

Open justice: court reporting in the digital age Justice Select Committee - Call for Evidence

15 October 2021

About APPEAL:

1. APPEAL is a non-profit law practice committed to fighting miscarriages of justice and demanding reform. We provide investigation and legal advocacy for victims of unsafe convictions and unfair sentences who cannot afford to pay for a lawyer themselves. We use individual cases as leverage for system-wide criminal justice reform by educating the media, parliament, criminal justice policy makers, the legal profession and the public about how and why miscarriages of justice occur and what needs to change to stop them.
2. APPEAL's Women's Justice Initiative (WJI) uses strategic litigation to appeal sentences and convictions for women experiencing severe disadvantage in the criminal justice system; women who are victims of domestic abuse, whose mental health has been ill considered, and who are given damaging short sentences. The Women's Justice Initiative represents women who are criminalised for minor, non-violent offences, including the non-payment of the TV License fee which is tried by the Single Justice Procedure.

Summary of APPEAL's consultation response:

3. This consultation response is split into four parts, each addressing a term of reference.
 - a. Firstly, we set out **a major barrier to the media obtaining information from the courts** that we regularly face in the course of our work: Sections 17 and 18 of the Criminal Procedure and Investigations Act 1996 and how the provisions apply to sharing post-conviction case information with the media. We recommend how this barrier may be overcome.
 - b. Secondly, we set out **what could be done to make information on court cases more transparent and accessible** in relation to the Single Justice Procedure in prosecuting low level criminal offences.
 - c. Thirdly, we consider that HMCTS should modernise its transcription service in accordance with the latest technology to **make information on court cases more transparent and accessible**.
 - d. Finally, in looking at **the effect of court reform and remote hearings on open justice** we urge government to be cautious when it comes to proposals contained in the Judicial Review and Courts Bill.

1: A major barrier to the media obtaining information from the courts: The Criminal Procedure and Investigations Act 1996 ('CPIA'):

1. In the course of its work, APPEAL sometimes considers it to be in its clients' best interests to place information about particular cases in the public realm. This would be by providing information to responsible journalists. However, we are regularly prevented from doing so because it would constitute a breach of the CPIA.
2. Sections 17 to 19 of the CPIA and paragraph 22.8 of the Criminal Procedure Rules 2014 are all concerned with the confidentiality of material disclosed to defendants under the CPIA.
3. In summary, section 17 of the CPIA provides that material given by the police or Crown Prosecution Service to a defendant in the course of criminal proceedings must not be disclosed or used except in connection with those criminal proceedings.
4. There are a number of reasons why a defendant should be permitted to share certain information with journalists (directly or via legal representatives) that has been disclosed to them by the prosecution.
5. Firstly, a defendant has a fundamental right to do so as part of their right to a fair trial protected by Article 6 ECHR. Sharing information can be part a key part of an effort to persuade a journalist to investigate the safety of a conviction and to publicise their findings to try and gain access to justice.
6. This view is supported by the 1999 landmark case *Ex Parte Simms (A.P.)*¹. In that case two prisoners maintaining innocence were seeking to challenge the Home Secretary's blanket ban on journalists interviewing prisoners who are alleging a miscarriage of justice. Lord Steyn, giving the leading judgment, held that prisoners have a "fundamental or basic right... to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner".
7. Although APPEAL clients are some of the lucky few who benefit from investigative assistance, our resources, based on charitable funding, are limited. Investigative support from a journalist can therefore be hugely beneficial for a case. Moreover, 90% of appellants to the Criminal Cases Review Commission are unrepresented. The number of appellants with legal representation has been declining over a number of years from a historical

¹ *Regina v. Secretary of State for the Home Department Ex Parte Simms (A.P.) Secretary of State for the Home Department Ex Parte O'Brien* (Consolidated Appeals), UKHL 33, 2 AC 115: <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990708/obrien01.htm>

average of 34% to 23% in the period 2012-2014 to 10% in 2018-2019². Unrepresented applicants are even more in need of investigative support.

8. Further, Lord Steyn's comments make clear that publicity can in and of itself play a role in "gain[ing] access to justice for the prisoner" who maintains their innocence. Even if a prisoner has representation and does not require investigative assistance, publicity can play an important role in overturning a wrongful conviction and in ensuring mistakes made are publicly acknowledged and rectified³.

Case Study

A reporter at a national newspaper has been investigating the case of one of our clients. Serious doubts have been raised about the safety of his conviction, for which he served almost two decades in prison. APPEAL has information that further undermines the safety of the conviction and leads that would assist in the journalist's investigations, but due to the CPIA we have been unable to share these with them. Although the journalist has the resources and skills to investigate the safety of the conviction and report on their findings, their ability to do so is being stymied by the CPIA.

9. Secondly, it is in the interests of the freedom of speech, protected by Article 10 ECHR to allow an appellant to publicly raise questions concerning the safety of their conviction into the public domain. As Lord Steyn observed in *Ex Parte Simms*:

"Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see Stone, Seidman, Sunstein and Tushnet, *Constitutional Law*, 3rd ed., (1996), 1078-1086. It is this last interest which is engaged in the present case. The prisoners argue that in their cases the criminal justice system has failed, and that they have been wrongly convicted. They seek with the assistance of journalists, who have the resources to do the necessary investigations, to make public the wrongs which they allegedly suffered."⁴

10. Lastly, and pertinently for the aims of this consultation, the ability to share certain information about a post-conviction case crucial for the interests of transparency and open justice. The public must be able to learn about the

² University of Sussex, *The criminal cases review commission: legal aid and legal representatives*, May 2021: <https://sro.sussex.ac.uk/id/eprint/99153/>

³ For example, public campaigns for the victims of the Post Office scandal played a key role in these miscarriages of justice eventually being recognised and rectified by the system

⁴ *Ex Parte Simms*

imperfections of the criminal justice system and how they may lead to miscarriages of justice. Only in this way may the public hold the justice system to account. Public accountability is of course a central pillar to maintaining a fair and effective justice system.

Recommendations in relation to the CPIA to improve open justice

11. We consider that the wording of the CPIA should be amended to allow the sharing of CPIA protected information by a defendant. We suggest the following amendment (highlighted in bold) to section 17(2) of CPIA:

(2) The accused may use or disclose the object or information—
(a) in connection with the proceedings for whose purposes he was given the object or allowed to inspect it,
(b) with a view to the taking of further criminal proceedings (for instance, by way of appeal) with regard to the matter giving rise to the proceedings mentioned in paragraph (a),
(c) in connection with the proceedings first mentioned in paragraph (b), or
(d) to a journalist, for possible publication, where the accused is making serious representations about the safety of their conviction*.

**This borrows language from Prison Service Instruction (PSI) 37/2010, which governs prisoners' access to the media.*

2: What could be done to make information on court cases more transparent and accessible: reforming the Single Justice Procedure:

12. Since 2019, APPEAL has been researching the Single Justice Procedure ('SJP') in relation to prosecutions for the non-payment of a TV licence, as part of our Women's Justice Initiative. Over the course of our investigations, we have grown increasingly concerned about the extent to which it runs contrary to principles of open justice including the complete lack of oversight and accountability around the procedure and the resulting risk that it may give rise to widescale miscarriages of justice.

Background to the SJP

13. Summary offences which are not punishable with imprisonment may be tried by a single magistrate under the SJP. Relevant offences include common assault and battery, truancy, non-payment of TV licenses and, from July 2020, offences under emergency Coronavirus legislation.
14. In 2020, SJP prosecutions accounted for 47% of all criminal prosecutions in England and Wales.⁵

⁵ The statistics for 2020 show that 535,504 cases were dealt with via the SJP: <https://questions-statements.parliament.uk/written-questions/detail/2021-05-26/7818> 1.13m individuals were dealt with by the criminal justice system in 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987892/criminal-justice-statistics-dec-2020.pdf

15. Those prosecuted under the SJP receive a notice in the post and are asked to submit their plea within 21 days online or by post. If someone receives a notice and does not respond, or if they respond and plead guilty, they are automatically convicted on the papers, in closed court.
16. 71% of those who receive a SJP notice letter in the post do not respond.⁶ In the case of offences prosecuted under Coronavirus legislation only, this rises to almost 90%.⁷ Thousands of people are therefore regularly being convicted and fined for Coronavirus offences in their absence, in closed court and without any checks or balances.⁸

Why the SJP makes court cases less transparent and accessible

1. The SJP is an inherently closed procedure where information on cases is not shared with the media unless someone pleads not guilty and an open magistrates' court hearing takes place. As stated above, the vast majority of cases are heard on the papers behind closed doors as most people do not respond to the SJP notice.
2. Although paper and online listings are available, they give very little information about each case. Outcome information is not available to the public except by phoning about individual cases.
3. To date, there has been no public scrutiny by any government body of SJP prosecutors (including the police as SJP prosecutor) or prosecutions. This is in contrast to the CPS which is scrutinised by the CPS inspectorate and whose director is called to give evidence to the Justice Committee.
4. Due to a lack of transparency and oversight, as well as no Legal Aid to allow meaningful representation, there is both a higher likelihood that prosecutions will be unlawful and a lower likelihood that they will be identified and rectified. This is clearly demonstrated in the context of SJP prosecutions brought under Coronavirus legislation – a particularly complex area of the law. There is evidence to suggest that there may have been a large number of unlawful coronavirus prosecutions carried out via the SJP⁹.

⁶ See PQ 143756, <https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756> - data directly available here: <https://drive.google.com/file/d/1r1owWjhJ4suAF-hrPEOM4VVT5inXlesk/view>; Also <https://questions-statements.parliament.uk/written-questions/detail/2021-05-26/7818>

⁷ *ibid*

⁸ As of March 2021, 4,432 coronavirus prosecutions have been made via the SJP, with around 90% of prosecutions receiving no plea. See also: *ibid*

⁹ See investigation by Fair Trials and Big Brother Watch available here: https://www.fairtrials.org/sites/default/files/Single_Justice_Procedure_briefing_%28June_2021%29.pdf and reporting by reporter Tristan Kirk here: <https://twitter.com/kirrkorner/status/1429721360704606210>

5. The Justice Select Committee is already aware of this as, in a recent inquiry around coronavirus offences, it commented:

"A lesson learnt from the pandemic is that the Ministry of Justice should review the transparency of the single justice procedure and consider how the process could be made more open and accessible to the media and the public".¹⁰

However, we consider that the lack of transparency exhibited by the SJP is a problem that extends beyond coronavirus offences to all offences prosecuted under this procedure. As stated above, almost half of all criminal prosecutions in England and Wales are brought via this secretive procedure¹¹.

Reforming the SJP

6. In order to provide an adequate inspectorate and oversight of SJP prosecutions, the remit of the Crown Prosecution Service Inspectorate should be expanded to include all "state sponsored" prosecutors, including those bought under the SJP.
7. For reasons of transparency, there should be regularly published statistics on how many people are being prosecuted under the SJP, for which offences, including the number that have pleaded guilty, not guilty or entered no plea. Currently this information is obtained piecemeal via Parliamentary Questions.
8. There should also be open access to blank online and postal SJP Notice forms.

3: What could be done to make information on court cases more transparent and accessible: court transcription technology:

9. Access to justice for post-conviction appellants relies on the availability of transcripts from the original criminal trial proceedings. In order to identify whether a miscarriage of justice may have occurred, it is essential that we understand exactly what happened during the trial stage, particularly what was said by witnesses in the case. Without this information, the work of an appeal lawyer, a litigant-in-person, the Criminal Cases Review Commission and the Court of Appeal Criminal Division ('CACD') is substantially hampered. As the Vice-President of the CACD recently put it:

¹⁰ 'Covid-19 and the Criminal Law', 21 September 2021

<https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/71/7102.htm>

¹¹ More information on the SJP can be found in APPEAL's briefing, September 2021, available here:

https://static1.squarespace.com/static/5537d8c5e4b095f8b43098ff/t/615c3b64a16c6f1af47f2868/1633434469375/2021_10_04+SJP+Briefing+FINAL.pdf

“the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether a historical conviction is safe.”¹²

10. APPEAL’s experience is that the quotations given by the transcription firms contracted with Crown Courts can amount to thousands of pounds. This is prohibitively expensive for appeal lawyers and unrepresented appellants.

Case Study

We represent a man who represented himself at his trial for a serious offence. To understand what happened at court and assess the fairness of his trial, we needed a transcript of the court proceedings, which lasted over 60 hours. At the hourly rate of £157.74 provided by a contracted transcription company, this would have cost over £10,000 including VAT. To avoid this prohibitive cost, we instead had to pay over £1000 to get the audio recordings digitized and provided to us, then rely on volunteers to produce transcripts of the proceedings. We were fortunate to have voluntary assistance but it would simply not be possible for most law firms and individuals.

11. We consider that the cost of court transcripts could be substantially reduced if the HMCTS deployed the use of automated speech-to-text technology. Such technology has dramatically improved in recent years. It is, for example, used in many courts across Australia including the Federal Court of Australia and the Department of Justice and Attorney-General in Queensland¹³.
12. APPEAL believes that such technology should be considered as part of the digitisation of the court system.

4: The effect of court reform and remote hearings on open justice: Proposals contained in the Judicial Review and Courts Bill:

13. The Judicial Review and courts Bill contains proposals to expand the roll out of the digitisation of the courts in England and Wales and will have a substantial impact on open justice.
14. Overall, APPEAL has serious concerns about the way in which the proposals have been brought forward: they have not been based on research or successful piloting and have not been the subject of a public consultation. Given the fundamental impact these changes will have on our justice system, APPEAL believes this is contrary to responsible governance and democracy.

¹² *R v Warren & others (Shrewsbury 24)* [2021] EWCA Crim 413, <https://www.bailii.org/ew/cases/EWCA/Crim/2021/413.html>

¹³ <https://www.auscript.com/en-AU/about/>

15. One of the major changes being proposed is the introduction of online pleas, which will apply to any offence, including the most serious. As Transform Justice said in its briefing on the Bill:

“The assumption behind the proposal is that the plea hearing in the magistrates’ or Crown Court is a purely administrative hearing, that people know whether they are guilty or not, and that no debate or discussion is necessary. There is also an assumption that the entering of a plea and any discussion in court concerning the plea does not need to be observed either by public observers, the media or witnesses of the crime (including the alleged victim).¹⁴”

16. APPEAL, like Transform Justice, strongly disagrees with this narrative. The entering of a plea is a key moment in criminal proceedings. Deciding on what plea to enter is a complex decision involving an understanding of the elements of a criminal offence and the available defences. The plea determines the course of the criminal proceedings and the repercussions, particularly for the defendant, are huge.

17. There is also evidence to suggest that factors other than factual guilt can lead to defendants pleading guilty. Such factors may include shorter custodial sentences and saving the time and money that would be involved in a full trial¹⁵. This can lead to miscarriages of justice.

18. For these reasons, we believe the entering of a plea is of paramount importance and should be subject to the same open justice principles as latter stages of criminal proceedings. Witnesses, alleged victims, the public and the press should be able to witness a plea being entered in open court, as well as any discussion in court about the plea.

19. Finally, as more criminal court hearings moved online through the HMCTS court reform programme, it is of paramount importance that the media and public are permitted *and facilitated* to observe remotely. During the pandemic this principle was not enforced: the media were given access to court hearings by video link but the public were not unless special permission – which was given inconsistently between courts – was obtained from the judge.

Conclusion:

20. Transparency and open justice are key to ensuring criminal cases can be effectively scrutinised, both to ensure that miscarriages of justice are identified and to maintain public confidence in the system. As the number of people who are able to secure legal representation in criminal cases declines

¹⁴ Transform Justice Briefing on the judicial Review and Courts Bill, September 2021, available here: <https://www.transformjustice.org.uk/wp-content/uploads/2021/08/Briefing-on-the-criminal-justice-aspects-of-the-Judicial-Review-and-Courts-Bill.pdf>

¹⁵ For more information see research from the University of Exeter, available here: <https://evidencebasedjustice.exeter.ac.uk/current-research-data/incentivized-admission/>

and the digitisation of the court system is expanded, the media and investigate journalists will play an increasingly important role in exposing miscarriages of justice. There has never been a more appropriate time to revisit the restrictive rules contained in the CPIA, as well as explore how the SJP and proposals to introduce online pleas will hamper their ability to obtain the necessary information to do so.

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