



Law Society
of Scotland

Consultation Response

Open Justice: the way forward

September 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Ministry of Justice consultation: *Open Justice: the way forward*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

Whilst we understand that this consultation applies predominantly to courts and tribunals in England and Wales, we do note that the proposal will apply to reserved Tribunals, and specifically to the Employment Tribunal in Scotland. We have therefore responded to this consultation with a specific focus on the current position in and the implications for the operation of the Employment Tribunal. Our comments below should be read in that context.

¹ [Open Justice: the way forward - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

Consultation Questions

Open Justice

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

In our view, the principle of open justice means that the general public should be able to access and understand the legal processes which govern our justice system. This involves ensuring that proceedings can – as far as reasonably practicable – be accessed by individuals. Further, that the general public understand how the system operates which gives them comfort that justice will be done within that system.

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

Our view is that independent judicial powers are not always clear to the public. The judicial system in the United Kingdom is complex and spans three distinct legal jurisdictions. Further, we have a wide range of different courts and tribunals whose individual jurisdictions and rules are not always obvious to members of the public.

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

Whilst we appreciate that various attempts have been made to increase the openness and transparency of the justice system, we believe there is still room for improvement. Advances in technology and the law have enabled hearings to be accessed remotely by members of the public who may not have previously been able to travel to a court or tribunal.

However, improvements may still be made in relation to the transparency of the system. The rules which govern access to courts and tribunals can be complex and vary between courts and tribunals.

4. How can we best continue to engage with the public and experts on the development and operation of open justice policy following the conclusion of this call for evidence?

Regarding engaging with the public, developing a range of forms of communication taking into account the varying and diverse needs of all aspects of society is needed. This includes considering how best to engage different sectors of society, including targeting education and awareness campaigns at groups who do not currently engage with or feel represented within the justice system.

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

The currently low levels of public legal education are likely proving to be a barrier to the effective operation of open justice. Whilst mechanisms can be put in place to allow access to proceedings, it is immaterial if the public do not know how to access them or understand the proceedings taking place.

Questions on Listings

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

Yes, for those who practice in Employment Law, or appear in Tribunal, it is useful to have knowledge of cases which are listed. From a Claimant's perspective, it may be that cases are similar in nature and an application can be made to join them together. From a Respondent's perspective, if there is a serial Claimant who has raised a number of cases in a short space of time, then it can be useful to bring this to the attention of the Judge.

It is also useful to review the number of cases against an organisation to try and troubleshoot any issues which may be arising, to try to limit the number of cases they are involved in by addressing deficiencies in training, for example, which should lessen the burden on the Justice system in the long term.

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

No. Should parties wish to have information restricted, they can make the appropriate application to the Court or Tribunal. The principle of transparency ought not to be impinged upon. If there are concerns about this, then along with the acknowledgment paperwork received by an individual raising or defending a claim, guidance can be provided. For example, when a claim is lodged in the Employment Tribunal, a number of useful appendices are provided, including an explanation on the next steps and sources where further legal advice can be obtained. Guidance on options available to those who wish to restrict what is published could also be provided at this stage. A Judge could then make a decision on any application.

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

N/a

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

N/a

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

N/a

11. If media lists were available (subject to appropriate licensing and any other agreements or arrangements deemed necessary by the Ministry of Justice) for the use of third-party organisations

to use and develop services or features as they see fit, how would you use this data, who would you provide it to, and why are they interested in this data?

N/a

Questions on accessing courts and tribunals

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

We were aware that the FaCT service helps users to find the correct contact details to individual courts and tribunals.

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

We note that although the FaCT service purports to offer information on non-devolved tribunals in Scotland, when Scottish postcode details are inserted into the 'find the nearest court or tribunal by postcode' option, instead of bringing up the employment tribunals in Scotland, the service reports that the user should contact the Scottish courts and tribunals service. Further, if the user does not know the name of the court or tribunal, the service asks 'what do you want to know more about' giving options. We suggest these options should include 'Employment' to aid the navigation of users to information on the employment tribunals, where appropriate.

It may also be helpful for users to receive information through the FaCT service on how they may request to attend hearings at the relevant court or tribunal remotely.

Remote Observation and Live Streaming

14. What are your overarching views of the benefits and risks of allowing for remote observation and livestreaming of open court proceedings and what could it be used for in future?

Remote observation is a welcome development in a relation to many cases in the Employment Tribunal.

In terms of benefits, it has allowed parties who have their own live claims to attend and observe how a Tribunal Hearing unfolds. Previously, this was done via in-person attendance exclusively, but this is not always practical, when taking into account parties and witnesses may not live near a Hearing Centre and travel time involved, as well as individual cost for travel and sustenance.

Allowing remote observation is also in line with ESG goals in reducing travel.

Remote observation can be used by students and junior practitioners for training, for Solicitors who have instructed Counsel and for family members of individuals in a supportive capacity.

For those who have their own proceedings commencing shortly, there is value in remote observation as it may allow them to fine tune their own approach and avoid any mistakes they may have otherwise made, reducing the overall administrative time spent at the outset of a case.

A drawback, from an Employment Law perspective, may be that an individual has raised matters which have affected them significantly, for example, allegations of a form of discrimination or harassment. To have the knowledge that people may be allowed to remotely observe what they consider to be a highly personal set of circumstances may deter them from pursuing a claim, or impact on how they present on the day.

Further, an unscrupulous employer could observe the Tribunal proceedings and choose to withdraw an offer or not consider an application from an individual raising a claim. From an employer's perspective, it may allow for an unscrupulous employee to 'gap spot' and pick up on areas in which they can build upon to fabricate a claim.

Naturally, it is far more difficult to monitor or prevent the recording of proceedings when these are streamed.

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

Yes, as with any public Hearing, subject to any restrictions, this should always be the default starting position.

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

Yes, as above, subject to any restrictions, this should always be the default starting position. There is a strong public interest principle in allowing the media access to remote Hearings.

17. Do you think that all open court hearings should allow for livestreaming and remote observation? Would you exclude any types of court hearings from livestreaming and remote observations?

From an Employment Tribunal and Employment Appeal Tribunal perspective, yes, this ought to be an option, again, as the default starting position, subject to any reporting restrictions.

There should not be any types of cases excluded from the outset. Because of the nature of the claims, individual facts are so varied, so labelling all cases which fall in a general category as excluded would carve them out. Again, the default starting point ought to be that all open court Hearings should be available to livestream. If interested parties wish for this default to change, then they can make the necessary application.

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

No, unless parties or Judges of their own volition pursue this avenue.

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

No. All Courts and Tribunals ought to be equipped to allow for livestreaming, so if a member of the public wishes to attend a Hearing remotely and is unable to do so, they can attend their nearest Court or Tribunal to allow them to log in and view a Hearing remotely.

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

Live streaming could be made the default starting position for cases. In terms of Employment Tribunal remote observation, interested parties still need to generally contact the Listings Team at an individual Hearing centre, who will then send out a link. Often, this is at the last minute, or e-mails are not responded to due to the strain on the Tribunal's resources.

Even when login details are provided, that does not allow entry in the Hearing- individuals need to be permitted to enter by the Judge and this can be missed given the number of matters Judges are dealing with in live time, resulting in individuals being left in the waiting room for considerable periods of time.

If there was a live stream channel that individuals could use, which didn't require permission to enter a Hearing, then it would free up administrative resources significantly.

Questions on broadcasting

21. What do you think are the benefits to the public of broadcasting court proceedings?

Broadcasting proceedings can educate, and build confidence in, the public on the operation of the justice system, encouraging the public to use the justice system to seek legal redress and increasing the likelihood of those who use the justice system accepting the outcome(s) in proceedings. Broadcasting proceedings can also improve the accessibility of the justice system, permitting the public access to proceedings (or part of proceedings) out-with the working day. Live streaming is, of course, also very beneficial in this regard but only permits proceedings to be viewed in real time which is not always suitable for the public.

22. Please detail the types of court proceedings you think should be broadcast and why this would be beneficial for the public? Are there any types of proceedings which should not be broadcast?

We consider proceedings which are, at present, open to the public ought to be suitable for broadcasting, subject to the consent of the parties (as in Scotland), and subject to necessary restrictions to protect the privacy interests of vulnerable parties and witnesses. However, we have some concerns about the impact of broadcasting on certain types of proceedings (see our answer to Q23 below).

23. Do you think that there are any risks to broadcasting court proceedings?

We consider a risk with broadcasting is that the extract(s) of the proceedings broadcast fail to give a fair, balanced and unbiased reporting of the case. There is also a risk with broadcasting proceedings that it will serve to discourage individual parties concerned about their privacy from seeking justice. The employment tribunals and employment appeal tribunals were originally intended to be a more informal setting for the

adjudication of employment disputes. Whilst the formality of proceedings in the employment tribunals has increased steadily over the years, there is a risk that the presence of cameras and broadcasting equipment in the employment tribunals will erode the informality further and may discourage employees and former employees from using the employment tribunal system to seek justice.

24. What is your view on the 1925 prohibition on photography and the 1981 prohibition on sound recording in court and whether they are still fit for purpose in the modern age? Are there other emerging technologies where we should consider our policy in relation to usage in court?

The 1925 prohibition on photography and the 1981 prohibition on sound recording in court may not still be fit for purpose in the modern age. It may be preferable to repeal these statutes rather than legislate in a piecemeal fashion for exceptions/derogations. New legislation on photography/sound recording/broadcasting in the courts and tribunals could be devised on a principled basis which is flexible enough to accommodate the myriad of different situations in which broadcasting may be requested and to adapt as new technologies are introduced in the future.

Single Justice Procedure

We have no comments on questions 25 and 26.

Publication of judgments and sentencing

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

The search function for Employment Tribunal decisions is not clear or easy to use. Further, it often does not provide the results that are being searched for. Judgments also do not appear to be in any particular order which can make searching for and accessing decisions difficult. Judgments prior to February 2017 are not readily available online and the process for obtaining them is opaque.

28. The government plans to consolidate court judgments and tribunal decisions currently published on other government sites into FCL, so that all judgments and decisions would be accessible on one service, available in machine-readable format and subject to FCL's licensing system. The other government sites would then be closed. Do you have any views regarding this?

Overall, it would be preferable if all court judgments and tribunal decisions could be accessed through a single platform. The FCL does not currently host decisions of Employment Tribunals, but does hold the decisions of the Employment Appeal Tribunals (2021 – 2023). Therefore, it would be logical to host both sets of decisions on one platform.

If the FCL model is retained for any new system, it would be preferable to retain the features allowing users to filter by court/tribunal and to arrange decisions in date order.

29. The government is working towards publishing a complete record of court judgments and tribunal decisions. Which judgments or decisions would you most like to see published online that

are not currently available? Which judgments or decisions should not be published online and only made available on request? Please explain why.

We would hope to see all judgments and decisions of Employment Tribunals published online. However, certain cases may feature circumstances which would make them more suitable to only be made available upon request. This could be integrated into the current system of privacy orders.

30. Besides court judgments and tribunal decisions, are there other court records that you think should be published online and/or available on request? If so, please explain how and why.

We note references in the consultation to sentencing remarks. However, this is not our area to comment upon.

31. In your opinion, how can the publication of judgments and decisions be improved to make them more accessible to users of assistive technologies and users with limited digital capability? Please give examples in your response.

As proposed in the consultation, ensuring that online judgments are machine readable will make them more easily accessible. For those with limited digital capability, ensuring that local services (e.g. libraries) can provide internet access and support for individuals to research cases may assist.

32. In your experience has the publication of judgments or tribunal decisions had a negative effect on either court users or wider members of the public?

Individual claimants are often not aware that judgments (including their name) will be made public. These judgments often contain sensitive personal information which is then accessible to anyone who searches the name of the individual.

Questions on the computational re-use of judgments on Find Case law and licensing

We have no comments on questions 33 to 36.

Questions on tribunal judgments published on Gov.uk

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

Yes. We have searched online for tribunal decisions for research purposes and for the purposes of preparing, pursuing and defending tribunal claims.

As mentioned in Q27 the system does not provide all judgments and decisions, and the search function is not always user-friendly.

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

Yes, as this is where the majority of the public would commence their search for records. However, care must be taken regarding the privacy of individual's sensitive personal information which may be contained within judgments.

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

The necessary information would include: party names; court/tribunal; decision maker; date of hearing; date of judgment; neutral citation; type of case; and decision.

Safeguards should be put in place to protect vulnerable parties. This will include where privacy order or reporting restrictions have been put into place.

Question on public access to sentencing remarks

40. N/A

Questions on access to court documents

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

As a non-party to proceedings, access to court or tribunal documents might be sought for educational or research purposes.

42. Do you (non-party) know when you should apply to the court or tribunal for access to documents and when you should apply to other organisations?

Our understanding is that the rules/guidance for access to court documents vary depending on the court or tribunal. We understand that in some instances documents should first be requested from the parties rather than the courts.

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

We understand that some of the court/tribunal websites contain information on access and the procedures/requirements will be set out in the relevant court/tribunal rules or practice directions. We would suggest that individuals would likely contact the clerk of the relevant court or tribunal with questions about access which they could not otherwise find the answers to.

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

We understand that, as a minimum, documents which form part of the court/tribunal record are typically held. It is also our understanding that other documents which inform the decision-making may be available. However, we would nonetheless welcome clarity on all of the types of court or tribunal documents held and the retention period for each court/tribunal.

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

We have found that the rules pertaining to access differ depending on the applicable court or tribunal (and the document sought). We are not aware of any single source which explains the rules pertaining to access for all courts and tribunals. For access to Supreme court documents, it is understood that non-parties are asked to seek the required documents from the parties themselves in the first instance: this additional step adds an additional administrative burden on the non-party accessing court or tribunal documents, delays the non-party's access and is problematic when the party no longer exists as an entity or cannot be located. It is also not always clear exactly which documents are retained by the court/tribunal and for how long.

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

It would be helpful if there was a single resource which outlines for each court and tribunal, the types of court or tribunal documents which are accessible to non-parties (including length of retention period) and the procedure to be followed to request access. It would be further helpful if this resource contained links to relevant court forms etc. for requesting access. Where there are different rules/procedures for access to documents depending on the applicable court/tribunal, these should be clear and on a principled basis. It would also alleviate the administrative burden of contacting parties for permission/access to documents (where this is required/encouraged by the court/tribunal) if non-parties were given a standard form to issue for this purpose.

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

We consider that all material which is presented to the decision-maker(s) to inform their decisions in cases ought to be accessible to non-parties.

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

See answer to Q46 above.

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

We do not consider that there should be different rules applied for requests by accredited news media, or for research and statistical purposes. To support the principle of open justice, we consider access to court or tribunal documents should be available on an equal footing to all.

50. Sometimes non-party requests may be for multiple documents across many courts, how should we facilitate these types of requests and improve the bulk distribution of publicly accessible court documents?

We appreciate it may be administratively time-consuming for courts and tribunals to fulfil these types of requests. The development of a single electronic storage system managed by HMCTS to store all court and tribunal documents presented regardless of the court or tribunal to which they pertain may assist in fulfilling these types of requests.

Questions on data access and reuse

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

We consider data derived from the justice system should be shared with the public for educative, evaluative and research purposes.

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

There is already helpful information offered on the role/remit of the Data Access Panel and the relevant procedures/conditions for accessing data - <https://www.gov.uk/guidance/access-hmcts-data-for-research>. It may support access and responsible re-use of data to add to this page short case study examples of data requests and decisions on release, as well as examples of data sharing agreements.

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

We consider the re-use of any data relevant for educative, evaluative and research purposes should be encouraged.

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

We are unsure what the biggest barrier to accessing data and enabling its reuse is. It may be that there is a lack of knowledge among the public of the types of data available, the purposes for which data will be released and the relevant procedures for requesting access. Whilst not barriers as such, ethical, GDPR and licensing considerations are also relevant to the access and reuse of data by the public.

55. Do you have any evidence about common misconceptions of the use of data by third parties? Are there examples of how these can be mitigated?

No

56. Do you have evidence or experience to indicate how artificial intelligence (AI) is currently used in relation to justice data? Please use your own definition of the term.

No.

57. Government has published sector-agnostic advice in recent years on the use of AI. What guidance would you like to see provided specifically for the legal setting? In your view, should this be provided by government or legal services regulators?

Guidance on responsible use (and avoiding misuse) of AI would be welcome.

Questions on public legal education

58. Do you think the public has sufficient understanding of our justice system, including key issues such as contempt of court? Please explain the reasons for your answer.

In our experience, the public does not have sufficient understanding of our justice system. Many members of the public do not have direct contact with the justice system and have not received any formal education relating to the justice system.

59. Do you think the government are successful in making the public aware when new developments or processes are made in relation to the justice system?

Whilst the government do announce when new developments or processes are introduced, and often participate in media interviews, we believe more could be done to enable wider understanding of new developments and processes.

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

In our experience, members of the public do not clearly understand the structure of the justice system, their rights, the processes they are required to follow within the system and the remedies available to them. Within the Employment Tribunal system, we often see that individuals are unaware of the relatively short time limits they have for commencing claims. They also do not fully appreciate the jurisdiction that the Tribunal has. There are certain things, such as an apology or the provision of a reference, which the Tribunal cannot order.

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

We have found that the information is often available to the public. However, it can be hard to access and is not sufficiently consolidated.

It is often not in an easy-to-understand layout. Whilst the information may be complex, it could be made more reader-friendly.

62. Do you think there is a role for digital technologies in supporting PLE to help people understand and resolve their legal disputes? Please explain your answer.

Yes. Digital technologies can play a key role within a wider strategy for enhancing PLE. They can be used to help people understand their rights and legal processes. Regarding resolving disputes, helping individuals understand their rights may also lead to a better understanding of the issues in dispute between parties which could lead to earlier resolution of disputes. Digital technologies also have the potential to help more people develop the skills and confidence to gain access to justice.

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

We consider that the Government may have a role in coordinating PLE. However, input should be sought from a variety of organisations who can provide hands-on experience of individuals interacting with the legal system.

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

Schools, law clinics, libraries, advice centres and civil society organisations could all be utilised to assist in increasing public knowledge of the legal system. However, it is important that they are provided with the funding and resources to carry out this work.

65. Which methods do you feel are most effective for increasing public knowledge of the justice system e.g., government campaigns, the school curriculum, court and tribunal open days etc.?

We consider that including legal education within the school curriculum during the compulsory school years has the potential to be a very effective method for increasing public knowledge.

BUSINESS

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