, journalists and media organisations recognise that some of the proposed reforms could increase the openness of the justice system – but it remains unclear to what extent opportunities to achieve such increase will be seized by the HMCTS as an integral part of its reform programme.

Introduction

I am responding in a personal capacity as a journalist and as a senior university teacher at Sheffield University's Dept of Journalism Studies.

At the invitation of the HMCTS, I became in late 2018 one of the additional members of a Media Working Group as its role was expanded by the HMCTS to be part of ‘stakeholder’ engagement concerning the proposed reforms to the court and tribunal system. I am grateful for that invitation.

The Group’s formation and expansion demonstrates that the HMCTS reform teams want to hear about journalists’ perspectives, including by learning more about the working practices of reporters covering the courts and tribunals. Nothing that I say here should be construed as criticism of that Group, not least because this new focus in its work is, as I say, very recent. Also, the extent of any success it has will depend on the quality of input from its media members, including myself, as well as on the input and responses of its HMCTS members. However, this engagement with the news media in formal consultation has, I feel, begun late in the HMCTS’s development of ideas - and possibly late as regards design of technology - in its reform programme.

I am not a lawyer but worked for 18 years as a journalist, for four daily regional newspapers and one national newspaper. I have reported many court cases.

I have been a co-author of the last five editions of McNae’s Essential Law for Journalists, published by Oxford University Press. The other co-author is Mike Dodd, legal editor of the Press Association. This book is the law textbook/manual most used in UK newsrooms.

I chair the media law examinations board of the National Council for the Training of Journalists (NCTJ), and I am that board’s chief examiner. The board sets the media law syllabus studied by, and media law exams taken by, journalism students at NCTJ-accredited university departments, colleges and commercial training centres throughout the UK. Open justice is a core topic in the syllabus. The copyright in the McNae’s book is owned by the NCTJ. The ethos of the book and of this syllabus is that journalists have a duty to safeguard open justice, including by making challenges in court to invalid or unnecessary reporting restrictions.

I made a written submission about open justice matters to the Committee of Public Accounts’ inquiry into the HMCTS reform programme which was referred to in that Committee’s report. I have endeavoured, below, not to repeat unnecessarily any element of that submission. However, I should here repeat that I know that others will make important points concerning rights of defendants and other parties, the treatment of witnesses and the interests of other 'stakeholders'. I limit the scope of my response to my field - journalism and journalism’s protection of open justice benefits.

It should be noted that I can now draw on details published by the HMCTS about its reform programme which had not been published, or not so clearly published, at the time I made my submission to the Committee of Public Accounts

Open justice benefits and the role of journalists

1. It will be unnecessary to say much at all to the Justice Committee about the societal benefits of open justice. But, for context, I will list briefly the major rationales for open justice.

https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/976/976.pdf
2. The possibility that publicity about any court case will lead to more evidence emerging has been referred to as the investigatory rationale.

3. The scrutiny rationale is that holding proceedings in public helps to ensure that they are conducted appropriately, that testimony is honest, and therefore that just outcomes are more likely. The rights of defendants, claimants and witnesses are in most instances protected best by open justice, whether or not every such person wants it, rather than by a closed hearing. Arguably, those most in need of the protections of the scrutiny enabled by open justice are those who are most vulnerable, including those who do not have lawyers. Society is best protected by just outcomes, obviously.

4. The confidence rationale for open justice asserts that the greater the scrutiny and understanding of judicial proceedings, and the wider the recognition that the possibility of scrutiny exists, the more likely it is that the public will trust that system, so making it more likely that the public will use or co-operate with it, and that people directly affected by judgments will accept that they are just.

5. The confidence rationale is related to a public education rationale regarding openness, which says that good quality information about how courts work educates the public about them, and that the deeper and more widespread this knowledge is, the more robust public confidence in the justice system becomes.

6. A further rationale is that open justice improves a wide range of public policies as it enables the exposure of ‘matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case’.

7. For decades case law, statute and some court rules have recognised the major role played by news media – in coverage of court and tribunal proceedings - in safeguarding for society the benefits of open justice, and that contemporaneous coverage, or as contemporaneous as justice permits, is better than delayed coverage as regards the fullest preservation of the benefits, e.g. to engage the public to read such coverage when the relevant events remain fresh and therefore are most likely to be newsworthy.

8. Open justice developments in recent years have included the landmark judgment in the Guardian News and Media case, which established that the default position in common law is that journalists covering judicial proceedings should have access to case material (e.g. documents) to aid their reporting of cases unless some overriding reason justifies denying or limiting that access.

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4 This statute law, relevant rules, and relevant judgments are covered in chapters 15 and 16 of the 24th edition of McNae’s, published in 2018.

5 R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates’ Court [2012] EWCA Civ 420. This Court of Appeal judgment set a precedent for all types of court. For example, it was cited by an Upper Tribunal judge in Aria Technology Ltd v Commissioner for HM Revenue and Customs, with Situation Publishing Ltd as a Third Party [2018] UKUT 0111 (TCC) when ruling that a journalist should have access to case documents.
Backdrop of decline in number of reporters covering the courts

9. It is well documented that the economic decline of the news media industry means there are now fewer reporters to cover judicial proceedings than there were in previous decades, and that consequently the beneficial effects of open justice may well have been reduced by what research suggests is a major reduction in the news media’s coverage of the courts – for example, a reduction of 40% in the court coverage in regional newspapers.6

10. This reduction makes it even more important for the HMCTS reforms not to diminish media coverage of judicial proceedings – for example, by increasing the practical challenges journalists have to meet in such work - and for the reform process to seize any opportunity to increase or deepen such coverage.

11. It is true, of course, that media coverage of criminal courts has only ever been of a small fraction of such cases, and that – even in better economic times - media coverage of civil, family and tribunals cases has been very limited because of various factors (e.g. case complexity, and the restrictions on reporting evidence as given in family cases).

12. But even though media coverage of judicial proceedings is inevitably selective, there is a ripple effect in that what coverage is produced underlines that there is potential for random or opportunistic – including reactive - media scrutiny in any proceedings open to reporters. That potential helps maintain standards in the justice system, including among prosecutors and in police evidence, and in what state agencies tell tribunals, and therefore helps maintain public confidence in the administration of justice.

Concerns about the impact of the HMCTS reforms on open justice

13. A key proposal in the reform programme is that, when a hearing is to be conducted without there being a physical courtroom,7 journalists and the public can watch and hear these ‘fully video hearings’ live by using ‘observation terminals located in viewing areas inside court buildings’.8 There has been no testing yet of whether journalists will be able to cover ‘fully video hearings’ as well as they can cover hearings in physical courtrooms.9

14. As I stated in my submission to the Committee for Public Accounts, in a physical courtroom a reporter can ask the lawyers, parties or legal advisers when needing to check spellings of names referred to in evidence, or the wording of the charges, or what the

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7 In that tribunals are a form of court, please treat any general reference I make to courts as including tribunals, and to courthouses as including tribunal centres, unless the context means a distinction has to be made.


9 Note that the HMCTS pilot of a ‘fully video hearing’, in a tax tribunal case, did not involve journalists using terminals remotely from the courtroom, because they were in the same physical room as the judge. ‘Putting people at the heart of reform’, page 10.
magistrates’ names are, etc, or to overcome any audibility problem. How can that be done quickly or at all if the reporter is only a passive observer, observing a screen? Open justice also requires that a reporter can - if appropriate - make contact with parties, their lawyers and possibly (after they have given evidence) witnesses or crime victims to ask for comment on or contextual information about the concluded hearing or their experiences of the justice system. In a physical courthouse that approach can be made after the hearing or during an adjournment. Such people may approach the reporter, offering comment, wanting publicity. But if all those directly involved in a ‘fully video hearing’ are at different remote locations, how is the reporter to make that contact easily, or anyone involved who wishes to speak to the reporter do that? Will they even know that a reporter is seeking to cover the case? They presumably will not know who is watching at the terminal. How in these circumstances is the reporter going to be able - from the ‘terminal’ – to exercise rights under court rules to query or challenge an invalid reporting restriction, or be notified that a restriction is being sought? These are questions which are as yet unanswered by the HMCTS in what is proposed for its reforms.

15. If the public and reporters are to share access to the same terminals, what happens if there is a dispute about who has priority in such use, e.g. about which hearings will be ‘watched’?

16. If the public and reporters are to share the same ‘viewing area’, this could lead to tension which does not occur when reporters are on the press bench of a physical courtroom and members of the public – e.g. relatives of a defendant in a criminal case – are in the courtroom’s public gallery. As I stated in my submission to the Committee for Public Accounts, journalists are sometimes the subject of threats of violence made in the vicinity of a courtroom. Sharing ‘a viewing area’ with the public could increase that risk, even if court staff are present, because there will be no magistrate or judge there.

17. The HMCTS’s radical programme of closure of hundreds of courthouses may well have been a factor in reduction of media coverage of criminal courts, in that a regional or local media organisation faces more cost to send a reporter to a court if it is more distant than the closed courthouse. Some counties now only have one magistrates’ court.

18. The HMCTS proposals include there to be an extension of the range of criminal cases dealt with in the single justice procedure (SJP), and therefore an increase in the number of such cases. Unless the defendant opts for hearing in a physical court, or the magistrate decides such a hearing is appropriate, the media cannot know of the evidence or mitigation in such cases, or reasons for the level of any punishment, in that the media is only told the charge and the outcome. To increase the number of such cases would be a further, radical reduction in open justice. It is also proposed that for some types of SJP case, a defendant who admits the offence will be fined in an automatic, online process with no magistrate being involved. The SJP procedure, for any defendant pleading guilty, offers an opportunity to escape public scrutiny of the detail of their wrongdoing, and permits only limited media scrutiny of the process as a whole. It should be remembered that, although any new tranche of SJP cases may be minor cases, opportunistic media coverage of these types of case does occur on occasion now in physical courtrooms, and can contribute to debates on policy. For example, one of my journalism students last year covered (in coursework) a rail fare evasion case at Sheffield magistrates’ court, when the defendant – who was an asylum seeker, and

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Putting people at the heart of reform. Response to PAC recommendation 2’, at paras 91 and 92
therefore impoverished because public policy meant he was unable to take up paid work – offered mitigation that he got on trains without a ticket in order to stay warm.

19. Also under consideration in the reform programme in criminal cases is that the allocation decision in some either-way cases should be ‘taken online’ and that other case management could be conducted online or by a ‘fully video hearing’.\(^{11}\) If ‘taken online’ means that there would be no hearing at all, then how will the media know what was said in the allocation process or in ‘online’ case management? Although at present reporting restrictions prevent full, contemporaneous reporting of allocation hearings in almost all such proceedings, and similarly restrict the reporting of other types of pre-trial hearings, a reporter can attend allocation hearings, and therefore may be able to take notes at this early stage of the case of some detail of the alleged offence(s) and of any previous convictions the defendant has, and may glean detail from case management discussions in pre-trial hearings. This means that, if later there is a guilty plea, that detail can be reported then, and the public does not have to wait until the sentencing hearing to hear – for example - some detail of how the crime was described in court.

20. Also, there is an HMCTS aim that, subject to legislation, a defendant accused of an indictable-only offence will make his/her first appearance in a court at Crown court, rather than, as now, at the most local magistrates’ court.\(^{12}\) If this proposal becomes law, it could – because of the increased cost for local media organisations to cover the more distant Crown court – reduce the number of such preliminary hearings which are attended by journalists (or indeed by members of the public in the locality of the alleged crime). That means the defendant will not have as much protection from the open justice principle. Also, for a community to know - as far as reporting restrictions allow – contemporaneously what happens when, say, an alleged murderer first appears in court is important. Such a report provides assurance that the justice process is underway. In some instances the police may produce an online report of such an appearance. But the reform proposal could mean that the only published report of such a first appearance is controlled by the police, an organisation directly involved in the case. Also, a local reporter attending a preliminary hearing can - as I have described above - start to note detail of what is alleged in the case, which may be illegal to publish contemporaneously but can be published later quickly if there is a guilty plea. In some cases what is said in a preliminary hearing becomes pertinent after an acquittal, e.g. if the defendant or their lawyer alleged impropriety by the police in that preliminary hearing but not at the trial. If a reporter is able to attend such a preliminary hearing, there is the option of publishing that allegation, in the public interest, after the acquittal.

Technological opportunities to increase the openness of justice

21. The HMCTS has decided there will be more closures of courthouses. As the proposal is – as regards ‘fully video hearings’ – for ‘observation terminals’ to be sited in the remaining courthouses, it is unclear how overall the introduction of ‘fully video hearings’ will offset the detrimental effect of court closures as regards media coverage of proceedings (or help members of the public from the locality of closed courthouses to observe proceedings). If the proposal were to become more radical - that accredited journalists could use their own


\(^{12}\) ‘Putting people at the heart of reform. Response to PAC recommendation 2’, at para 99
computers, in a newsroom or their office, to report cases through using such an ‘observation’ channel - that may increase, in particular, media coverage of civil and tribunal cases.

22. Is there any reason why accredited journalists should not have access, for every criminal case in which they have a professional interest, to that part of the Common Platform which is the prosecution’s summary of the alleged offence(s), subject to any reporting restrictions which apply to preliminary hearings or which already apply or are indicated as being sought as regards the identification of individuals? This summary could, at the very least, inform news media decisions on what cases to cover later at the trial or sentencing stage, and so may lead to more coverage, in that the newsdesk can be surer which trials or sentencings will be the most newsworthy, and so worth resourcing in coverage. Also, should the defendant plead guilty to all charges, could it be allowed at that stage for that prosecution summary to form the basis of a news report, if no other consideration should legally or ethically prevent this? It seems to me that the possibility of some regulated, journalistic access to the Common Platform, including to defence/mitigation submissions, and to any summary it holds of a case’s outcome, should be explored as a possible means of increasing media coverage of cases in an age when there are fewer reporters to attend court.

23. Could journalists have access in civil and tribunal cases to the digital record of evidence, case management decisions, etc, to be reported as the case proceeds, subject to any safeguards - for example, as regards the privacy of parties if there is sensitive, medical information? In civil cases, at present journalists must write to the court for access to the ‘statement of case’, under Civil Procedure Rules. And in tribunal cases, they must apply to the tribunal for access to case material. In my view, the greater access afforded to journalists to case material in these jurisdictions, the more likely it is that more cases will be covered by the media. As I say in para. 8 above, the default position in law is now that there should be such access.

24. Has the HMCTS considered what happens abroad as regards journalists’ access to case material, e.g. the PACER system in the USA?

Opportunities for further engagement of journalists as ‘stakeholders’ in the reform process

25. In reading HMCTS publications to research this submission, I have seen references to various working groups which seem likely to have considered or are considering open justice matters. For example, there is an HMCTS ‘open justice group’ 13, a Video Hearings Group, and a group which has discussed what changes may be needed to civil court or tribunal rules.

As far as I know, journalists and media organisations have had no direct input into the discussions of these groups, and are not aware of any decisions those groups have made about open justice matters. This is something I hope to raise as the Media Working Group develops its work. But it may be that the Justice Committee might want detail of what all such judicial or HMCTS groups have discussed in regard to open justice.

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