OPEN JUSTICE: COURT REPORTING IN THE DIGITAL AGE
A CALL FOR EVIDENCE

SUBMISSION OF THE MEDIA LAWYERS ASSOCIATION

A. Introduction

- This submission is provided on behalf of the Media Lawyers Association ("the MLA"). The request for evidence raises the fundamental question of the application of the open justice principle in the social media age. It raises significant issues about public and media access to court proceedings.

B. The MLA

- The MLA is an association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters, and news agencies. A list of its members is set out in an annex to this submission. The MLA exists to promote and protect freedom of expression and the right of everyone to impart and receive information, ideas, and opinions.

- The MLA engages in public consultations on matters that affect the media including proposed legislation impacting freedom of expression.

- It also intervenes selectively in legal proceedings where principles relating to open justice are at stake and has substantial experience of third party interventions before the Courts. The MLA and its members have provided submissions to assist Courts at every level, from magistrates' and County Courts to the Supreme Court, in understanding issues relating to open justice, access to Court material, and anonymity.[1]

- The MLA welcomes the opportunity to respond to the consultation. In addition, it recognises the positive developments that have been taken in open justice in the last decade, including: CPS media protocol[2], Changes to the Criminal and Civil Procedure rules, Tweeting from court[3], the HMCTS general guidance to staff on supporting media access to courts and tribunals[4], the HMCTS media

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[1] See, amongst many other examples, the anonymity appeal in *C v Secretary of State for Justice* [2016] 1 WLR 444, the key case on access to Court material, *Cape Intermediate Holdings Ltd v Dring* [2020] AC 629, and the upcoming appeal on reporting criminal allegations, *Bloomberg LP v ZXC* (UKSC 2020/0122).

[2] https://www.cps.gov.uk/publication/publicity-and-criminal-justice-system

[3] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/996681/HMCTS314_HMCTS_media_guidance_June_2021.pdf

working group on issues relating to reporting the courts, and the Coroner's media guidance No. 25[5].

- The MLA recognises these initiatives have been largely successful. There is an increased sense of cooperation and understanding between the relevant departments and the media on issues around reporting and the courts. Whilst progress has been made, there is more work to be done and key issues which occur across the board that require consideration in order to facilitate open justice.

C. Summary

- In summary, key to change is investing in a central digital way for journalists to access expeditiously information

    i. about court hearings (the listing of);
    ii. documents relating to court hearings (orders); and
    iii. documents arising out of court hearings (skeleton arguments, pleadings, indictments).

- One of the main problems is the inability to access expeditiously court orders made in the courts. In 2021 it is surprising that journalists and news outlets cannot access a database to find out what orders there are. This is an area which really needs to be addressed urgently.

- This can be achieved by a database that is accessible to recognised journalists but not the public. The MLA are conscious that the costs of implementing such a system has previously been cited as a hurdle to implementation. However, given the speed at which the courts have developed to accommodate changes required during the pandemic, we consider it is something which should now be achievable or at the very least given greater consideration.

- We also contend that there should be a "Reporter's Charter" in the courts emphasising the importance of open justice and setting out basic standards that reporters can expect at court:

    - A designated place to sit in the court
    - Access to information: when a case is listed, where and when and the names of the parties and in criminal cases the charge and in civil cases the cause of action
    - Access to reporting restrictions in a case
    - Access to Wifi at court
    - Access to documents in a case
    - Right to make representations to the court
    - Right to access the judgment in a case

[5] https://www.judiciary.uk/wp-content/uploads/2016/10/guidance-no-25-coroners-and-the-media-1.pdf

- It is vital that the justice system embraces modern methods of communication. Greater progress should be made in the area of broadcasting court proceedings. Although there have been some developments in this area, the pace of change is very slow. The issue of filming sentencing in Crown Court has been passed by Parliament but is not yet implemented. Areas which are suitable for broadcast and should be implemented: filming in the High Court, sentencing in magistrates courts, filming some areas of a coroner's inquest – for example recommendations made by the coroner. Developments in this area have so far been successful – for example filming in the Grenfell Inquiry and other inquiries (including showing witnesses) and filming in the Supreme Court. Much more could be done in this area.

D. How the media's coverage of courts has changed, and what the implications are for open justice

- The internet plays an increasingly important role in providing information to members of the public, at a time when financial pressures on more traditional sources of media are higher than ever. The media organisations to whom MLA members provide advice have popular websites. The majority of their journalists also maintain a presence on social media.

- This reflects the reality of how the public now accesses information. The Reuters Institute for the Study of Journalism at the University of Oxford carries out an annual review of 36 markets around the world, together with additional qualitative research. Its most recent "*Digital News Report 2021"*[6] suggests that that:

  a. The reach of local and national newspapers fell by 10% in 2020.

  b. More than 2,000 staff across the UK's national and regional press lost their jobs as a result of the COVID-19 pandemic.

  c. Digital access to media organisations has increased. The *Telegraph* and the *Times* now have around 400,000 digital subscribers. Around 900,000 people regularly pay for access to online journalism from the *Guardian* (via a combination of subscription to apps and recurring donations). Despite the fall in use of print media, the online sites of media organisations like BBC News, *The Guardian*, Sky News, *MailOnline*, *The Independent, The Telegraph, The Sun*, and local and regional newspaper websites attract significant proportions of market access.

  d. Social media companies now provide news coverage in the UK. *Facebook* began its news service in January 2020 and *Google* also licenses news content.

  e. The most popular source of news in the UK between 2013 and 2021 was "*Online (inc. Social)"*, which was used by 74% of the market. 41% of the market obtained news through social media, alone, and 22% share news via social media, messaging, or email. Only 15% of the market obtained the news solely through print media.

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[6] "*Reuters Institute Digital News Report 2017*", at pp.61-2. Available online at: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf

f. Internet penetration has reached 95% of the population. 68% have access to a smartphone.

- In its "*Digital News Report 2017"*, the Reuters Institute for the Study of Journalism suggested that only 18% of those surveyed in the UK said that social media can be trusted to separate fact from fiction. This compared with 41% for news brands.[7] By its 2021 report, the Reuters Institute reported that only 6% trusted news on social media, which compared with figures above 50% for brands such as BBC News, ITV, Channel 4, the *Financial Times*, Sky News, *The Times*, *The Independent*, and *The Guardian.*

- Not every member of the public will be able to attend trials, including in local courts and tribunals. Physical access to courts and tribunals became all but impossible during the COVID-19 pandemic. At a time when physical access to court hearings is being reduced, there is a heightened need to encourage, rather than discourage, public access to court proceedings through court reporting on digital media.

- The MLA is committed to facilitating open justice. Open justice is a constitutional principle that stretches back to the fall of the Stuart dynasty.[8] "*Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions*."[9] There is good reason for the repeated affirmation of the importance of open justice, as the Lord Chief Justice recently summarized:

  > "*(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)*".[10]

- The media helps to ensure that each of these principles remain a reality. It acts as the "*eyes and ears of the public"* in court proceedings across the country. It also recognizes the need to do so responsibly. Hence, as more and more people look to social media for information, media organisations seek to use social media and digital media to improve their digital footprint and to ensure that their information is reaching its widest audience. This is not just a matter of the public's right to know; it is a commercial imperative.

- Hence the media has sought to provide direct access to the public to court proceedings in way that is contemporaneous, compliant with any reporting restriction orders, and accurate. This has included, amongst other examples,

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[7] "*Reuters Institute Digital News Report 2017"*, at p.55.

[8] *Re BBC* [2015] AC 588, per Lord Reed, at 600C-G.

[9] *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, per Lord Sumption, at §13.

[10] *R v Sarker* [2018] 1 WLR 6023, per Lord Burnet CJ, at §29(iv).

live reports on social media, which will often contain more detail and colour than a compiled report at the end of a Court day.[11]

- One such area is the developments as regards the use of cameras in courts. Some progress has been made, for example in the Supreme Court and the Court of Appeal. However progress is very slow – for example, we are still waiting for the implementation of the law that has been passed in parliament to allow sentencing in the Crown Court to be filmed. Noticeable that the issue of filming in courts and inquiries has not led to any significant problems.

- Overall, therefore, at a time when public trust in social media news is low, the focus of the Committee should be on ensuring that media organisations can continue to publish Court coverage that the public can access and trust.

E. What barriers are there are to the media obtaining information from the courts? What could be done to make information on court cases more transparent and accessible?

- Despite the importance of facilitating open justice, the experience of media organisations is that it is expensive and administratively cumbersome to find out information. The following four examples exemplify this concern. For each barrier, the MLA seeks to identify a solution.

- First, it is often difficult to know what cases will be listed where and when. There is no central repository of court lists. Different courts have different approaches. The Royal Courts of Justice produces a daily cause list around 4pm on the day before a hearing is due to take place.[12] However, it is not always a complete list of the hearings that are listed and information about hearings (such as which witnesses will be called in trials) is sparse. The Old Bailey provides a final daily court list online every day at 10am, by which time many hearings will already be underway. Coroners' Courts provide information in different ways in different parts of the country (depending on which local authority funds the local Coroner).

- Whilst the MLA appreciates changes can be made very late in the day to court lists, if advanced notice, the day before a hearing, was common practice for all courts, it would help media organisations to be able to make enquires to attend the hearing (if remote) or attend more hearings and increase open justice. By way of example, the current inquests into the deaths caused by Stephen Port provide an example of good practice. The court website is regularly updated, in advance, with details of the witnesses to be called given, transcripts of evidence immediately made available, and associated court documents hyper-linked.[13]

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[11] See, for example, the live tweets of the journalist, Nick Wallis from the *Post Office* litigation (https://www.postofficetrial.com/2018/11/day-1-morning-session-tweets.html) and of the libel claim in *Depp v News Group Newspapers:* (https://twitter.com/nickwallis/status/1280787530275786752).

[12] https://www.gov.uk/government/collections/royal-courts-of-justice-and-rolls-building-daily-court-lists

[13] https://www.eastlondoninquests.org.uk/hearings/

- It is understood that a "*Courtsdesk"* software is currently being trialled, but its success will depend on the extent to which each individual court engages with it. The MLA respectfully suggests that the Department of Justice should take the initiative to modernize the system and to provide a centralized repository of court lists (and associated court documents). Companies House provides an obvious template for a similar database that is publicly accessible and easily searchable. This has brought with it real public benefit for both journalism and the fair running of business.

- Second, it is difficult to get information about what can and cannot be reported about court proceedings. Reporting restriction and anonymity orders are frequently made by courts in every jurisdiction. However, once again, practice varies significantly between different Courts.

- Media organisations are not often put on notice of applications for such orders. Applications for orders in civil courts are usually accompanied by an explanatory note setting out the reasons why anonymity is sought, a witness statement justifying the need for any such order, draft orders, and (often as a confidential annex to the draft order) the name of the person seeking anonymity.[14] In certain circumstances, such applications can be sent to PA Media, which operates the "*Copy Direct*" injunctions alert service,[15] which enables applications to be circulated to media lawyers to enable them to respond.

- However, the practice of advanced notice is often not followed, with the result that reporting restriction orders are made without media representations. Strong guidance should be incorporated into procedural rules of all courts and tribunals that require advance notice to the media of reporting restriction applications.

- As noted in the Coroner's Guidance No.25 advanced prior notice "gives the opportunity for the press to make representations should they wish. It also avoids late applications by the media at the inquest which the coroner may find disruptive.[16]"

- Once reporting restrictions are made, different courts and tribunals provide them to the public in different ways. Some tribunals, such as police disciplinary hearings or Coroner's Courts, post such orders on police or local authority websites, without clear information as to what is being restricted or why. Some courts, including Crown Courts, simply physically post a reporting restriction order outside a court room, with the result that only journalists who travel to the hearing in person can see them. Once again, the Department of Justice could immediately improve the responsible reporting of courts by providing a centralized repository of reporting restriction orders for media organisations to access.

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[14] *Practice Guidance (HC: Interim Non-Disclosure Orders)* [2012] 1 WLR 1003.

[15] *A Healthcare NHS Trust v P* [2015] EWCOP 15 (Fam), in which Newton J summarized the "*Copy Direct"* service, at §§25, 34, and 61-2.

[16] https://www.judiciary.uk/wp-content/uploads/2016/10/guidance-no-25-coroners-and-the-media-1.pdf

- Third, it is difficult to get information about specific court proceedings themselves:

    a. Depending which court or tribunal journalists attend there appears to be very little uniformity about how they can access the information required, especially in relation to orders which may be in force.

    b. Court staff often appear reluctant to answer telephone queries. When requests are sent by email, it is the experience of media organisations that perhaps due to the volume of emails received, such requests often disappear into the general enquiries inbox and it may be weeks before a response is received. It is suggested that courts could have a dedicated inbox / phone line for press enquiries, which would be dealt with by staff with appropriate experience.

    c. It can be difficult to know how to access virtual hearings (as set out further, below) and there have been occasions where hearings have been turned into remote hearings at the last minute leaving the journalist unable to attend.

    d. When hearings occur by way of remote link, journalists are unable to check information with the lawyers in the case or with court staff. This has been a particular problem during the COVID-19 pandemic. This can lead to accuracy issues where they are unable to check spellings and details which they would be able to do if face to face in the court building.

- Fourth, it is difficult to get documents and information from court hearings. The courts have been clear that, where documents have been placed before a judge and referred to in the course of proceedings, the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong.[17] This ruling reflects the reality of modern court proceedings. Without access to the documents before the court, proceedings can quickly become meaningless to journalists. Oral argument is frequently based on references to documents (such as skeleton arguments, witness statements, and documentary exhibits). Unless the press can see such documents, oral argument is difficult to follow. In addition, having the documents provides greater accuracy for example, spelling of names of counsel, especially where hearings are remote.

- Despite the clarity of this ruling, and the importance of such material to court reporters, it is practically difficult and expensive to obtain such material from courts. It is the experience of members of the MLA that:

    a. Such documents are rarely provided in advance, with the result that it is necessary to try to obtain them during breaks or after court hearings are finished. There are rare examples of good practice, such as the Undercover Policing Inquiry, which recently made the document bundle available for inquiry hearings in advance of the hearings commencing.

[17] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, Toulson LJ, as he then was, §85; endorsed by the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2020] AC 629, §§38 and 44.

b. Although the parties should provide such materials promptly, it is frequently necessary to make a formal application to court (with the associated expense) and even to attend contested court hearings to resolve such applications. Such hearings are often not even listed until many months after a hearing. First-instance courts can often misunderstand this area of the law and take an unduly narrow approach to the provision of material. Such expensive and time-consuming applications should not be necessary, particularly in cases in which journalists are entitled under the procedural rules to automatic access to documents (such as where witness statements are relied upon in civil trials).

c. Even if such applications succeed, there is rarely a system in place for documents to be physically provided to journalists. Some courts charge high sums of money for access to photocopiers. Or else journalists are required to ask the parties' lawyers to provide electronic copies.

- The MLA suggests that digital technology could be much better utilised to enable access to documents before and during hearings. Requests from journalists ought to be promptly determined and granted. It should be possible to apply for such materials quickly and without a court fee (such as by way of e-filing). Documents should be provided in electronic form or displayed on screens that the media can access (as occurred in the recent Fishmonger Hall inquests).

F. The implications of social media for court reporting and open justice

- As set out above, the creative use of social media by journalists can facilitate open justice. The use of social media to provide information about court proceedings to the public is increasingly important given: (a) the proportion of the population who only obtain information through social media, and (b) the low level of trust in news provided on social media. These factors make it all the more important for the Committee to facilitate responsible court reporting on social media.

- Some recent statements (including from the Attorney-General[18]) have warned about the potential for prejudice to court proceedings caused by social media. The reality of such a risk can be over-stated. Indeed, it is unlikely that a jury will be realistically affected by social media commentary given that:

  a. A key tenet of the open justice jurisprudence is that juries and criminal courts can be trusted to perform their duties with diligence and care. This is for two reasons: juries have an instinctive urge to act with fairness and juries' minds are focused by the trial procedure.[19] The importance of trusting a criminal jury to comply with directions made by the trial judge has been underlined repeatedly.[20]

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[18] https://www.gov.uk/government/news/attorney-general-launches-new-campaign-to-combat-contempt-of-court-online

[19] See, for example, *Re B* [2007] EMLR 5, §31.

[20] *Attorney General v ITN and Others* [1995] 1 Cr App R 204; *R v Dobson* [2011] EWCA Crim 1255; *Ex p The Telegraph Plc* [1993] 1 WLR 980; *Montgomery v HM Advocate* [2003] 1 AC 641, at 674.

b. The Court of Appeal expects judicial directions to be made to a jury to cover the risk of internet research[21] and such directions are now commonplace.[22] The Court of Appeal expects a jury to comply with such directions.[23]

c. Juries' minds are focused through the trial process. This focusing effect is not a "*polite fiction*": "*… listening to the evidence and hearing it being tested in cross-examination in the immediacy of the court environment will be likely to focus the minds of jurors on what they are hearing in court. This is more likely … to dispel notions that they may have picked up from reading prejudicial material, rather than to reinforce preconceived views.*"[24]

d. It is not simply a common law principle that juries should be trusted. Sections 71-73 Criminal Justice and Courts Act 2015 have also introduced specific criminal offences for jurors who step out of line by carrying out research, share that research, and engage in other prohibited conduct. There is also specific statutory power that can permit a Judge to direct the surrender of electronic communications devices for the duration of a hearing. These criminal offences provide further protection against the risk of jurors seeking out prejudicial comment on social media.

e. Even if comments on social media postings are highly abusive and deplorable, content is not the same as effect. The latter has to be assessed in context by such matters as reference to what is already in the public domain (in the case of witnesses especially in the community in which they live), the status of the commentators, the nature of the comment, the effect of the trial process on those taking part, and judicial historical experience. Social media postings are, in reality, often no more than "*pub talk*".[25] It is likely to be immediately apparent to any reader of social media comments that people are just saying the first things that come into their head and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious.

- Frequently, assertions of risk of social media prejudice on criminal proceedings are linked to a single case, in which a jury was discharged after commentary on local newspaper websites: *R v F and D* [2016] 2 Cr App R 13. However, properly understood, *F and D* was a case on particularly extreme facts,

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[21] *R v Thompson* [2010 EWCA Crim 1623.

[22] See, amongst many other examples, *The Guardian: "Phone-hacking jury warned of prejudice risk in trial of Brooks and Coulson"*, 29th October 2013.

[23] See, amongst many other examples, *R v Coutts* [2006] 1 WLR 2154, at §§26 and 97, *R v Abu Hamza* [2007] QB 659, at §90, *R v C* [2017] EWCA Crim 557, at §24; *In re Guardian News and Media Ltd* [2016] EWCA Crim 58, at §§47-59.

[24] *Fraser v HM Advocate* [2013] HCJAC 117, §29.

[25] *Smith v ADVN Plc* [2008] EWHC 1797 (QB), per Eady J, at §17; *Clift v Clarke* [2011] EWHC 1164 (QB), per Sharp J, as she then was, at §36. If further authority is needed, see the Supreme Court's recent assessment of *Facebook* publications in *Stocker v Stocker* [2020] AC 593, at §§41-46: "*this is a casual medium; it is in the nature of conversation rather than carefully chosen expression … People scroll through it quickly. They do not pause and reflect.*"

involving young and vulnerable defendants and witnesses. Extreme facts tend not to be useful starting points for general legal reform.

- Even if there is a risk of such social media commentary, the answer to such a problem is not to place further restrictions to the media's ability to report proceedings openly. There is an increasing trend in first-instance criminal trials for judges to make reporting restriction orders against media organisations with the aim of trying to regulate social media comment by members of the public. Such orders are often unworkable, disproportionate, and in breach of the open justice principle. They are also aimed at the wrong target. They punish responsible publishers for the irresponsible conduct of members of the public. They prevent lawful conduct by media organisations, and fail to engage with the social media organisations who host the prejudicial postings in issue.

- Alternative solutions could be:

    a. To combat and punish social media users who step out of line.

    b. Involve social media companies. They could be encouraged to regulate such posts. The MLA is concerned that its members face drastic reporting restriction orders at a time when the focus of the criminal Courts is not on the social media websites who are actually responsible for the publication and deletion of prejudicial comments on those websites. In the same way as newspapers and broadcasters regulate comment pages on their websites, social media websites are likely to have the ability to find solutions to these problems (such as, for example, the use of filters on their sites to identify commentary on ongoing court cases, geoblocking or temporarily blocking certain postings, and providing information about postings on their platforms which might have breached Court rules).

G. The effect of court reform and remote hearings on open justice.

- Remote hearings bring advantages for open justice. They make it easier for journalists to attend hearings across the country without needed to physically travel there. However, if they are to become more commonplace after the COVID-19 pandemic, the MLA respectfully suggests the following improvements to current practice:

    a. Firstly, as set out above, better, centralized court lists should be provided to enable journalists to know what hearings will be heard, when.

    b. Secondly, clear information should be provided to enable journalists to understand how to obtain access to virtual hearings. Currently, access depends on journalists being given links by court clerks, whose contact details are in some instances not readily available. There have been occasions where journalists have emailed for access in advance but not had a reply. Delay or limited access to remote proceedings has led to significant difficulties in accessing public interest proceedings.

    c. Thirdly, there should be a presumption that journalists are allowed access to virtual Court hearings where the parties are, themselves, attending by way of virtual link. In many Courts, there is a rule that journalists must attend even virtual hearings in-person, even where the parties are attending by way of electronic link. What is the justification for requiring a

journalist to travel (sometimes significant distances) to attend a virtual hearing in a Court room? This has led to previous Court challenges which should not have been necessary.[26]

d. Fourthly, the system must work so that the parties are audible and journalists are not straining to hear what is being said during the course of the proceedings.

e. Fifthly, steps should be taken to ensure that alternative means of access are available if hearing links break. Current practice suggests that, if a hearing link stops working, a court clerk may not re-admit a journalist to a hearing for some time.

H. Next steps

- The MLA has worked collaboratively across courts and tribunals on the issue of open justice and we would welcome the opportunity to discuss and explore further the challenges and offer assistance to promote open justice in the digital age.

MEDIA LAWYERS ASSOCIATON

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[26] See, for example, the pre-action protocol letter sent by Dr George Julian: https://www.georgejulian.co.uk/wp-content/uploads/2021/05/2021.05.10-Pre-action-letter-redacted.pdf