Response to the Open Data consultation

We are responding in our capacity as doctoral researchers in law. Judith Townend is researching how defamation and privacy law affect national newspaper journalism at the Centre for Law, Justice and Journalism, City University London. Lucy Series is researching issues around the Court of Protection and community care at the University of Exeter. We support the overall aims of the open data consultation across all spheres of public life, including those areas of the private sector that fulfil public functions. However, in this response we will limit our comments to how 'open data' could be enhanced and improved in the legal sphere.

The case for greater openness in the legal sphere

Greater openness is needed to enhance public understanding and perceptions of the justice system in the UK. Openness in the legal system is desirable from the perspective of justice 'being seen to be done'[1] and the accountability of the courts. In relation to the family courts, Lord Justice Munby has commented on how a lack of openness has brought the family court system into disrepute, and fostered a perception of unaccountable and 'secretive' justice. He comments: 'There are many important and pressing issues confronting the family justice system, but transparency is surely amongst the most important and the most pressing, for it goes to the root of public confidence in what we do.'[2] We note, however, that even in other courts and tribunals, written judgments are not automatically made available to the general public. In the main, the system that has sprung up is haphazard, inefficient, and relies upon the discretion of individual judges making the judgments available.

Openness in the legal system also has an important educative role. This includes keeping the public informed. In this sense, legal blogs, which are growing in prominence, have played a very important role in communicating knowledge outside the legal profession and academic institutions. Both respondents write blogs[3] which are related to our research, and which enable rapid and widely accessible dissemination of our findings. Blogs provide an excellent forum for discussion; for debate to be constructive, it is essential that it is also *well informed*. We would welcome, therefore, greater accessibility of *digitised* and online information concerning the courts for researchers and bloggers to tap into. Legal blogging can help counter widespread poor reporting of cases and legal processes in the mainstream media. We would direct the consultation towards blogs like the *UK Human Rights Blog*[4], *Pink Tape*[5] and *Nearly Legal*[6] which fulfil a fantastic public service of making difficult areas of law comprehensible and accessible to the public in a way mainstream press and lawyers rarely achieve. Bloggers, journalists, researchers and the general public rely on the availability of good quality data from the courts, a provision that we will argue is currently piecemeal and limited at

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[1] *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233

[2] LORD JUSTICE MUNBY (2010) 'Lost opportunities: law reform and transparency in the family courts'. *Child and Family Law Quarterly,* 273.

[3] Lucy Series' blog is at: http://thesmallplaces.blogspot.com
Judith Townend's blog is at: http://meejalaw.com

[4] http://ukhumanrightsblog.com/

[5] http://pinktape.co.uk/

[6] http://nearlylegal.co.uk/

best. It was encouraging to hear the Master of the Rolls, Lord Neuberger, address some of these issues in in a speech earlier this year. He said:

> *I think that a more active approach might usefully be taken by those of us who are concerned with the administration of justice to ensure that judgments are publicised and properly reported. We should perhaps build on the Supreme Court's practice of issuing short, easily accessible judgment summaries with judgments; we should foster the already developing community of active informed court reporting on the internet through blogs, and tweeting; we should support the responsible legal journalists; we should initiate, support, encourage and assist public legal education. The great strength of our society is that it is built on the competing voices of free speech. Justice to be truly open must join its voice to the chorus; and must ensure that inaccurate or misleading reporting cannot gain traction.*[7]

In our view, improving "public legal education" is especially crucial at a time when the number of litigants in person is set to rise following reforms to the legal aid system[8]. Giving unassisted litigants better access to information about legal processes and case law will help reduce inequality of arms. This includes publishing written judgments wherever possible, ensuring that unreported cases are not only digested by lawyers with expensive subscriptions to law reports and members of an "inner circle".[9]

Justice should be as open and transparent as possible in a democratic society. For our research purposes, this includes the publication of written judgments, but the agenda for open justice in the UK can be viewed much more widely. As researchers, bloggers and (in the case of Judith Townend) journalists we are also concerned about the difficulties encountered when trying to obtain information about court listings and reporting restrictions. In this submission, we will also discuss the ways in which legal information is disseminated, and we will consider also how the Freedom of Information Act 2000 could be extended to other legal bodies to promote greater accountability and aid research. It seems to us that renewed attention should be given to courts data distribution, and this consultation offers an opportunity to re-open a conversation about open justice.

Publication and dissemination of written judgments

The current system for publication and dissemination of written judgments could serve the open justice agenda much better than it currently does. We acknowledge and welcome the important work done by the third party website and charity *BAILII*[10]. As the Nearly Legal blog commented[11]:

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[7] LORD NEUBERGER OF ABBOTSBURY (2011) 'Open Justice Unbound?' *Judicial Studies Board Annual Lecture.*[42]

[8] see, for example, House of Commons Justice Committee Operation of the Family Courts Sixth Report of Session 2010–12, Volume I. Available at: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/518/51802.htm

[9] In the recent Court of Protection case *A London Local Authority v JH &Anor* [2011] EWHC 2420 (COP) counsel for Mr H relied upon an unreported case – which the judge found persuasive in reaching his conclusions. The case can now be found on the website http://www.mentalhealthlaw.co.uk/, but has not – to date – been posted on BAILII. This is a recent example of where unreported case law – to which litigants in person would have no knowledge or access - has enabled legal practitioners to build a case.

[10] www.bailii.org

[11] http://nearlylegal.co.uk/blog/2011/06/BAILII-needs-your-cash-regularly/

[It] remains astonishing that without BAILII, there would be no free public access to the higher court judgments which form the law, save for the Supreme Court.

However, we believe that the system is limited in a number of ways. Most of these limitations are a consequence of the action (or inaction) of public bodies rather than BAILII itself, which has played a commendable and invaluable role in making courts data available to the general public. Firstly, many judgments – even those that are written - are not passed onto the BAILII website for publication. In the family division this problem is particularly acute. We note that many senior judges, including Lord Justice Munby and Sir Nicholas Wall[12], have attempted to encourage judges to publish anonymised judgments *wherever possible*, rather than merely where they feel a case is 'legally' interesting. While the interests of lawyers and judges may not be synonymous with those of the public and of legal researchers, we regard these unpublished judgments worthy of study and scrutiny. We note that the Family Courts Information Pilot heard evidence of concerns about privacy of legal practitioners, but it found no evidence that litigants involved in legal proceedings shared these concerns.[13] Judicial culture surrounding the publication of judgments may take many years to change, or may not at all, but a reliance on a discretionary system seems inherently unsatisfactory when there is no clear rationale why some judges may choose to publish and others may not. We note that similar issues may pertain in other courts and tribunals beyond the family division, albeit less acutely. An effective resolution to this matter may require a statutory intervention.

As documented by a number of sources, it is unclear as to whether judges or the Crown hold copyright of written judgments[14]. Subsequently, individual judges and not the state determine whether – and how – a judgment may be published or disseminated. If copyright is truly an obstacle to open justice, it seems it may be necessary for the government to take action to resolve this dispute. These judgments are part of our legal and cultural heritage; they are produced by holders of public office and funded by public money. These cases, particularly in the family courts, often concern the actions of public bodies in extremely sensitive matters. It seems inherently problematic and undemocratic that copyright – and hence control – of the judgments should not be held by the Crown, and available for free and widespread distribution, conforming to the government's agenda for 'making open data real'. We would like the government to consider sharing the judgments under an Open Government Licence.[15]

Finally, we suggest that courts publish judgments on their own sites, and for these to be: a) properly redacted to protect confidentiality; and b) searchable, indexable and reproducible by third parties. Without the ability to search and cache the content of the judgments, developers are limited in how they can 'add value' to the raw texts[16]. This would allow the development of automated procedures

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[12]HOUSE OF COMMONS JUSTICE COMMITTEE (2011) 'Sixth Report of Session 2010–12: Operation of the Family Courts. Volume II'.*HC 518-II.* [Question 191]

[13]MINISTRY OF JUSTICE (2011) 'The Family Courts Information Pilot: November 2009- December 2010 '.

[14]e.g. The Bar Council, at http://www.barcouncil.org.uk/guidance/CopyrightStatusofCourtJudgments/

[15] http://www.nationalarchives.gov.uk/doc/open-government-licence/

[16] The website www.mentalhealthlaw.co.uk shows how value can be added to judgments: it organises cases by topic; it includes judgments summaries; and links to articles and news stories about different cases. Another excellent example of 'added value' to legal materials is Google Scholar's legal opinion search engine. Here is an example of the page for the case Brown v Board of Education (1954), note the page of 'citations' at the top:

to alert people to judgments on particular topics and powerful search tools that could look *within* the judgments themselves.

Court listings data

We would also like to register our concern at the way court listings data is made available to the public. Personal experience revealed that although the courts hold listings for a week or longer in advance, a member of the public could only find out whether a case is listed one day in advance. This means that when a member of the public wishes to watch a particular case, they must contact the court daily to see if the hearing is listed for the next day.

The public are also able to find out listed hearings for local courts only one day ahead, via information published on the Courtel company website.[17]It states: 'Due to legal restrictions, only public lists are published on this web site'. As a result, any member of the public who wants to know when a particular case will be heard must check the court listings daily, and will only have one day's notice to ensure they would be able to attend.

A request under the Freedom of Information Act 2000 by Mark Goodge[18] suggests that this restriction is a result of the contract Courtel holds with the Ministry of Justice to disseminate the data. We note that the contract grants Courtel exclusive rights to information that it receives for free. No other organisations are able to hold the data, which is effectively monopolised by one company that provides both paid-for and free services. We are unclear why "legal restrictions" are in place, but we would ask that the Cabinet Office ask the Ministry of Justice the legal basis for restricting free access to court listings. Furthermore, we ask the Cabinet Office and the Ministry of Justice to consider that the current system for providing information one day in advance requires the listings to be checked closely daily by a member of the public wanting to see a particular hearing. This means they are actually forced to look at the listings – and hence personal data – in far more detail than they would if other systems were in place to register an interest in a particular trial and be alerted when it was coming up. The system as it stands neither offers particularly effective protection of personal data, but nor does it facilitate public access to the courts.

Information on reporting restrictions

We appreciate the sensitivity around centralising reporting restrictions data, but would like to use this opportunity to raise a number of observations and concerns. Firstly, court reporting is not limited to professional media organisations and we would encourage courts officials to supply bloggers, as well as journalists, with necessary and relevant information wherever possible. At present, orders may be served on specific media organisations and via the PA CopyDirect service, which communicates material to subscribing media organisations[19]. A Freedom of Information response to a request made by Judith Townend[20] described the Ministry of Justice's consideration of the introduction of a reporting restrictions database, a plan that was never implemented. As part of the MOJ's answer, it stated:

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http://scholar.google.co.uk/scholar_case?case=12120372216939101759&q=brown+v+board+of+education&hl=en&as_sdt=2,5

[17] http://www.courtserve2.net/courtlists/current/crown/indexdailies.htm

[18] http://www.whatdotheyknow.com/request/information_provided_to_courtel

[19] As discussed by Holman J in Jane (A Child), Re [2010] EWHC 3221 (Fam) (November 2010)

[20] http://www.whatdotheyknow.com/request/46401/response/119034/attach/html/3/FOI 67061 Townend.pdf.html

The reporter can always contact/visit the court where the case is being/was heard and the court will provide any copies of reporting restrictions. If they are uncertain that the person is a journalist they would ask for press card or email showing a press email address.

While we are glad that the courts are willing to supply court reporting restrictions to journalists, we would encourage the MoJ to consider how restrictions might also be communicated to bloggers and members of the non-press, who publish online and to whom the same contempt of court laws apply. If court listings data were to be re-organised, for example, it could be helpful to integrate a system for flagging cases to which reporting restrictions were attached. Anyone reporting the case could then make sure they informed themselves of the relevant orders before writing about it. At the very least, they should be easily able to find out that an order was in place. As it stands, if a journalist or blogger misses a reporting restriction when it is given in court they could unwittingly commit Contempt[21].

Secondly, we would urge the Cabinet Office data consultation to consider how data about injunctions and court orders will be collected in future. Often, there is inadequate collated information with which to inform the media and the public. For example, in May 2011, the Master of the Rolls, Lord Neuberger was unable to confirm exactly how many anonymised injunctions and so-called "super injunctions" had been issued since 2000[22]. We support the Master of the Rolls' introduction of a pilot scheme to record statistical data in relation to certain non-disclosure injunctions, and urge the government to consider similar pilots in other areas of law.

Expanding the Freedom of Information Act to more legal bodies

We note that the consultation considers whether the scope of the Freedom of Information Act 2000 should be expanded to include more bodies, and in particular those bodies that are not strictly speaking 'public' organisations but which fulfil a public function. We support these aims. The freedom of information website WhatDoTheyKnow.com[23]lists public bodies that they would like to see subject to the Freedom of Information Act 2000[24], including the Association of Costs Lawyers, the Council for Licensed Conveyancers, the Council of the Inns of Court, the General Council of the Bar, the Institute of Legal Executives, the Legal Complaints Service, Lincoln's Inn, the Honourable Society of Gray's Inn, and The Law Society. We would encourage the consultation to consider whether these bodies should be subject to the Freedom of Information Act, although many of them adhere to open data principles in response to requests for information.

Furthermore, there are legal bodies that are clearly arms of the state that are not subject to the Freedom of Information Act, in particular the Office of the Official Solicitor. There is no obvious reason why the Official Solicitor is not subject to the Freedom of Information Act, despite the important and sensitive public work he does. Nor, unfortunately, does this office respond to requests for information as if they were subject to the act.[25] We would like to request that the

[21]As recounted by James Brewster, in 'The Silent State: Secrets, Surveillance and the Myth of British Democracy', Brooke, H. (2010).
[22]Press conference, 20 May 2011. Transcript available at:
http://www.judiciary.gov.uk/Resources/JCO/Documents/110520-superinjunctions-transcript.pdf
[23]A mySociety project.
[24]http://www.whatdotheyknow.com/body/list/foi_no
[25] A request for information from the Official Solicitor was recently rejected on the grounds they are not subject to the Freedom of Information Act.

Cabinet Office gives consideration to why the Official Solicitor's office is not subject to the Freedom of Information Act, and whether – in the interests of open data and public accountability – it should be.

General comments

We recognise this submission is directed towards greater openness in only one limited arena of public life, that of the law and courts. However, transparency and openness in law are fundamental principles in a democratic society. The organs of justice lag far behind many other areas of public life, which routinely publish information relating to their affairs and which have made good use of digital technologies to enhance public access. Despite these reservations, we would like to point to the efforts of the Supreme Court and its justices as a paradigm of open justice in a modern democracy. The court provides judgments, and even readily understandable judgment summaries, on its websites. Its listings are public and available for all to see. Its hearings are even televised, subject only to certain restrictions in very sensitive cases. Its judges engage in efforts to improve public understanding. We feel other courts and public bodies could learn a great deal from their example. In many cases what is required is a change in culture and attitudes towards the public's need for knowledge of legal matters, and proper structures to facilitate that process.

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http://www.whatdotheyknow.com/request/appeals_under_s21a_mental_capaci
A further request for the same information was made through a parliamentary written question, and was also rejected:
http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110509/text/110509w0001.htm