



By Email

Ministry of Justice

openjusticepolicy@justice.gov.uk

7 September 2023

Subject: Call for Evidence: Open Justice¹

Thank you for providing us with the opportunity to respond to this call for evidence. We welcome this consultation on the Ministry of Justice's Open Justice initiatives and support the important work you are doing in this area.

Our approach to innovation at the Bar and its impact on Open Justice

1. The Bar Standards Board (BSB)² is one of ten legal service regulators in the United Kingdom, including our oversight regulator, the Legal Services Board. We are authorised to regulate practising barristers, pupils, unregistered barristers, certain specialised legal services businesses (known as BSB entities) and certain overseas lawyers registered with us.
2. We recognise the importance of data, technology and innovation and the role it can play in delivery of legal services. In our 2022-25 Strategic Plan³, under our Strategic Aim of Access, we stated that:
 - Technology and innovation have an important role in helping to deliver legal services for consumers, especially around improving access to justice, and in helping to deliver transparency for consumers to navigate legal services and
 - We need to ensure the Bar is equipped to adapt to such technological changes and meets the expectations of future clients.
3. There is considerable mutual benefit between open justice initiatives within the court system and technology adoption at the Bar. Digitalisation initiatives within the court system can be a significant catalyst for barristers to take up new technologies – as has been the case with e-bundles and virtual hearings, particularly during the Covid-19 pandemic. In the other direction, given their key roles as users of court infrastructure, barrister participation and support are crucial for the success of open justice initiatives within the court system and the public interest benefits they promise, including transparency, ease of use, and efficiency.

¹ <https://www.gov.uk/government/consultations/open-justice-the-way-forward/call-for-evidence-document-open-justice-the-way-forward>

² <https://www.barstandardsboard.org.uk/>

³ [Bar Standards Board Strategic Plan 2022-25.](#)

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4. We therefore support your open justice initiatives and hope to collaborate as closely as possible. Working together, we can strengthen alignment with innovation initiatives at the Bar and within the legal services sector more broadly, so all are as impactful as possible.

Access to Court documents and information – Questions 41-50

5. In light of our role as the Bar regulator, we are best suited to respond to the set of questions on Access to Court documents and information, which according to the call for evidence include transcripts, skeleton arguments and other documents which may involve barristers.
6. Notwithstanding our views as regulator, we would also encourage you to seek the views of the Bar Council⁴, as the representative body for the barrister profession.
7. As a regulator, we operate in the public interest and would generally favour open access to Court documents where it promotes the public interest in transparency, public legal education and understanding of the court system. Our regulatory objectives also call us to support a strong and effective barrister profession, and we recognise blanket open access may not always align with this interest.
8. In particular, we understand extending public access to some types of materials drafted by barristers may raise an intellectual property ownership question which may not have a clear answer. While judicial opinions and other documents drafted by the Court have been clearly licenced for open use by the Open Justice Licence, we understand documents drafted by barristers representing their clients may be governed by uncertain ownership rights that complicate publication. Where these documents are made to the Court and intended to assist the Court, there is a strong normative argument that they should be viewed in the same light for access purposes as Judges' opinions and other Court documents.
9. From a regulatory standpoint, there may however be certain situations in which full open access may not align with the professional requirements on legal professionals set through code of conduct⁵. For example, open justice provisions may impact how barristers comply with their duty to the court under rC3 and requirements to act in the client's best interest and to protect client confidentiality under BSB Handbook rule rC15. Knowing certain documents, e.g. skeleton arguments, will be systematically made public may impact how barristers write the document and their degree of candour. This may impact their duty to the court if these documents are less informative as a result, their duty to act in clients' best interests if their reputational interests conflict, and their ability to maintain client confidentiality to an appropriate degree if far more information is made public than is currently the case. We believe these Open Justice initiatives should therefore be designed

⁴ <https://www.barcouncil.org.uk/>

⁵ <https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html>

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with legal service providers' professional obligations under the respective codes of conduct in mind; going forward we would be happy to work with you to this end.

10. As an example of the significant benefits of transparent, public access to court documents, we have benefitted ourselves from open court documents available in certain United States jurisdictions. We recently carried out an analysis of the case of ChatGPT misuse in New York⁶ to evaluate the risks were a similar situation to arise within our jurisdiction. We were able to make use of a publicly available repository including the full docket of court documents, which enabled us to track the full history of the case as it happened and monitor further developments in real time⁷. This CourtListener resource is made available by the Free Law Project⁸, a US non-profit organisation. The Free Law Project provides multiple tools that build upon publicly available, machine-readable court documents with clear policies governing which documents are to be included⁹. These third-party resources demonstrate the leverage effect that your Open Justice initiatives could make possible in the UK.

Again, we thank you for this opportunity to comment on these important Open Justice initiatives. We would be glad to collaborate on projects that impact the Bar. Please do not hesitate to contact Henry Fingerhut, Policy Manager for Technology & Innovation, at hfingerhut@barstandardsboard.org.uk if you have any further questions regarding our response.

⁶ <https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html>

⁷ <https://www.courtlistener.com/docket/63107798/mata-v-avianca-inc/>

⁸ <https://free.law/>

⁹ <https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files>