



'Justice system data': a comparative study

Report and recommendations

A report examining how Canada, Australia and Ireland manage the data and information that is generated by their justice systems.

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Contents

Executive summary	2	5 Ireland	92
1 Background	3	5.1 Background	92
1.1 Background	3	5.2 The courts of Ireland	96
1.2 The brief and our approach	4	5.3 COVID-19	100
1.3 Methodology	5	5.4 Critical appraisal	102
2 What is 'justice system data'? A review of the global and national context	8	5.5 Summary	103
2.1 Overview: national and global initiatives	8	6 Comparative analysis and conclusions	104
2.2 Advantages of widening access to justice data	11	6.1 Approaches to justice system data	104
2.3 Risks and safeguards for widening access to justice data	12	6.2 Comparative discussion	114
2.4 The UK (England and Wales) context	16	6.3 Conclusion	119
3 Australia	23	Glossary of terms	123
3.1 Background	23	Appendix A: List of interviewees	124
3.2 Federal position	28	Appendix B: Project information sheet supplied to interviewees	126
3.3 States	32	Appendix C: Key resources	128
3.4 Victoria	32		
3.5 New South Wales	41		
3.6 Critical appraisal	47		
3.7 Summary	51		
4 Canada	52		
4.1 Background	52		
4.2 Federal position	61		
4.3 Provinces and territories	67		
4.4 British Columbia (BC)	67		
4.5 Other provinces: snapshots	82		
4.6 Critical appraisal	85		
4.7 Summary	91		

Executive summary

This report analyses the ways in which ‘justice system data’ – that is the information generated by the process of justice – is managed in three countries: Australia, Canada and Ireland. It considers how data-sharing methods are perceived to relate to judicial independence, innovation, and public understanding and confidence in the justice system.

Commissioned by The Legal Education Foundation (TLEF) as part of its ‘Smarter Justice’ programme, the report builds on previous TLEF work on justice data in England and Wales, and aims to inform UK-based policy making as well as knowledge exchange in international legal and technology networks. The research, which took place from May–August 2020, identified that:

- There is a common understanding and definition of ‘justice system’ data types and access in the three case studies of Australia, Canada and Ireland, though in all contexts justice data management has evolved messily over time (with emergency measures during the COVID-19 period) rather than as the result of purposive design.
- Improved access to justice data is perceived by legal, academic and NGO stakeholders to help deliver access to justice, and protect important principles of open justice, judicial independence and public understanding of the law, and is part of these countries’ work to meet access to justice policy objectives, including UN Sustainable Development Goal 16.
- In opening up justice data, challenges and tensions across the jurisdictions were also exposed: the impact of legacy practices; the under-investment and decentralised approach to technological reform; a data deficit for user and case experience; a tension between privacy and transparency in the provision of court records containing personal data; and a lack of accountability measures for the management of justice system data.
- There is limited robust empirical data with which to measure the impact of justice sharing and access methods against desirable outcomes for a justice system.

In light of the findings, we argue that there is a need for:

- Clearly presented policies, shared publicly, on the differing roles for executive, court service, judiciary and any third-party providers in the management of justice system data.
- Accountability mechanisms for access to justice data: i.e. appropriate routes of application and appeal for accessing justice data that is not readily available in the public domain.
- Consideration of public and court user views and experiences in the design of justice system data processes (especially with regard to the use of personal data).
- Detailed measurement of the impact of data sharing practices on outcomes of the justice system.

1 Background

This chapter introduces the project brief and provides details of the methodological approach taken.

1.1 Background

Contemporary justice systems are complex and messy as a result of anachronistic structures and rules that have evolved since the medieval period; they have not been neatly designed to fulfil specific purposes and protect individual or collective interests (even if these purposes and interests are now cemented and protected in national and international law). Inevitably, this means ‘justice system data’ – that is the information generated by the process of justice – is equally complex and messy, with a hybrid of policies and laws governing its collection, storage and dissemination. The transition from analogue and paper-based systems to digital technological methods, with some aspects fast-tracked during the COVID-19 pandemic period, has only further complicated the picture.

Despite the importance of reliable data for the purposes of understanding law and legal process, for the development of evidence-based justice policy, and for meeting the objectives of fair and open justice, the theory and practice of justice system data management are rarely the primary focus of academic and policy attention, and often incidental to a broader discussion about an aspect of law. There are, of course, notable exceptions. A previous report on digital justice in England and Wales by The Legal Education Foundation (TLEF) identified data needs within the English justice system and urged the creation of a robust strategy for data collection, analysis and sharing, with 29 specific recommendations, which HM Courts and Tribunals Service (HMCTS) responded to in October 2020.¹ More recently, the Civil Justice Council/TLEF review of the use of remote civil courts during the COVID-19 pandemic highlighted the data gaps on civil justice, and re-iterated the need for the expansion of data collection, and investment in robust data systems.²

In order to further explore this area, we were commissioned by TLEF as part of its ‘Smarter Justice’ programme, which includes developing a Justice Lab UK, to undertake a short-term comparative study considering the ways in which justice system data is managed in different countries, focussing on English-speaking common law jurisdictions. The overall objectives of this study were to consider how current approaches and past experiences can inform the development of justice data systems in other contexts. The research took place from May–August 2020, conducted remotely during the COVID-19 restricted period.

We contend that while part of a broader agenda on open data and access to administrative data, justice system data deserves its own particular and special treatment, owing to the particular constitutional principles underpinning its generation and use, such as a separation of powers between judiciary and executive.

- 1 Natalie Byrom, ‘Digital Justice: HMCTS Data Strategy and Delivering Access to Justice’ (The Legal Education Foundation, 2019) <https://research.thelegaleducationfoundation.org/blog/digital-justice-hmcts-data-strategy-and-delivering-access-to-justice> accessed 23 July 2020; ‘TLEF Statement on HMCTS’ Response to Its “Digital Justice” Report’ (The Legal Education Foundation, 9 October 2020) <https://www.thelegaleducationfoundation.org/articles/tlef-statement-on-hmcts-response-to-its-digital-justice-report> accessed 8 December 2020.
- 2 Natalie Byrom, Sarah Beardon and Abby Kendrick, ‘The Impact of COVID-19 Measures on the Civil Justice System’ (Civil Justice Council/The Legal Education Foundation, 2020) <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf> accessed 15 June 2020.

Within the scope of this project we cannot promise a complete overview of each of the chosen countries; as we peeled back the layers of the chosen jurisdiction, we discovered further layers of complexity and idiosyncrasy, as we attempted to understand the handling of justice system data within the federal or national level courts, the state or province level courts, and within these, between different court types and jurisdictions (civil, criminal, family, tribunal). Even within a court ‘type’ in a single regional jurisdiction, there may be differences in practice and policy. We have, however, attempted to set out a more thorough comparative review than currently exists in the academic and policy literature. Our review focuses on Australia, Canada and Ireland, with some reference to other global and national initiatives. Our goal is to inform policy development in England and Wales and beyond but as one of our interviewees advised, we do not attempt to set universal recommendations or standards at this point. Instead we focus on evidencing and explaining the principles and practice of existing systems and drawing conclusions on what has and has not worked in the regions we studied, highlighting good practice examples. We hope these conclusions can be drawn upon to inform future justice data governance in England and Wales, where some of the recommendations of ‘Digital Justice: HMCTS Data Strategy and Delivering Access to Justice’ (Byrom, 2019) are already being progressed, as well as to assist initiatives in other countries and at a global comparative level.

1.2 The brief and our approach

Our brief asked us to consider:

- 1 How other countries define ‘justice system data’. What are the categories they use to describe the different types of data generated by the justice system? This includes information like case files, judgments, management information, tribunal decisions etc.
- 2 What arrangements are in place for making this data available to different stakeholders (public/press/researchers/private sector) and how are they financed? To what extent have other countries delegated the function of data dissemination to the private sector?
- 3 Where have other countries placed different types of data on the open/shared/closed spectrum? Are these arrangements time limited, e.g. closed until x date?
- 4 What have been the benefits and drawbacks of the approaches developed in these countries? We are particularly interested in identifying robust research that is capable of demonstrating a link between the types of sharing practices adopted and:
 - a. judicial independence
 - b. public understanding of the law
 - c. public confidence in the justice system
 - d. innovation
 - e. the attractiveness of the legal system as a forum for resolving disputes.

In order to answer these questions, via literature review and remote interviews, we have structured our report as follows. Following this introduction, which includes a description of the methodology of the report, Chapter 2 gives more detailed context for the report, providing a definition of ‘justice system data’; details of global initiatives on improving justice data; the risks and safeguards for managing justice data; and an overview of justice system data in England and Wales. Chapters 3, 4 and 5 describe our main case studies, the justice systems in Australia, Canada and Ireland, considering the questions above for selected courts in each jurisdiction, and other relevant issues that emerged in the course of the research. Chapter 6 offers a comparative and critical analysis of all three case studies, with some reference to other jurisdictions, including England and Wales; and makes some general conclusions and recommendations of good practice for policymaking and practice in this area (while not attempting to draft universal standards). The Appendices offer a list of key resources and information about our interviewees.

It should be noted that our case studies do not follow identical structures, though we try and capture similar information within each chapter. This is because of the particular characteristics of the selected justice systems, and the similarity or distinction between different courts. So, for some jurisdictions it made more sense to describe a feature (e.g. handling of court listings) for several courts together; for others, we needed to consider the same feature at court-level because the approach varied. Additionally, as explained below, the type of people interviewed in each jurisdiction varied to a certain extent.

1.3 Methodology

Our approach to the methodology was simple and orthodox in approach and was conducted during May–August 2020, remotely from home, owing to the restrictions of the COVID-19 period.

Ethical review

The University of Sussex granted ethical approval to the project (reference: ER/JT367/8). The project information sheet supplied to interviewees can be found in Appendix B: Project information sheet supplied to interviewees.

Literature review

We reviewed academic and policy materials in the main legal databases and their international services (primarily LexisNexis and Westlaw), as well as in online searches via Google, Google Scholar, DuckDuckGo and SSRN, using keyword searches (adapted to the search functions of each site) on combinations of terms such as ‘justice’/‘court(s)’, ‘justice system’ with terms including ‘data’, ‘digital’, ‘online’, and ‘open justice’. We also searched for material in the few international journals specifically concerned with legal information management.

Further to this, we gathered information about the court services via justice department websites, court and legal organisation websites, and other legal information services (such as the Legal Information Institute [LII] sites).

One methodological issue that arose was the difficulty in isolating or identifying relevant search results via the search engines and legal databases, owing to the generic nature of some of the terms (e.g. ‘justice’ and ‘data’), and the over-specificity of terms such as ‘justice system data’. It should be noted that, in academic projects and publications, ‘data justice’ typically refers to a distinct body of work on the law and regulation of data more generally (not limited to the data generated by the justice system, which is our primary interest here). However, having spent a significant amount of time varying our search terms, we are confident that we identified a large proportion of relevant literature; this was indicated by the fact that we had already identified many of the papers or documents that were later recommended to us by interviewees.

Interviews

Alongside this ongoing literature review, we identified key individuals from different professional backgrounds (mostly from within academia, court services, legal technology and access to justice organisations) across the jurisdictions in which we were interested; as noted above, the roles varied in each jurisdiction. For example, in Canada, we identified a number of interviewees with specific roles relating to access to open data and law; we did not necessarily find individuals in equivalent roles in the other jurisdictions. We invited interviewees to be interviewed by audio or video call via a remote meeting platform, typically Microsoft Teams. Further interviewees were recruited after our first interviewees recommended other people for us to speak to, sometimes assisting with introductions. Our purpose for the interviews was to verify the information we were gathering via the literature; to clarify the scope and nature of the justice system which they specialised in; and to gather views on the operation of justice system data practice and policy in their jurisdictions, against the critical appraisal factors described in the brief. Most of the people we approached agreed to be interviewed; this was perhaps because they were interested in the nature of the brief (many indicated this when they spoke to us) but we may have also benefited from the remote working conditions during the COVID-19 period, which may have increased their availability for a call. The interviews were either semi-structured or unstructured, and asked specific questions about their areas of expertise (sometimes picking up points from material they had authored), and often went in unexpected directions depending on their interests and views.

It was not our purpose to identify a representative sample of views; this would require a more extensive and systematic surveying exercise among user groups. Where relevant, we quote the interviewees directly (most of whom agreed to be cited by name, generally speaking in a personal rather than institutional capacity); however, we perhaps drew on the interviews to a greater extent for signposting to further materials, and in shaping our understanding of the different justice systems. We are very grateful to all the interviewees for their generosity of time, especially given the unusual working conditions during the pandemic period, and for all the follow up information they supplied by email.

Owing to the limited timescale and resource of the project, we decided not to conduct a widespread survey among court and legal system officials, instead gathering the information by way of literature/online materials review and interviews. However, this would be an option for larger scale research, to establish more factual information about the functioning of the justice system, particularly the internal systems in place, which are more difficult to ascertain from public documents.

Focus

Our brief asked us to consider common law, English-speaking countries, so as to easily compare with England and Wales, which shares many commonalities with these jurisdictions. For the scope of project we had to narrow our focus to three major jurisdictions (with more attention paid to Canada and Australia because of their size and diversity of jurisdictions), but the method could easily be expanded to other types of legal systems (e.g. European civil law jurisdictions) for future projects with more resource for translation and a cross-country research team.

Our review of each country considered both higher and lower courts in regional and federal jurisdictions. We did not have time to examine tribunals in depth, though we do make some reference to practices in Canadian administrative tribunals in Chapter 4, where we identified interesting material relating to the management of justice system data, even though the tribunals sit outside of the main courts system and are subject to their own information regime.

Although we mention some technical aspects of data management, in general, our discussion is broad and we do not discuss the mechanics of data collection, preparation and linkage, access, and retention/re-use in depth. Such work can be found in other quarters: in Dr Natalie Byrom's ongoing work with HMCTS,³ and as part of the University of Oxford's UK government/UKRI funded project on AI and law, for example.⁴

The types of data we focused on were based on our brief, and also the 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' report by the Legal Education Foundation, and were influenced by the discussions we had with interviewees. Broadly, we focused on these categories: case level data (e.g. documents contained in the court file); administrative/management information data (e.g. listings, outcomes); primary legal data (e.g. written judgments); hearings data (e.g. transcripts and recordings); and court user data (e.g. court user and case characteristics).

In the next chapter, which provides further context on what we mean by 'justice system data' and the different types of access permitted or possible in practice, we explore these categories and definitions in more detail, as well as some of the main issues for the development of justice system data management.

3 'TLEF Statement on HMCTS' Response to Its "Digital Justice" Report' (n 1).

4 Stergios Aidinlis and others, 'Building a Justice Data Infrastructure' (2020)

2 What is ‘justice system data’? A review of the global and national context

This chapter explains what is meant by access to ‘justice system data’, provides details of global initiatives on improving justice data, and considers justice data risks and safeguards. It summarises the ways in which justice system data is managed in England and Wales.

2.1 Overview: national and global initiatives

In this report we use the term ‘justice system data’ to describe the information generated by the process of justice and will explore the ways in which it is collected, stored and disseminated within the selected jurisdictions. Before we do so, we offer a more detailed discussion of access to justice system data, set out the principles guiding our approach, and the policy context in which it sits, at both national and global levels.

Broadly speaking, we can think of justice system data in two categories of access: data collected for internal use by the relevant authorities (e.g. judiciary, court service, government justice department); and data that may be released publicly, whether openly online or to a more restricted category, such as members of the media. This is the division made by the inactive Court Information Act (CIA) 2010 in New South Wales, Australia;⁵ it divides all justice data into two access categories: ‘restricted access information’ and ‘open access information’ which is information that members of the public and the media have a right to access. Within this dichotomy, public or open access information is not necessarily synonymous with ‘open data’; the latter term more specifically refers to ‘data that can be freely used, re-used and redistributed by anyone – subject only, at most, to the requirement to attribute and sharealike’.⁶ Most justice data in the UK does not take this form and advocates of more access to data do not necessarily propose it should. Both categories are part of what Richard Susskind describes as ‘information transparency’ in the court system:

... visibility over court processes, procedures, and operations; over data about the throughput and volumes of cases, their subject matter and value; about scheduling, outcomes, and costs to the public purse. In respect of particular cases, open justice and transparency require that the public should have access: to advance notice of hearings; to some kind of record of proceedings; to information about the parties and procedure involved, and the nature of the dispute; and to some details about case management decisions, the substance of the determination itself, and an explanation of the finding.⁷

In practice, the two access categories offered by the CIA 2010 are not always clearly delineated, and we may think of them within a Venn diagram, with a third category of overlap, where the internal datasets are made public for the purposes of research or commercial use. In the context of England and Wales, an example for this third category are de-identified datasets from the magistrates’ courts which are being made available to ‘accredited’ researchers via the ADR UK and Ministry of Justice ‘Data First’ initiative;⁸ another is the licensing of ‘listings’ data to commercial service Courtserve UK and, separately, via a pilot project led by the Caerphilly Observer.⁹ This data is not open access at source but is shared with external third parties and of a more public nature than records restricted to internal use, who may be permitted to share the resulting applications or outputs built from the data. It is in this overlapping where issues may arise in particular, with alternative legal information providers, or ‘non-accredited’ researchers or media, asking why they too cannot have access and permission to re-use the data.¹⁰

5 The Court Information Act (CIA) received Assent in May 2010 but it is not yet in force. See page 42.

6 ‘What Is Open Data?’ (Open Data Handbook) <http://opendatahandbook.org/guide/en/what-is-open-data/> accessed 20 July 2020.

7 Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 194.

8 In which the Ministry of Justice has been funded by the UKRI’s ADR UK programme to ‘enhance the potential of data linking, both internally within the MoJ, as well as externally with other government departments’: ADR UK, ‘Data First: Harnessing the Potential of Linked Administrative Data for the Justice System’ (ADR UK) <https://www.adruk.org/our-work/browse-all-projects/data-first-harnessing-the-potential-of-linked-administrative-data-for-the-justice-system-169/> accessed 25 July 2020.

9 HMCTS, ‘Arrangement for Sharing Magistrates’ Court Information with the Caerphilly Observer’ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908988/CPR_5.8_Arrangement_Caerphilly_Observer_-_3_August_2020.pdf accessed 8 December 2020.

10 E.g. as discussed in this Twitter thread by Daniel Hoadley (20 June 2020) <https://twitter.com/DanHLawReporter/status/1278006490708750337> accessed 25 July 2020.

Because the framework for the collection, storage and distribution of justice system data has grown up over centuries, with the involvement of an array of third-party actors, including private companies and not-for-profit organisations, and in a complex constitutional backdrop of division between judiciary and executive, its governance is both complicated and patchy. Across all the jurisdictions considered in this report we have found a lacuna in terms of access and re-use policies, and a complex web of legal and ethical arrangements between a variety of justice system actors. There is, however, a push, and also an opportunity, to address these issues.

Of 210 pre-existing commitments to justice in 61 national and local member action plans made as part of the Open Government Partnership (OGP), over half focus on reforms to make the legal system more open; and include initiatives to increase transparency of information and data in justice institutions.¹¹ The focus of these commitments is not just on making legislation accessible (as has been the primary measure for open law in global indexes on open data¹²) but other types of justice data too. At a national level, the UK and Canada have agreed to include commitments on open justice in their future OGP National Action Plans, and initiatives to help them meet UN Sustainable Development Goal (SDG) 16.3, on the rule of law and access to justice, also require them to address matters of data governance and administration. Beyond the case studies offered in this report, countries around the world are developing commitments and indicators in their Open Government National Action Plans and SDG 16.3 projects, sharing ideas in global forums and initiatives. For example, the OECD has a specific programme of work on access to justice aligned with SDG 16.3; its intended actions include:

- Identifying the measurements for effective access to justice.
- Identifying good practices.
- Understanding people's legal needs and the justice pathways they take.
- Policy dialogue on the quality, responsiveness and accessibility of justice services.
- Understanding the links between access to justice and dimensions of inclusive growth (eg. health, employment).
- Conducting reviews and developing implementation support for the delivery of people focused justice services.¹³

These will not succeed without the improvement of mechanisms for gathering, organising and disseminating justice system data, including sustainable funding and investment for this work.¹⁴ This report focuses on the data generated by the court system but we acknowledge, as one leading expert in access to justice, Professor Trevor Farrow, reminded us, that this is only one piece of the puzzle; he told us, 'there's a big iceberg out there ... courts and tribunals are always going to be the small part of how people deal with justice issues'.¹⁵ To move to a system which delivers fair and equal justice to citizens, it needs data from other stages of the process. As Farrow has discussed in his written work, it needs to be better at preventing the escalation of legal problems to a court setting, to be proactive and preventive in the mould of a well-functioning health system, rather than passive and merely responsive to legal disputes and social issues.¹⁶ It is beyond the ambition of this report to tackle that wider problem, but the broader goal should be kept in sight.

11 As of March 2020, Open Government Partnership, 'Justice Fact Sheet' (Open Government Partnership, 2020) <https://www.opengovpartnership.org/wp-content/uploads/2019/05/Justice-Fact-Sheet-March-2020.pdf> accessed 19 July 2020.

12 In, for example, reports by the Open Data Barometer and Global Open Data Index. A new Global Data Barometer, building upon five editions of the Open Data Barometer initiative, aims to expand the methods used to monitor open law.

13 OECD, 'Access to Justice' (OECD) <http://www.oecd.org/gov/access-to-justice.htm> accessed 18 July 2020.

14 In Canada, limited funding has been blamed for the lack of technological advancement in the Ontario Federal Court, see, for example, Jacques Gallant, 'Ontario Courts Remain in Technology's Dark Ages, Chief Justice Says' Toronto Star (24 June 2019) <https://www.thestar.com/news/gta/2019/06/24/ontario-courts-remain-in-technologys-dark-ages-chief-justice-says.html> accessed 18 July 2020.

15 Interview with Trevor Farrow (15 July 2020)

16 See Trevor Farrow, 'What Is Access to Justice?' (2014) 51 Osgoode Hall Law Journal 957, 978-980..

- 17 'University of Oxford Receives £1.2m for AI and Legal Services Project' (University of Oxford, 29 November 2018) <https://www.ox.ac.uk/news/2018-11-29-university-oxford-receives-£12m-ai-and-legal-services-project> accessed 20 July 2020; 'Unlocking the Potential of Artificial Intelligence for English Law' (Oxford Law Faculty, 20 December 2018) <https://www.law.ox.ac.uk/unlocking-potential-artificial-intelligence-english-law> accessed 20 July 2020.
- 18 As recommended in Dr Natalie Byrom, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (The Legal Education Foundation, 2019) <https://research.thelegaleducationfoundation.org/blog/digital-justice-hmcts-data-strategy-and-delivering-access-to-justice> accessed 23 July 2020.
- 19 'Remote Courts' (Remote Courts Worldwide) <https://remotecourts.org/> accessed 25 July 2020.
- 20 One early monitoring exercise has been conducted by Dr Natalie Byrom for the Civil Justice Council: Natalie Byrom, Sarah Beardon and Abby Kendrick, 'The Impact of COVID-19 Measures on the Civil Justice System' (Civil Justice Council/Legal Education Foundation 2020) <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf> accessed 15 June 2020. See also: House of Lords Select Committee on the Constitution, 'Uncorrected Oral Evidence: Constitutional Implications of Covid-19' (Parliament.uk, 22 July 2020) <https://committees.parliament.uk/oralevidence/768/html/> accessed 10 August 2020.
- 21 Amanda Jerome, "'Paper-Based System Is Not Going to Exist Anymore,' Chief Justice Morawetz Says of Post-COVID-19 Court' (15 April 2020) <https://www.thelawyersdaily.ca/articles/18576/paper-based-system-is-not-going-to-exist-anymore-chief-justice-morawetz-says-of-post-covid-19-court> accessed 18 July 2020.

The impetus for change is not confined to international development initiatives, or NGO networks, however. Across national jurisdictions, there is also interest and pressure from commercial organisations to make justice data more accessible and re-useable, an agenda which governments are exploring, eager to seize business opportunities and improve the efficiency of the justice system. In the UK, for example, the government has funded University of Oxford researchers, working with private sector partners, £1.2 million to investigate the 'Unlocking the Potential of Artificial Intelligence for English Law' with one work package designed to 'guide introduction of digital justice measures, with a view to enhance coordination across government and private-sector investments'.¹⁷ Although such initiatives and investments are being built upon messy and muddled approaches to justice system data, at their heart should be robust and well-designed governance models, guided by established legal, ethical and democratic principles.¹⁸ However, it is no use building solid structures over a weak base or foundations – the equivalent of building upon a mat pulled over a hole in the floor. It is logical then that governance models also need to be applied to the justice system data management that drives technological applications, even if these are not currently in place. The holes must be filled, the rotten floorboards fixed.

This report aims to contribute to these objectives and developing discussions at local, national and global levels to help jurisdictions improve their justice system data governance models, with the primary object of increasing access to justice and upholding the rule of law for their citizens, which will help law and policymakers understand the functioning of the justice system more clearly and improve its efficiency and fairness for all users. If, as seems inevitable, better data also opens the door to further commercial development (which may or may not be incentivised by core access to justice principles), then it is essential that this is governed and administered in fair and transparent ways that meet strict public and citizen interest tests. This report is based on the proposition and understanding that it is these latter interests that should be the first priority of governments and judiciaries.

An additional challenge and opportunity for justice system data management has been added to those discussed above by the COVID-19 pandemic, in which physical contacts, including court hearings and lawyer-client discussions, have been severely restricted by national guidance and law. Although new technology for remote courts has been in development for many years, these restrictions have expedited and changed the nature of its introduction, as documented on the Remote Courts website resource.¹⁹ Court services around the world have been forced to move to remote meeting platforms, often using non-custom-built technology, including Skype For Business, Zoom, Webex, and BT MeetMe, as well as e-filing services. For the most part, systematic and reliable research on the effects and outcomes of remote courts is not yet available²⁰ but anecdotally court users – primarily lawyers – have reported mixed experiences of success and failure. While the impact on court users and justice outcomes is beyond the scope of this report, the introduction of new digital and remote court technology is relevant to the justice data questions we are addressing. They generate new data, and new means of collecting data (primarily through video and audio recording) and raise new questions around public accessibility of proceedings. It seems likely that similar methods will be maintained after the restrictions imposed during the COVID-19 pandemic are relaxed – one Canadian senior judge has said 'we cannot go back' – so these questions are an important part of reforming management and governance of justice system data.²¹

2.2 Advantages of widening access to justice data

The advantages to opening up justice data are many and serve multiple needs. Though there are motivations and issues specific to justice system data, in many ways the advantages of better access to justice data mirror the advantages of open government data more broadly conceived; these include improvements to 1) public service delivery; 2) business opportunities; 3) government efficiency and cost saving; 4) prevention of corruption; and 5) trust in government.²² The Open Government Partnership argues that investment in 'building a fair and effective justice system will see returns impacting all OGP issues, particularly public service delivery and anti-corruption'.²³ With regard to access to justice specifically, commitments may be seen to enhance the legal capability of individuals through improved access to information; improve participation in the justice system by strengthening access to and quality of legal help; strengthen forums and processes used to resolve justice problems; and improve outcomes and reduce hardship for those with legal need.²⁴

As well as meeting external demands for transparency and accountability, better data can improve internal processes. Beverley McLachlin, a former chief justice of Canada and chair of the Action Committee on Access to Justice in Civil and Family Matters has recently argued:

...We need data to tell us where the problems are in our justice system. A user-based justice system, which is what we need, presupposes that we know what users need. Data is a two-way street. Technology can help us get data, and data can drive technologies that will help us schedule and plan judicial proceedings more effectively. Algorithms are essentially complex predictive models based on data – that data foundation must be reliable, transparent and consistent.²⁵

Although the roots of open justice run centuries deep, it is still an emerging area of work for international initiatives around open governance and sustainable development, and we need to look to data initiatives in other areas of governance to understand the potential implications of improving and widening data access. One example might be the provision of more open parliamentary data, where parallels can be found both in terms of benefits and risk, but also in the challenges that will be faced by justice data initiatives.

Comparative example

In the UK, a useful comparison is the growth and development of parliamentary open data, which began with external developers building the initiative TheyWorkForYou (TWFY) in 2004, to make Parliament easier for the public to understand. The underlying data was scraped from Hansard, the UK's official record of parliamentary proceedings, despite that this was – at the beginning – a copyright infringement of Crown copyright materials. Since then, licenses have been introduced to legitimise its activities. Although Hansard was already 'public' in nature, TWFY radically changed the way public users could access information and reviews suggest that politicians' behaviour has changed as a result of this increased scrutiny by citizens and voters (for example, an increase in rebellious votes against a party or government line), and is likely to have saved its professional users large amounts of time researching parliamentarians' activities.²⁶ Though further improvements could be made to parliamentary open data²⁷ and the case study is not yet closed, analysis of its history, use and social impacts, indicate some of the advantages to taking a more open approach; as one report noted, 'it may provide a window through which to view the more long-term impacts of such public data re-use outputs'.²⁸

22 Open Government Partnership, 'The Skeptic's Guide to Open Government' (2018) https://www.opengovpartnership.org/wp-content/uploads/2018/09/SKEPTICS-GUIDE_20180710.pdf accessed 19 July 2020.

23 Open Government Partnership, 'OGP Policy Area: Justice' (Open Government Partnership) <https://www.opengovpartnership.org/policy-area/justice/> accessed 19 July 2020.

24 Open Government Partnership, 'Access to Justice' (2019) <https://www.opengovpartnership.org/wp-content/uploads/2019/09/Justice-Policy-Series-Access-to-Justice.pdf> accessed 19 July 2020.

25 Beverley McLachlin, 'Access to Justice: A Plea for Technology in the Justice System' (The Lawyer's Daily, 17 July 2020) <https://www.thelawyersdaily.ca/articles/20104/access-to-justice-a-plea-for-technology-in-the-justice-system-beverley-mclachlin> accessed 17 July 2020.

26 Becky Hogge, 'TheyWorkForYou: Taking the Long View' (2016) 11 <https://odimpact.org/files/case-study-they-work-for-you.pdf> accessed 25 July 2020.

27 Thomas Firth and Richard Norris, 'Achieving More with Open Data at Data.Parliament.Uk' (Open Data Institute, 2016) <https://www.parliament.uk/documents/PDS/Achieving-more-with-open-data.pdf> accessed 25 July 2020.

28 Hogge (n 26) 13.

2.3 Risks and safeguards for widening access to justice data

There are particular risks of widening access to justice data that may not apply to other areas of open governance work, the perception of which may have stymied reform of justice data reform, alongside other factors discussed above, such as the complex arrangements between different parts of the justice system and external providers. Former chief justice of Canada, Beverley McLachlin, has also commented that 'the challenge of meaningful regulation has frequently served as a barrier to tech innovation in justice'; and within her outline of technological innovation she includes the provision of 'better data'.²⁹ 'Meaningful regulation', to allow the desired innovation she describes, needs to be designed around the following points of risk, which have been identified in the pre-existing literature and also the case studies explored in this report. We will discuss these risks – that may be mitigated by regulatory mechanisms – in greater detail in Chapter 6: Comparative analysis and conclusions.

Judicial independence

An important feature of common law justice systems is the separation of powers between the judiciary, executive, and legislature. The independence of the judiciary in conducting its functions – which includes decision-making on the lawfulness or constitutionality of executive actions – is central to the notion of the 'rule of law'. Although the judiciary is reliant on state funding allocated by governments, much of its business is organised separately from government departments. The result is that, in many instances, judicial data processes have grown up distinctly from government initiatives and have also varied between different jurisdictions and courts within a single country.

Such independence may be important; in the UK, concerns have been raised about the practical as well as symbolic effect of government management of judicial content. For example, British legal commentator Joshua Rozenberg perceives that 'it is surely wrong in principle for court sites to be branded "GOV.UK" and hosted on a government website. In a democracy, the courts must be seen to be independent of the government.'³⁰ However, the downside of such independence is a confused and inconsistent approach to the management and protection of judicial data.

In addressing inconsistencies and improving the quality of judicial data, the risk to judicial independence, and methods for its preservation, must be central considerations. As will be explored in the chapters that follow, judges are alive to the dangers of performance management and government or other parties' interference in their role. To mitigate the risks to judicial independence through changes to justice system data processes, these concerns must be fully explored with robust safeguards put in place. The overall objective should be to improve, rather than undermine, judicial independence by improving the way in which justice system data is managed.

29 McLachlin (n 25).

30 Joshua Rozenberg, 'How Will Online Courts Work?', *The Online Court: will IT work?* (The Legal Education Foundation, 2020) <https://long-reads.thelegaleducationfoundation.org/how-will-online-courts-work/> accessed 21 July 2020.

Data privacy

Another important risk consideration is that of data privacy. As with other aspects of the justice system, there is no over-arching design for the management of court users' data privacy. In accordance with the principle of open justice – another important facet of the rule of law – the personal data of individuals who participate or feature in court hearings and evidence, had been widely shared via reports in the media, official law reports or other court materials, now often published online. Though, as we will see in the case studies, there are some restrictions guiding re-use and publicity of court data, this personal data is now accessible in a way that would not have been possible prior to the birth of the World Wide Web and global search tools. Individual name searches take the requester to the detail of the cases in which the subject of their search has been involved (possibly indirectly) even when they did not intend to search court records. Since the development and widespread use of search tools over the past two decades, legal academics and third-sector organisations have begun to grapple with the lawfulness and ethical requirements for open courts data, and the move from 'practical obscurity' to easy access of personal data in court records, with profound implications for an individual's life.

As Ardia explains, in the context of the United States, where court records are among the most open and readily accessible in the world:

While court records have long been open to public inspection, the difficulty of actually accessing individual documents made the information in these records practically obscure. Over the past decade, however, courts across the country have been moving to make their records available online, and many courts require litigants to file their pleadings, motions, and other documents in electronic format. As a result, it now takes little effort to find and link information across cases, courts, and states.³¹

Prompted by this easier access and publicity of court records and personal information contained within them, there is also now a growing body of law on personal privacy and 'the right to be forgotten' or 'right to erasure' in relation to court records, though it is still at a relatively youthful stage, and it seems likely that important and landscape-changing decisions are yet to come. To an extent, the personal data contained within court records has escaped the broader provisions of data protection law with various exemptions for judicial processing of data, in different legal contexts, though this may change in the hands of future lawmakers.

As we shall see in the more detailed case studies, there are varying approaches to the privacy of personal data in court records. Within the EU, there is a growing trend toward anonymisation. In July 2018, the Court of Justice of the European Union replaced the names of natural persons involved in requests for preliminary rulings with initials, and any additional identifying information, in all public documents.³² In many common law countries, however, with notable exceptions (e.g. for cases involving children and the victims of sexual offences), the reporting of names has been understood as an essential part of open justice, and this is frequently argued by media organisations challenging the basis of automatic or discretionary reporting restriction orders.³³

31 David S Ardia, 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' (2017) University of Illinois Law Review 1396 <https://heinonline.org/HOL/Page?handle=hein.journalsunillr2017&id=1418&div=&collection=David>.

32 CJEU, 'Court of Justice of the European Union PRESS RELEASE No 96/18'.

33 See, for example: David Sharman, 'Daily "Brings Justice" to Victim's Family after Winning Right to Name Murderer' (HoldtheFrontPage, 24 July 2020) <https://www.holdthefrontpage.co.uk/2020/news/daily-brings-justice-to-victims-family-after-winning-right-to-name-murderer/> accessed 27 July 2020.

Data security

Connected to the question of data privacy is data security. In opening up justice data, how can confidential data generated by the justice system be processed securely? This is a related but distinct concern to the privacy of individuals more broadly. The question here is not whether and how to make information public, but how to protect information that is assessed confidential in nature. The risk here is that in opening up justice data, insufficient provisions are made to protect the confidentiality of restricted data not intended for publication. This might include personal data that is protected by reporting restrictions and legal privilege, personal data from court materials and registers that has no mandate for public access but may be de-identified for analytical purpose, and private communications. As with other areas of public policy, the existence of the disclosure risk is not a reason for not broadening access to public data, but it must be properly assessed and mitigated for in the design of mechanisms for processing justice system data.

Rehabilitation of offenders

Part of the data privacy topic, but worthy of mention as a distinct consideration is the issue of rehabilitation of offenders. The developing case law mentioned above has begun to consider how the online publication and dissemination of case information can jeopardise protections offered by rehabilitation of offender laws. In the UK, the charity Unlock, which represents those with convictions, has a campaigning and educational programme of activity on the 'right to be forgotten' that as well as drawing attention to the issue, offers advice to those wishing to pursue online content removal. There is an obvious tension between increased 'information transparency' (which Susskind identifies as a likely outcome of online courts);³⁴ and the closure or sealing of more records to enhance the rehabilitation of convicted offenders into society (as recommended in The Lammy Review in 2017 on the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the criminal justice system, and the Fair Checks campaign³⁵). While criminal appeal charities are pushing for better data (e.g. access to cheaper transcripts for the purposes of appeal) in the interests of fair justice, more online publicity of criminal records or involvement in criminal cases, could undermine efforts to improve rehabilitation. Increased publicity of online court records may also have consequences in other jurisdictions such as family, civil and tribunals, where individuals may be stigmatised for having participated in bringing a case, for example, in an employment tribunal.

Access to justice

The points above sit within a broader category of access to justice. Dr Natalie Byrom's Digital Justice report describes an 'irreducible minimum standard' of access to justice under English law, 'which is capable of acting as an empirical standard for the purposes of iterating reformed services and evaluating the impact of court reform'. The components of this irreducible minimum standard are:

- (i) access to the formal legal system,
- (ii) access to an effective hearing,
- (iii) access to a decision in accordance with substantive law,
- (iv) access to remedy.³⁶

34 Susskind (n 7).

35 David Lammy, 'An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System' (2017) 9 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf accessed 27 April 2018; 'FairChecks' <https://www.fairchecks.org.uk/> accessed 26 July 2020.

36 Byrom, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (n 1) 4, 17. Also see Dr Natalie Byrom, 'Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice' (The Legal Education Foundation, 2019) <https://research.thelegaleducation-foundation.org/research-learning/funded-research/developing-the-detail-evaluating-the-impact-of-court-reform-in-england-and-wales-on-access-to-justice> accessed 26 July 2020.

In turn, these were adopted by the House of Commons select committee on justice, which recommended in a 2019 report, that the Ministry of Justice should be as transparent as possible in its evaluation of court reforms. Among the recommended approaches, it suggested that reform programme projects should be evaluated against the standards described above; that 'the transfer to digital systems should be used as an opportunity to collect detailed, anonymised data on the operation of courts and tribunals and the experiences of users by reference to their personal characteristics'; and evaluation must be 'robust and objective, using a comparator group where possible'.³⁷

If these recommendations are followed, more and better data collection and analysis is vital, and this report adopts the assumption that better data will help policymakers improve access to justice mechanisms, in line with SDG 16.3 objectives. As the select committee suggests, this data can be anonymised. But some access to justice initiatives – such as David Lammy's call for greater publication of sentencing remarks,³⁸ and the Labour Party's proposal to live-stream more types of cases³⁹ – also require increased public access to non-anonymous and personal data, and for this type of data, it should be acknowledged that there is a potential side-effect that increased visibility of the personal data contained within justice information in the public domain will in fact deter individuals from bringing legitimate cases.⁴⁰

At the same time, it may also encourage them. As noted by a legal practitioner assessing changes to the publication of first instance Employment Tribunal judgments in the UK in 2017, there could be various implications for increased accessibility of the information contained in judgments that may have a bearing on litigation strategy. In one light, claimants and employers may suffer adverse consequences from the publicity of their litigation history. In another, it will remove the possibility of increased publicity influencing a decision whether to appeal (as appeal judgments were already more visible online); and could have a positive impact on the parties in some circumstances, assisting claimants with information about employer's previous conduct, for example. However, he argues, the emphasis should be on whether 'existing protections' to protect parties are sufficient, rather than whether the material should be made public.⁴¹

37 House of Commons Justice Committee, 'Court and Tribunal Reforms' (House of Commons 2019) HC 190 65 <https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf> accessed 26 July 2020.

38 Lammy (n 35) 7.

39 Elliot Chappell, 'Labour Calls on Government to Livestream Court Cases' (LabourList, 1 May 2020) <https://labourlist.org/2020/05/labour-calls-on-government-to-livestream-court-cases-both-during-and-after-covid-19/> accessed 5 May 2020.

40 See, for example: Karen Eltis, 'The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context' (2011) 56 McGill Law Journal/Revue de droit de McGill 289, 316.

41 Jamie Anderson, 'Employment Tribunal Judgments Online' (Internet Newsletter for Lawyers, 18 May 2017) <https://www.infolaw.co.uk/newsletter/2017/05/employment-tribunal-judgments-online/> accessed 23 July 2020.

Assessing risks and developing safeguards

In protecting access to justice, risk assessments are essential. As a result of the ad hoc and inconsistent way in which justice system data processes have developed over time, it seems probable that in most scenarios, full risk and data protection/security assessments for access and publicity of court records have not been carried out, nor assessments on the societal and economic – including equality – impacts. Here, law and policymakers would be wise to look to the risk assessments conducted in other areas for changes to the ways in which data is processed and controlled. For example, they might take inspiration from the UK National Archives' risk assessment procedures for government departments to manage digital continuity, and its Information Management Self-Assessment Tools for the wider public sector,⁴² and look to the methodology of impact assessments required in other areas of law (e.g. for protecting data, or preventing unlawful discrimination and advancing equality). Additionally, there are a wide range of tools (or methodologies) that can be used for considering the ethics of data use, such as the UK's Open Data Institute Data Ethics Canvas.⁴³

Such exercises would help the organisations responsible for managing justice system data develop appropriate modes of governance and regulation where none exists. Oversight and regulatory mechanisms would both offer protection to the subjects of justice system data (whether direct parties in cases, or other people whose personal data is used), but also safeguard public rights of access to justice data provided by principles of free expression and open justice. Such governance mechanisms are the subject of discussion in the UK, the context for which we now examine.

42 The National Archives, 'Risk Assessment' (The National Archives) <http://www.nationalarchives.gov.uk/information-management/manage-information/policy-process/digital-continuity/risk-assessment/> accessed 23 July 2020.

43 The ODI, 'The Data Ethics Canvas' <https://theodi.org/article/data-ethics-canvas/> accessed 23 July 2020.

44 Dr Natalie Byrom, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (n 1); Judith Townend, 'Towards a National Commitment to Open Justice Data in the United Kingdom' (Spotlight on Corruption/Open Government Network 2019) <https://www.opengovernment.org.uk/wp-content/uploads/2019/10/Open-courts-final-October-2019-latest.pdf> accessed 23 July 2020; Rahul Rose, 'Veil of Secrecy: Is the Fight against Corruption Being Undermined by a Lack of Open Justice?' (Corruption Watch, 2018) https://drive.google.com/file/d/1RDcWNyHMQUAUIkcSiSjRXdH6OWiIICM/view?usp=embed_facebook accessed 23 July 2020.

45 Byrom (n 1) 25.

46 Byrom (n 1); Townend (n 44); Rose (n 44).

47 Reformed service as described in: David Phillips, 'HMCTS Reform Programme: Online Civil Money Claims and Civil Enforcement' (11 March 2019).

2.4 The UK (England and Wales) context

This report was born out of previous initiatives that concentrated on England and Wales,⁴⁴ where justice system data is described in greater detail, with various recommendations suggested for reform and development. We do not repeat the exercise in full here, though adopt some of the ideas and perspectives of those earlier reports, as well as the justice data framework provided by The Legal Education Foundation's 'Digital Justice' report by Dr Natalie Byrom.⁴⁵ To provide some comparative context for the chapters that follow, we first summarise the findings of those reports, against the broader themes we will be addressing for our detailed country case studies. The three reports on justice data by Byrom, Townend and Rose⁴⁶ concentrate on courts in England and Wales (and the UK Supreme Court); we are not aware of equivalent research specifically on justice system data in Northern Ireland and Scotland, where distinct regimes apply.

What constitutes 'justice data' in England and Wales?

In her 2019 report, Dr Byrom categorised 'justice system data' in England and Wales as shown in the following table.

Table 1 Categories of justice data in England and Wales (Byrom, 2019)	
Categories of data	Illustration of the types of data referred to within these categories, using Civil Money Claims Online ⁷⁴ as an example
Court user data	<ul style="list-style-type: none"> • Geo-demographic and equalities characteristics of parties • Party type e.g. bulk user? • Represented vs unrepresented (full representation/unbundled/limited scope)? • Perceptions of fairness/user satisfaction/customer effort
Case level data	<ul style="list-style-type: none"> • Claimant/Defendant name and contact details • Detailed case type • Value of claim • Directions questionnaire • Procedural mechanisms initiated by parties e.g. defence, counterclaim, application for default judgment, appeal of judgment • Procedural mechanisms initiated by court e.g. referral to mediation, settlement review, or full hearing • Outcome by stage e.g. settled, withdrawn, judgment issued • Value of settlement/judgment • Costs order issued? • Enforcement applied for (warrant of execution, attachment of earnings order, third party debt order, charging order, bankruptcy petition) • Application for suspension of a warrant/variation of order made? • Application notice, certificate of cancellation or satisfaction applied for? • Administration order applied for?
Administrative/management information data	<ul style="list-style-type: none"> • Court listings • Judge allocated • Applications for help with fees? • Track allocated • Date and time stamped information for each 'event' from initial filing to outcome e.g. case management hearing held, referral to mediation • Order for a private hearing/anonymisation of parties applied for? • Outcome e.g. settled, withdrawn, judgment issued
Primary legal data	<ul style="list-style-type: none"> • Judgments

We have adopted these categories for this report, with a few simplifications and additions, to allow for the different contexts being examined.

Table 2: **Categories of justice data in England and Wales (Byrom, 2019)**

Categories of data	Example types of data ⁷⁴
A Court user data	<ul style="list-style-type: none"> • Geo-demographic and equalities characteristics of parties • Party type e.g. claimant, defendant • Represented vs unrepresented • Perceptions of fairness/user satisfaction/customer effort
B Case level data (court file)	<ul style="list-style-type: none"> • Party name and contact details • Detailed case type • Value of claim • Directions questionnaire • Procedural mechanisms initiated by parties e.g. defence, counterclaim, application for default judgment, appeal of judgment • Procedural mechanisms initiated by court e.g. referral to mediation, settlement review, or full hearing • Outcome by stage e.g. settled, withdrawn, judgment issued • Value of settlement/judgment • Order/variation of order • Documents i.e. statements of case/pleading, witness statements, directions, affidavits, skeleton arguments • Exhibits/evidence
C Administrative/management information data (docket information)	<ul style="list-style-type: none"> • Hearing listings information • Judge allocated • Record of charge or claim • Filing records e.g. witness statement has been lodged, plea, outcomes • Application for order for a private hearing/anonymisation of parties • Outcome e.g. settled, withdrawn, judgment issued
D Primary legal data (judicial rulings)	<ul style="list-style-type: none"> • Judgments (written or ex tempore) • Sentencing remarks
E Hearings data	<ul style="list-style-type: none"> • Transcripts • Audio recordings • Video recordings

The most significant addition is category E. This category of data has become even more relevant in the COVID-19 period, with the increased use of remote hearings.

Who has responsibility in England and Wales?

In England and Wales, the management of such data is partly determined by a hybrid of provisions originating in legislation, case law, civil and criminal procedural rules, practice directions, and practice guidance. The responsibility for the design of data systems falls to different bodies: the legislature, the judiciary and judicial office, the Ministry of Justice (a government department), and HM Courts and Tribunals Service (HMCTS, an agency of the Ministry of Justice which operates as a partnership between the Lord Chancellor, Lord Chief Justice and the Senior President of Tribunals). In addition, there are also organisations external to the judiciary and government that have a significant role in the design and implementation of justice data flows, such as the charities BAILII, which publishes court judgments, and the Incorporated Council for Law Reporting (ICLR) which publishes the official law reports; commercial legal information services such as LexisNexis and Thomson Reuters' Westlaw; and various transcription companies. Finally, legal representatives themselves often take responsibility for the temporary collection and storage of justice system data. The landscape is complicated, as identified by Byrom, whose research revealed:

...the complexity of current arrangements for the collection, storage and publication of justice system data under legacy systems; the limitations of current access arrangements; difficulties in identifying who 'owns' which datasets and poor public visibility regarding the data that is currently held by HMCTS. This has led to misconceptions about what is available and in what format and renders it difficult for stakeholders to formulate reasonable requests for data - consultation revealed that stakeholders often overestimated both the volume of data held by HMCTS under legacy systems and the ease with which this data could be accessed.⁴⁸

Remote justice data

Before the COVID-19 pandemic, the English courts were already beginning to experiment with technology for conducting partially-remote hearings: in the tax tribunal and remand hearings in the magistrates' court, for example. Video conferencing technology was being developed as part of HMCTS's £1.2 billion programme of court reform. The COVID-19 emergency led to the use of video being rolled out far more rapidly than it would have done otherwise, as physical court hearings were either suspended or held under extremely restricted conditions. In the first instance a 'smorgasbord' of technological methods were used, with hearings across courts and tribunal types held by platforms including Zoom, Skype for Business, BT MeetMe and Microsoft Teams.⁴⁹ At the end of April 2020, HMCTS announced that the Kinly Cloud Video Platform (CVP) would be rolled out to 60 magistrates' courts and 48 crown courts, with others to follow, including in the civil and family jurisdictions.⁵⁰ At the time of writing, the mix of methods continues, with greater use of CVP alongside other methods. With courts using a variety of technological platforms, and hearings organised in different ways, new questions arise about how data generated from such hearings is collected. In England and Wales, for example, barristers have reported that they have been asked to take responsibility for setting up and recording hearings, raising questions about the correct protocol for recording and storing/sharing files post-hearing.⁵¹ It is not yet – and may never be – possible to track all recording data from this period; it is likely that some recording technology will have failed to capture the required data, or that storage has been inconsistent.⁵² Additionally, it is not clear if all courts are routinely recording hearings: this was not something required for physical hearings in all court types (e.g. the magistrates' court).

48 Byrom (n 1) 14.

49 Described in Paul Magrath, 'Remote but Transparent? Open Justice under the Lockdown' (The Lawyer, 17 April 2020) <https://www.thelawyer.com/remote-but-transparent-open-justice-under-the-lockdown/> accessed 25 July 2020.

50 HMCTS, 'New Tech Will Help Keep the Criminal Justice System Moving during COVID-19 Pandemic' (GOV.UK, 30 April 2020) <https://www.gov.uk/government/news/new-tech-will-help-keep-the-criminal-justice-system-moving-during-covid-19-pandemic> accessed 23 July 2020.

51 See, for example, Lucy Reed, 'Invidious' (Pink Tape, 6 June 2020) <http://www.pinktape.co.uk/rants/invidious/> accessed 23 July 2020; Gordon Exall, 'When Remote Hearings Go Wrong' (Civil Litigation Brief, 17 June 2020) <https://www.civillitigationbrief.com/2020/06/17/when-remote-hearings-go-wrong-and-struggling-through-to-put-them-right-at-whose-costs/> accessed 23 July 2020.

52 See example in Exall (n 51).

In terms of data from other remote justice methods, such as online dispute resolution (ODR), the picture is again unclear. New online services have been introduced for online pleas for minor criminal offences, divorce, probate, civil money claims, and social security appeals, but we are yet to see full reports on the type of user data being collected. Limited information about the cases being resolved this way is made public online; an exception is listings data relating to the single justice procedure (SJP) for summary-only non-imprisonable offences; those cases that are ready for hearing, dealt with by a single magistrate on the basis of the papers alone, are listed in a PDF document published on the government website each day containing details of the name (surname and initial), town, county, postcode (area only), offence and prosecutor. At present, the cases listed only relate to single justice prosecutions brought by Transport for London and some single justice prosecutions by TV Licensing.⁵³ Further information about SJP cases can be sought by the media and public under Criminal Procedure Rules Part 5.8, with a greater level of access to SJP documents for the 'accredited' media, according to a protocol agreed between HMCTS, the Society of Editors and the News Media Association, and approved by the Lord Chancellor.⁵⁴

53 HMCTS, 'Single Justice Procedure Court Lists' (GOV.UK) <https://www.gov.uk/guidance/single-justice-procedure-court-lists> accessed 23 July 2020.

54 HMCTS, 'Protocol on Sharing Court Lists, Registers and Documents with the Media' (GOV.UK, 5 March 2020) <https://www.gov.uk/government/publications/guidance-to-staff-on-supporting-media-access-to-courts-and-tribunals> accessed 23 July 2020.

55 Susskind (n 7).

56 Byrom (n 1) 14.

57 Dr Natalie Byrom, 'Briefing: Coronavirus Bill, Courts and the Rule of Law' https://research.thelegaleducationfoundation.org/wp-content/uploads/2020/03/Recommendations-for-Coronavirus-Bill_V6.pdf accessed 23 July 2020.

58 For example, see oral evidence given by Rt Hon Robert Buckland MP (Secretary of State for Justice and Lord High Chancellor of Great Britain at the Ministry of Justice) to the House of Lords select committee on the constitution, which highlighted data gaps – such as on the impact of remote hearings on the interests of justice. House of Lords Select Committee on the Constitution (n 20).

59 Article 23(1)(f) GDPR and section 15(2)(b) and Schedule 2, part 2, para.6; Schedule 2, part 2, para.14(2) DPA 2018.

60 Judicial Data Protection Panel, 'Judicial Data Processing Complaints Handling Policy' (2020) 5 <https://www.judiciary.uk/wp-content/uploads/2019/04/Judicial-data-processing-complaints-handling-policy-May-2020-1.pdf> accessed 26 July 2020.

Although not much data about online court processes has yet been put into the public domain, Byrom's report observed that there was the possibility of much greater data capture, a point also made by Richard Susskind with regard to what he describes as 'information transparency' for Online Dispute Resolution (ODR) cases.⁵⁵ Byrom described how 'the introduction of new kinds of legal process ... reformed systems will generate new categories of justice system data, beyond the data that has historically been collected by HMCTS'. There is, therefore, 'an unprecedented and exciting opportunity to address systemic challenges in relation to the justice system data landscape, and in doing so deliver a justice system that is more transparent, more accountable and more capable of supporting research, innovation and evidence-based policy making'.⁵⁶

Ahead of the passing of the Coronavirus Act 2020, which expanded the circumstances in which technology could be used to hold 'remote' hearings, Byrom called for various data to be collected and analysed during the period, including these measures:

- Judgments given in cases that are held remotely - in writing and made publicly available.
- Monitoring of the impact of shift in mode of proceedings on individuals with protected characteristics under the Equality Act 2010.
- The failure rate of the technology used and the nature and extent of technical difficulties encountered must be monitored and recorded.
- Recording of all remote hearings, with transcripts of remote hearings being made available as soon as practicable to parties to the case and third parties.⁵⁷

Based on the evidence currently available, it does not appear that HMCTS and the judiciary have implemented these steps in full.⁵⁸

Data protection regime in England and Wales

In both the EU General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018 (DPA), which enforced the GDPR into UK law, there are various exemptions for the processing of personal data for those acting in a judicial capacity; for example, from the right of access and the right of rectification provided for by the GDPR.⁵⁹ Guidance issued by the Judicial Data Protection Panel states that 'the reason for the exemption is to secure the constitutional principles of judicial independence and of the rule of law'.⁶⁰

- 61 Recital 20, article 55(3) GDPR, section 117 DPA.
- 62 Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Judicial Data Protection Panel – Terms of Reference' 1 https://www.judiciary.uk/wp-content/uploads/2019/05/Judicial-Data-Protection-Panel-ToR-Final_as-at-18-January-2019.pdf accessed 25 July 2020.
- 63 Lord Chief Justice of England and Wales, 'The Lord Chief Justice's Report 2019' (Judiciary of England and Wales 2019) 14 https://www.judiciary.uk/wp-content/uploads/2019/11/6.5954_JO_Lord_Chief_Justices_Annual_Report_2019_WEB.pdf accessed 25 July 2020.
- 64 Judicial Office, 'Request for Information Relating to the Judicial Data Protection Panel' (16 June 2020). Personal letter to Paul Magrath (Transparency Project trustee) following his initial request under the Freedom of Information Act, which was refused. Additional information was supplied though deemed to be outside the scope of the requirements of the Freedom of Information Act 2000.
- 65 HMCTS, 'HM Courts & Tribunals Service: Personal Information Charter' (GOV.UK) <<https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/personal-information-charter>> accessed 25 July 2020; Ministry of Justice, 'Ministry of Justice: Personal Information Charter' (GOV.UK) <https://www.gov.uk/government/organisations/ministry-of-justice/about/personal-information-charter> accessed 25 July 2020.
- 66 Courtserve, 'CourtServe: Privacy Policy for the Court & Tribunal Lists' (Courtserve.net) <https://www.courtserve.net/generic/gdpr-policy-court-tribunal-lists.php> accessed 25 July 2020.
- 67 For a discussion on judgment re-use, see: Paul Magrath, 'BAILII and the Re-Use of Judgments as Public Legal Information' (Inform's Blog, 3 October 2019) <<https://inform.org/2019/10/04/bailii-and-the-re-use-of-judgments-as-public-legal-information-paul-magrath/>> accessed 25 July 2020.
- 68 BAILII, 'BAILII - Privacy Policy' (www.bailii.org) <https://www.bailii.org/bailii/privacy.html> accessed 25 July 2020.
- 69 Recommendation A4 in Townend (n 44) 16.
- 70 See 4.32 in Dr Natalie Byrom, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (n 1) 22.

Additionally, such processing is not subject to the same regulatory oversight as other types of justice system data; in England and Wales this means that the processing of personal data by an individual, a court or tribunal acting in a judicial capacity is excluded from the jurisdiction of the Information Commissioner's Office (ICO).⁶¹ There is, however, an expectation that the judiciary will establish an internal body which will supervise this data processing; as a result, in England and Wales, the Lord Chief Justice and the Senior President of Tribunals have established a Judicial Data Protection Panel, as mentioned above, to supervise data processing activities of courts and the First-tier and Upper Tribunals, the Employment Tribunals and Employment Appeal Tribunal when exercising judicial functions. The panel is also responsible for 'ensuring that effective systems are in place to facilitate compliance with data processing obligations arising under the GDPR and DPA 2018'.⁶² Limited information has been placed in the public domain with regard to the functioning and activity of this new body. The annual report of the Lord Chief Justice contains very brief summary of activities.⁶³ Personal correspondence from the Judicial Office confirms that between 25 May 2018 and 29 February 2020, the Judicial Data Protection Panel (the Panel) has considered 61 complaints, which have led to no further action (37 were considered outside the Panel's remit and 24 were not upheld).⁶⁴

Of course, there is justice system data that falls outside the exemptions for the processing of judicial data provided in the GDPR and DPA 2018 and would be overseen by data protection processes at HMCTS, MoJ, with regulatory oversight by the Information Commissioner's Office (ICO).⁶⁵ Additionally, third party data controllers or processors of data originating in the courts system may have responsibilities under the GDPR and Data Protection Act 2018. For example, Courtel Communications, which 'publishes and distributes the Court and Tribunal lists under licence from The Secretary of State for Justice acting through HMCTS', has published a privacy policy 'in respect of personal information within the Court and Tribunal lists published on the website'.⁶⁶ With regard to the personal information contained in judgments, BAILII, which currently prevents indexing of its website for bulk re-use of judgment data,⁶⁷ publishes a privacy policy stating that 'it is the responsibility of the public bodies which provide these databases to BAILII to determine, subject to the requirements of the laws under which they operate, the appropriate balance between the privacy interests of individuals and the public interests in dissemination of the information'.⁶⁸

As yet, there does not appear to be any substantial legal or academic analysis of the scope of data protection in the UK with regard to 'justice system data' as understood in this report, though previous reports have suggested the commissioning of an independent legal opinion,⁶⁹ as well as further research and consultation.⁷⁰

Justice system data accountability in England and Wales

To an extent, the data protection regime described above provides a limited amount of oversight and accountability of justice system data in the English context. The courts themselves are of course another means of accountability if a party has sufficient legal and financial means. Applications for access to court documents or permission to report the detail of reporting restrictions have been appealed via this route, with some appeals continuing all the way to the UK Supreme Court. Beyond that, some information about the operation of courts and tribunals may be sought under the Freedom of Information Act 2000 but not if it falls within the section 32 absolute exemption for court records. Additionally, although requests under the Act can be made to the Judicial Office, via the Ministry of Justice, the judiciary itself is not subject to FOIA nor the Senior President of Tribunals or the Lord Chief Justice. Information held by the Ministry of Justice for the Judiciary and Judicial Office may not be required to be released, unless it holds information 'otherwise than on behalf of another person' – i.e. if it holds the requested information to some degree for its own purpose.⁷¹ Although information can be sought from the MoJ and HMCTS with regard to their operations (e.g. spending and activities) under the FOI regime, the practical result is that FOIA 2000 provides a very limited mechanism for accessing data from the justice system.

Beyond the statistical data and other information that can be sought within the FOI regime, there is of course proactive publication of data by the Judiciary, MoJ and HMCTS that provides some element of accountability for the justice system. An extra level of accountability is provided if the data is required by way of practice directions in the civil or criminal procedural rules, or by legislation. For example, practice direction 40F to the Civil Procedure Rules 'provides for a scheme for the recording, and transmission to the Ministry of Justice for analysis, of certain data in relation to applications for injunctive relief in civil proceedings to restrain the publication of private or confidential information'. The direction, in its initial form, was introduced after it transpired that little to no records were being kept on applications and orders for privacy injunctions and so-called 'super injunctions'.⁷²

At the time of research there was no one data governance body within the justice system. However, HMCTS has reported – in response to Dr Natalie Byrom's recommendations – that a Senior Data Governance Panel (SDGP) is being established, and will operate in 'shadow' mode from autumn 2020.⁷³ In recent years developments such as the appointment of a senior judge in charge of data governance, and the creation of the Judicial Data Protection Panel and an advisory group on Artificial Intelligence⁷⁴ all signal heightened awareness and attention to these issues within the judiciary, in addition to transparency and open justice initiatives being pursued by the MoJ and HMCTS alongside its programme of reform.

Having set out the context and understanding of 'justice system data' adopted in this report, both in relation to global initiatives and the English legal system, we now turn to our first in-depth case study, which considers the Australian federal and state justice system.

71 Under s3(2)(a) Freedom of Information Act 2000. With thanks to Maurice Frankel, Campaign for Freedom of Information, for providing background information and case information.

72 Master of the Rolls, 'Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice' (2011) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf> accessed 25 July 2020.

73 HMCTS, 'Making the Most of HMCTS Data' 1,7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925341/HMCTS_Making_the_most_of_HMCTS_data_v2.pdf.

74 Lord Chief Justice of England and Wales (n 63) 5, 14.

3 Australia

This, our first case study chapter, provides an overview of justice system data in Australia at the federal and state level. It begins with an overview of the legal context and reviews the key features of the federal courts before moving to an account of the two largest states: Victoria and New South Wales. The chapter finishes with a critical appraisal of justice system data management in Australia.

3.1 Background

Structure

Australia has a common law system with a complicated legal system hierarchy comprising national and regional elements, namely the federal division and the state and territory division. In this chapter we focus firstly on the federal division, and then on the states of Victoria and New South Wales (NSW). We chose these two states chiefly because of their population size (they are the two most heavily-populated states in Australia), but also because issues unique to each of the two states have national and international significance, as we explain in the state-specific sections and then in the concluding appraisal at the end of this chapter.

Federal courts

At a national level there are four principal federal courts: the High Court, the Federal Court, the Family Court and the Federal Circuit Court. Together, the High Court, the Federal Court and the Family Court constitute the ‘superior’ federal courts. The High Court is the highest court in Australia, and the final court of appeal from all of the state and territory superior courts. It hears disputes about the meaning and/or interpretation of the constitution, and well as final appeals in civil and criminal matters from all courts in Australia. Appeals to the High Court are, however, by special leave only, which is rarely granted.

The Federal Court of Australia hears a different range of matters including bankruptcy, company and/or corporate law, industrial relations, native title, taxation and trade practices laws and appeals (except on family law matters), from the Federal Circuit Court. The Family Court of Australia is Australia’s specialist court dealing with family disputes and hears appeals from decisions in family law matters of the Federal Circuit Court. As the Family Court is a specialist court, we do not focus on it for the purposes of this review. The Federal Circuit Court of Australia is the ‘inferior’ or ‘lower’ federal court and hears less-complex disputes in matters including family law and child support, administrative law, admiralty law, bankruptcy, copyright, human rights, migration, privacy and trade.

State courts

At the regional level, there are six states and three internal territories, each with their own laws and court system hierarchies. State and territory courts fall within the responsibility of the relevant state or territory Attorney General or Minister for Justice. Every state and territory has a first level state court in different locations in the state or territory. The labelling of both first and second level courts is not consistent across Australia. For example, the two states that are the focus of this study have different names for their first level courts: the ‘Magistrates’ Court’ in Victoria is the ‘Local Court’ in NSW. The Magistrates/Local Court deals with criminal trials for summary offences and smaller civil claims.

Each state or territory also has:

- A superior court with ‘inherent’ jurisdiction in addition to its specific statutory jurisdiction. It can hear cases in any area except where a statute specifically says otherwise. The superior court is split between appellate and trial divisions, with the trial division dealing with the most serious criminal and civil cases. Serious criminal cases would include major drug offences, attempted murder, manslaughter and murder; serious civil disputes would involve disputes between people and/or organisations over money or property involving amounts over a demarcated threshold (this differs from state to state). The appellate division of the superior court will usually hear appeals from the trial division of the superior court itself as well as appeals from the second level courts.
- A second level court, which is generally called the County (NSW) or the District (Victoria) Court. The District/County Court is supervised by a judge and handles most criminal trials for less serious indictable offences, and most civil matters below a certain threshold (which varies from state to state as outlined above).

There are also specialist state courts such as the Children’s Court, and the Drug Court, but these vary from state to state, and we have not focused on the specialist courts in Australia for the purposes of this review.

Open justice and privacy

In general, civil and criminal courts at both a federal and a state level are open to the public in Australia. This is further to the English common law open justice principle, which dictates that the judicial process should be transparent and accessible to the general public. Former NSW Chief Justice Jim Spiegelman said in 2005 that the principle that justice must be seen to be done ‘is one of the most pervasive axioms of the administration of common law systems’.⁷⁵ More recently, at a federal level, the High Court of Australia confirmed its commitment to open justice in Zhao’s case (2015), when it stated that ‘the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny and courts will not act contrary to the principle save in exceptional circumstances’.⁷⁶

Suppression orders

Suppression orders form an exception to the open justice principle, and in Australia, are a major factor in understanding the availability of information from the court. Judges or magistrates in Australia can control the timing of the disclosure or publication of cases before them, or parts of cases before them, by issuing orders that prohibit disclosure and publication. Narrower non-publication orders prohibit publication but not disclosure. All superior courts in Australia, the Supreme Court for each state, the Federal Court and the High Court, have an inherent power to issue a suppression order over any case on the grounds of possible prejudice to a forthcoming case, but the lower courts in every state have a different regime. We review the different approaches in our jurisdiction specific sections, below.

75 As cited in Mark Pearson and Mark Polden, *The Journalist’s Guide to Media Law* (Allen & Unwin, 2019) 102.

76 Zhao’s case: *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378 [44].

Suppression orders have received particular and renewed attention of late, with a furore over their use in the case of the trial of Cardinal George Pell, Australia's highest-ranking Catholic cleric. Pell was charged with a number of offences; one set of allegations related to sexual assault in the 1990s, and the other to indecent assault charges from the 1970s. Because the trials were to take place back-to-back, the County Court Chief Judge, His Honour Peter Kidd, imposed a suppression order on 25 June 2018 preventing reporting of the first trial to avoid prejudice to the second. Unfortunately, the first trial resulted in a hung jury, and the retrial meant that the time frame (for suppression) had to be extended. At the end of the retrial George Pell was convicted of rape and sexual assault (Pell's convictions were subsequently overturned by the High Court of Australia). As one of our interviewees told us, 'if the third most powerful Catholic cleric in the world is convicted of child sex offences this is going to be difficult to contain'.⁷⁷ We come back to the Pell case in the section on Victoria, below. Numerous publications in Victoria, throughout Australia and indeed around the world, reported the verdict, resulting in charges for contempt of court which are ongoing at the time of writing.

Contempt

Contempt of court charges in the Pell case have been brought against 21 separate publications, 6 corporate groups and 19 individual journalists.⁷⁸ Contempt laws operate much as they do in England and Wales to restrict the way that cases can be publicly reported. Court reporters cannot publish material that prejudices a fair trial. In addition to the breach of suppression orders, contempt laws therefore aim to prevent journalists from revealing anything that might influence a jury, such as the existence of prior convictions, or any statement implying guilt or innocence of the accused. Unfortunately, common law rulings in Australia on the boundaries of permissible vis-à-vis contemptuous publication are confusing and inconsistent, 'leaving journalists and bloggers unsure of what can be published in particular circumstances'.⁷⁹ Overall, (and as exemplified by the response to the Pell breaches), contempt is a 'major risk' for journalists in Australia, much more so than privacy laws, from which journalists are mostly exempt.⁸⁰ Penalties, especially in the higher courts, can be severe: in Victoria, contempt is punishable by a maximum of five years imprisonment, in NSW, by 12 months. Lower maximum sentences exist in the lower courts.⁸¹

Privacy

In Australia, privacy law is a complex web of common law and statute, at a state and a federal level. The federal provisions in the Privacy Act 1988 (Cth) were introduced after a series of law reform reports in the 1980s recommended the introduction of nation-wide privacy standards,⁸² and set out the data protection infrastructure as it applies to government departments and agencies at a federal level. Section 78(4) provides an exemption for journalists, and section 7(1) for the courts. However, the courts are only exempt to the extent that a contrary intention does not appear in the Act. Generally speaking, judgments in Australia are not anonymised unless so required by statute or directed by the court. There are specific examples of federal law directing anonymisation: for example, in family law or national security type cases.⁸³

77 Interview with Professor David Rolph, University of Sydney Law School (2 June 2020).

78 *ibid.*

79 Pearson and Polden (n 75) 140.

80 Interview with Rolph, University of Sydney Law School (n 77).

81 Section 52, Magistrates' Court Act 1989 (Vic); Section 24, Local Court Act 2007 (NSW); see also Naaman Zhou, 'Suppression Orders in Australia: Why You Can't Read What You May Want To' *The Guardian* (14 December 2018) <https://www.theguardian.com/law/2018/dec/14/suppression-orders-australia-why-you-cant-read-what-you-may-want-to> accessed 6 July 2020.

82 Australian Law Reform Commission, 'Unfair Publication: Defamation and Privacy' (1979) www.alrc.gov.au/report-11; Australian Law Reform Commission, 'Privacy' (1983) www.alrc.gov.au/report-22.

83 See the Family Law Act 1975, and the National Security Information (Criminal and Civil Proceedings Act 2004): the latter closes courts if there is a risk of disclosure of information that may prejudice national security.

Copyright

Copyright laws have the potential in Australia, as elsewhere, to restrict the publication of primary legal data such as judgments and/or courts records and so forth. Australian copyright law is for the most part embodied in the Copyright Act 1968 (Cth). Under Part VII of the Act, the Australian government holds copyright in any work made by or under the direction of the government. Section 182A of the Act provides that for certain ‘prescribed works’ (which includes legislation and court judgments) copyright is not infringed by making a copy of a whole or a part of that work, as long as it is not sold for a rate that is above the actual costs of copying. The free access databases such as AustLII and JADE have bespoke licencing arrangements that have been put in place with the courts.

Right to know

Right to know legislation exists in every state and varies with each jurisdiction in terms of statute, protocols and charges. The Freedom of Information Act 1982 (Cth) provides the federal right to know legislative framework. It has been observed that, ‘while the aspirations of FOI are noble, the reality of the application of the laws can be deflating’.⁸⁴ In particular, a comparative analysis conducted in 2005 found that Australia was the worst in a series of case studies also involving Sweden, the United States, South Africa and Thailand. The report concluded that ‘Australia’s rhetoric projected an image of a mature functioning FOI system’ but in fact ‘the FOI regime was close to completely dysfunctional from a user’s perspective’.⁸⁵ The global ‘Right to Information Rating Map’ (which measures the strength of the legal framework for the right to access information held by public authorities on a country by country basis) assesses Australia’s right to information law as ‘problematic on several fronts’, and gives it a low rating of one out of four in relation to justice data.⁸⁶

We found that federal courts, while they are not exempt from the Freedom of Information Act, do have specific (but limited) reporting obligations. As elsewhere, court documents are exempt, but section 8 imposes an obligation for each court to publish an information publication scheme plan which sets out what information the court will publish and how and to whom the information is made available. Judges and registrars are exempt from the act. Each court is required to – and does – publish details of the officers responsible for meeting freedom of information requests.⁸⁷ We deal with the state-level infrastructure (the Government Information (Public Access) Act 2009 (NSW) and the Freedom of Information Act 1982 (Vic)) in the relevant state-level analysis sections. All jurisdictions have complaints procedures for complaints about process and about the judiciary.⁸⁸

Open case law

Australia is a pioneer of the ‘Legal Information Institute’ model. It has now exported this model to jurisdictions around the world. We review the Canadian and Irish Legal Information Institutes in our later case study chapters. The Australian Legal Information Institute (AustLII) is an important piece in the justice system data ecosystem in Australia. As the co-founder of AustLII told us, AustLII ‘takes a broad view of justice data’⁸⁹ and publishes ‘Australian public legal information’, which it construes as legislation, treaties, and decisions of courts and tribunals; as well as other legal resources such as law reform and royal commission reports, and a substantial collection of law journals.

84 Pearson and Polden (n 75) 116.

85 Pearson and Polden (n 75) 117.

86 ‘Country Detail | RTI Rating Australia’ <https://www.rti-rating.org/country-data/australia/> accessed 5 August 2020.

87 The High Court, ‘Information Publication Plan’ (2013) https://www.fedcourt.gov.au/__data/assets/pdf_file/0006/58758/Corporate-Plan-2019-2020.pdf accessed 12 December 2020.

88 *ibid.*

89 Interview with Professor Graham Greenleaf, Founding Co-Director and Senior Researcher, AustLII (20 May 2020).

This breadth enables AustLII to provide ‘an integrated legal research experience’, fuelled by the recognition that ‘law is interconnected, it is not really ever standalone’.⁹⁰ AustLII recognises, in other words, that ‘people coming through the system are not necessarily lawyers’, and asks the question: ‘how do we help the general public increase their understanding of the law?’⁹¹ Working with community law centres to provide plain language materials has been one initiative of the last couple of years. The insertion of automated rich hypertext to link judgments with statutory definitions, acts and regulations is another. Research into the computerisation of law is part of AustLII’s remit, and current projects include research into text retrieval, hypertext, inferencing and indexing and litigation support.⁹²

AustLII operates as a charity and is funded by its donors: there is a link to a contribution form on its website. Just as with the other LIIs, AustLII operates as a free-access service which is not funded by usage charges or advertisements. Contributors include organisations and individuals from the legal professions, universities and academic institutions, government agencies, organisations from business and industry, and courts, tribunals and regulators.

Working with the courts and tribunals across Australia, AustLII has ‘taught’ courts to format judgments with the files containing the necessary citation information so that they can be processed automatically by the AustLII software (scripts in the programming language Perl that are customised for each separate court, tribunal or law journal).⁹³ Legal materials can be copied and used free of charge with attribution; although users are warned that AustLII is not the copyright owner in the source documents that it publishes and is not therefore able to give permission for reproduction of documents.⁹⁴ Furthermore, AustLII is not a data repository, or re-supplier of source documents to other publishers, and blocks automated collection from potential re-publishers for this reason.⁹⁵

Interestingly, in the course of this research, we did not identify extensive critical commentary on the format and access model of AustLII as we have – as shall be described in the next chapter – for CanLII in the Canadian context, either from interviewees or in the literature. This may be because we were not able to identify as many people engaged in ‘open data’ and law discussions, as in Canada. This lack of evidence limits what we can say about the limitations of the AustLII approach and the lack of availability of bulk data for other publishers. The questions and criticisms raised in Canada (page 90), would be applicable in the Australian context, however.

Summary

In sum, the relationship between the federal and state, common law and legislative infrastructures have evolved in a piecemeal way to create a complicated justice data ecosystem. Matters are complicated further by the interplay of individual court process and state-mandated legislation, as can be seen in the jurisdictional sections that follow. Though the Australian legal community has been pioneering in its commitment to digital innovation – not least with the development of AustLII – much of the discussion was framed by interviewees in terms of journalistic and research access, and we were not able to identify extended discussions around open access law and terms of bulk data re-use, nor specific policy commitments in this regard. It seems likely these debates are happening however, and we welcome further contributions by readers of this report for any follow-up work we pursue. We now examine the federal courts’ structure and approach to open justice, before turning to the states of Victoria and New South Wales. We finish with a critical review highlighting some of the important themes from across the jurisdictions.

90 *ibid.*

91 *ibid.*

92 AustLII, ‘Who We Are & What We Do’ <http://www.austlii.edu.au/about.html> accessed 23 June 2020.

93 Interview with Greenleaf, Founding Co-Director and Senior Researcher, AustLII (n 89).

94 AustLII (n 92).

95 AustLII, ‘Policy on Use of Documents Located on AustLII’ <https://austlii.edu.au/austlii/copyright.html> accessed 12 December 2020.

3.2 Federal position

Courts services

Federal court administration is independent of the executive. The High Court was made an independent court by the High Court of Australia Act 1979, which vested the administration of the High Court in its judges. A chief executive officer and principal registrar have the function of assisting the judiciary in the day-to-day running of the court. The Federal Court was similarly created by the Federal Court of Australia Act 1976, and the Federal Magistrates' Court in 1999. Just as with the High Court, a chief executive officer or registrar assists the chief justice with responsibility for managing the court administration.

The courts services structure is still in a process of flux – there has been considerable restructuring over the last five years that at the time of writing is not yet complete. In essence, the federal courts are consolidating separate commission(s) that are being vested with responsibility for certain types and processes of court administration. Commonwealth Courts Corporate Services was created by the Courts Administration Legislation Amendment Act 2016 and began managing courts services centrally for the Federal Court, the Family Court and the Federal Circuit Court for the first time. These centralised services are comprehensive and include communications, finance, human resources, informational technology, library, procurement and contract management, property management, risk oversight and management and judgment publishing and statistics.

The Commonwealth Courts Corporate Services is managed by the Federal Court CEO and Principal Registrar, who consults with the heads of jurisdiction and the other CEOs. More recently, in 2019-20, the registry services functions for the Federal Court, Family Court and the Federal Circuit Court were amalgamated into the Commonwealth Courts Registry Services. The goal is to create a Federal Court of Australia Entity which will incorporate the Commonwealth Courts Corporate Services and the Commonwealth Courts Registry Services, but the legislation to achieve this has lapsed.⁹⁶ The High Court remains a separate body and has registry offices in the capital city of each state. All jurisdictions of court are governed by Rules of Court (and practice directions) made by each jurisdiction: each jurisdiction of court uses a different system and is governed by slightly different rules and practice directions.

The High Court of Australia

Access to court files

The High Court of Australia is the most open of all of the Australian jurisdictions we reviewed. As elsewhere, daily lists are published on the High Court website the day before proceedings.⁹⁷ But uniquely in the High Court, rule 4.07.4 of the High Court Rules 2004 sets out that any person may inspect and take a copy of any document (except affidavits) filed in any case. This means that access to administrative/management data and case level data (apart from affidavits) is entirely open.

96 Federal Court of Australia, 'Corporate Plan 2019-20' https://www.fedcourt.gov.au/__data/assets/pdf_file/0006/58758/Corporate-Plan-2019-2020.pdf accessed 12 December 2020.

97 Federal Court of Australia, 'Daily Court Lists' (30 March 2012) <https://www.fedcourt.gov.au/court-calendar/daily-court-lists> accessed 23 June 2020; High Court of Australia, 'Court Lists' <https://www.hcourt.gov.au/registry/court-lists> accessed 13 December 2020.

In 2020, the High Court made the leap from a paper-based court to one that provides for the electronic lodging of all court documents. The Digital Lodgement System Portal is an external-facing portal that allows legal firms, legal practitioners and self-represented litigants to register, file documents, receive notifications and track the progress of their cases at any time they choose.⁹⁸ This removes the natural ‘practical obscurity’ barrier by making it easy and cheap to access court documents that have been lodged in this way.⁹⁹ However, the registry retains some control: in order to access this portal, it is necessary to register with (and be approved by) the registry. It is likely that anybody applying to get access will be given it: the guidance notes to the digital lodgement system specifically state that ‘the DLS portal will provide access to documents filed by the parties, subject to access provisions in rule 4:07:4, and payment of requisite fees’.¹⁰⁰ While the choice of wording ‘subject to’ suggests that rule 4:07:4 introduces restrictions, actually as stated above it states that any person may inspect and take a copy of any document. While the wording is therefore ambiguous, the principle is clear: administrative/management data and much case level data are open to all groups in practice as long as they are approved by the registry.

The High Court has superior courts’ ‘inherent jurisdiction’ to make suppression orders, and the categories of cases are well established (the proper administration of justice, protection of witnesses, and so on).¹⁰¹ In addition section 93.2 of the Criminal Code gives judges and magistrates in all federal courts the power to make suppression orders for national defence/security reasons.

Listings

All court lists are online, with a link to a PDF file which sets out the day’s proceedings for each court. While the PDF file contains the details of each case, including names, case type and hearing details, in order to search for a specific case it would be necessary to view each PDF file in turn. There is no search functionality on the website.

Exhibits/evidence

For access to affidavits, annexures and exhibits to affidavits it is still necessary to apply to the registrar, but access will normally be given if all or part of the document has been admitted into evidence or read out in open court. Critically, it is possible to have access to statements of case pre-trial, which interviewees told us is appreciated, particularly by the media: ‘the pleadings are very freely available to non-parties (in federal courts) and this is liked by the media: because they have access to the pleadings they can write fair and accurate reports’.¹⁰²

Judgments/hearings/recordings

Judgments are made available from the High Court in real time, that is within half an hour.¹⁰³ Judgments are also sent to AustLII (again on the same day). The High Court also publishes audio/visual recordings of some hearings on its website, publishes transcripts of all of its hearings on its website,¹⁰⁴ and feeds these to AustLII within an hour; it has been doing this since 2000. The High Court bears the cost of transcription. The High Court also provides a free subscription-based email alert service which allows subscribers to be notified of upcoming judgments to be delivered and publishes judgment summaries.

98 ‘About the Registry’ <https://www.hcourt.gov.au/registry/about-the-registry> accessed 13 December 2020.

99 For an explanation of ‘practical obscurity’ see Chapter 2 (page 13) and Chapter 6 (page 115).

100 ‘Digital Lodgement System Portal Overview’ <https://cdn.hcourt.gov.au/assets/registry/DLS/DLS-Portal-Overview.pdf> accessed 13 December 2020.

101 Hogan v Hinch [2011] HCA 4.

102 Interview with Rolph, University of Sydney Law School (n 77).

103 Jennifer Lewis and Matthew Robinson, ‘Open Justice in Australia: A Silver Lining to the COVID-19 Cloud?’ (20 May 2020) <https://insights.doughtystreet.co.uk/post/102g8dq/open-justice-in-australia-a-silver-lining-to-the-covid-19-cloud> accessed 2 June 2020.

104 High Court of Australia, ‘Transcripts’ <https://www.hcourt.gov.au/publications/judgments/transcripts> accessed 12 December 2020.

Federal Court and Federal Circuit Court

Access to court files

Order 46, rule 6 of the Federal Court Rules 1979 (Cth) governs non-party access. Just as with the High Court, most administrative information and case level data are open in that any person may search and inspect them as of right. In practice, in the Federal Court and Federal Circuit Court, all court documents are also lodged electronically via the same eLodgment portal. As with the High Court, the registry has to ‘approve’ applicants before they get access.

Material can be restricted via a suppression order in the Federal Court if one of four grounds set out in section 37AG of the Federal Court Act 1976 apply, which more or less mirrors the categories of cases established in the High Court. These are: if restriction is necessary in order to prevent ‘prejudice to the proper administration of justice’; where it is necessary to protect national security; to protect someone’s safety; or to avoid causing ‘undue distress or embarrassment’ in sexual offences cases. The recent case of *Clark v National Australia Bank (No 2)* reinforces that:

the primary objective of the administration of justice is to safeguard the public interest in open justice, and that open justice is fundamental to the operation of the judicial power of the Commonwealth, it is fundamental that ... only confidentiality orders that are necessary be made... the word ‘necessary’ is a ‘strong word’.¹⁰⁵

The media have the right to make submissions on the application for a suppression order,¹⁰⁶ but court decisions that are suppressed do not appear at all.

The innovative search tool ‘Federal Law Search’ was liked by our interviewees¹⁰⁷ and provides access to administration/management data on current and concluded cases via the ‘Commonwealth Courts Portal’. Each case record in Federal Law Search provides a list of all court events, a list of documents filed by the parties, any orders of the court (in full text form since 2004), the date of delivery of any judgment (past and forthcoming), a link to judgments delivered, and the names of all parties and counsel. There is a record for all cases filed in the Federal Court since 1984, and for all cases in the Federal Circuit Court since its inception in 1999.¹⁰⁸ It is still necessary to register in order to gain access to the Commonwealth Courts Portal but it is more ‘open’ than the eLodgment portal as non-parties can also gain access.

Finally, one relatively new innovation that has proved extremely popular with journalists and with the general public, has been the introduction of ‘Online Files’. Federal Court officials explained to us that for the more high-profile cases every public document that has been filed in relation to that case (which does include most case level data including statements of case) is posted open access and free of charge in an ‘Online File’ on the Federal Court website. An Online File can also contain videos, transcripts of hearings and audio recordings of hearings.¹⁰⁹ Media representatives told us that journalists really like this as a system, which was originally introduced to prevent registries being overwhelmed with requests for documents in certain cases. The recent Geoffrey Rush litigation Online File, for example, received over 37,000 hits.¹¹⁰

Listings

Daily court lists are published centrally on the Federal Court website but listed by state/territory. This is done slightly differently by each state and/or territory, with some states (for example New South Wales) listing out hearings in full on the website (which are then searchable by using the general website search function) and others (for example South Australia) referring users back to the Commonwealth Courts Portal. In states such as South Australia where users are referred back this means listing information is only available if you have registered.

105 [2020] FCA 652 [13]–[14] italics in original.

106 Section 37AH(2)(d) Federal Court Act 1976.

107 Interview with Bruce Philips, Director of Public Information, Federal Court of Australia (7 July 2020).

108 Federal Court of Australia, ‘Check Progress of a Case’ (15 June 2020) <https://www.fedcourt.gov.au/court-calendar/check-progress-of-a-case> accessed 23 June 2020.

109 Interview with Philips, Director of Public Information, Federal Court of Australia (n 107).

110 *ibid.*

Exhibits/evidence

Technically, access to exhibits and evidence is more restricted. Rule 46 6(3) lists exhibits and some evidence as case level data to which non-parties do not have automatic access: they have to apply to the local registrar. This ‘restricted’ list also includes affidavits and various other interlocutory documents such as interrogatories and answers, disclosure lists and so on. Leave will normally be granted where the relevant part of the document has been admitted into evidence or read out in open court.¹¹¹ The request, which identifies the applicant as either a ‘media representative’ or simply a ‘non-party’ but which does not make it clear how or why this is relevant, can be lodged with the Federal Court Registry in the relevant state (each has its own email address) or with the central Federal Court Registry. However, it is possible that some evidence may be included in the ‘Online File’ system – that would be decided by the judge on a case-by-case basis.¹¹²

Judgments/hearings/recordings

Judgments are made available from the Federal Court and Federal Circuit Court on the same day.¹¹³ The Federal Court has the distinction of being ‘the first superior court to permit a camera to record a judge delivering a judgment summary and to have it subsequently broadcast by mainstream outlets’.¹¹⁴ A search of the Federal Court website reveals that the Federal Court has been live streaming selected cases since 1999.¹¹⁵ Media representatives at the Federal Court told us that where possible they send judgments out to journalists who they know will be interested often (once a judgment has been handed down) ahead of the judgments being posted on the Federal Court website.¹¹⁶

The Federal Court also has an eCourtroom, which is a visual courtroom that assists in the management of pre-trial matters by allowing directions and other interlocutory orders to be made online. The eCourtroom is ‘closed’ in that only parties are given access, but our interviewees told us that the eCourtroom was only used for matters that would have taken place in chambers, ‘anything of real substance had to be argued in a physical court’.¹¹⁷

COVID-19

COVID-19 has presented the same challenges in Australia as elsewhere, as courts across the country moved online with unprecedented speed in a very uncertain environment. Lockdown measures were announced by Prime Minister Scott Morrison in March 2020, and each state and territory introduced laws to restrict movement and prevent the spread of the virus. This had clear ramifications for the operation of all courts throughout Australia: by the end of March 2020 most courts had published their response to the new restrictions on their respective websites.

During the lockdown period the High Court stopped sitting. The Federal Court and Federal Circuit Court moved quickly to Microsoft Teams. In order to facilitate non-party access, online hearings continued to be listed with instructions for members of the public who wanted to observe remotely. In the ‘Guides to Online Hearings’ published on the Federal Court of Australia and the Federal Circuit Court websites, whole paragraphs ((5) and (8) respectively) are dedicated to open justice principles, with the Federal Court ‘continuing to consider its options for preserving the principle of open justice’,¹¹⁸ and the Federal Circuit Court stating that ‘hearings can be observed by any member of the public’.¹¹⁹ The Director of Public Information for the Federal Court told us that, ‘the was absolutely determined that the principles of open justice were respected and observed’.¹²⁰ However, members of the public had to be ‘permitted’ by both jurisdictions to view online hearings, and it is not clear on what grounds access was granted or refused, so this could not be said to be entirely ‘open’.

- 111 See also Federal Court Rules 2011 Select Legislative Instrument 2011 No. 134, 2.32 which is the practice direction giving effect to order 46, rule 6.
- 112 Interview with Philips, Director of Public Information, Federal Court of Australia (n 107).
- 113 Lewis and Robinson (n 103).
- 114 Bruce Philips, ‘The Federal Court: Breaking New Ground?’, *The Courts and the Media Challenges in the Era of Digital and Social Media* (Halstead Press) 79.
- 115 Pearson and Polden (n 75) 113.
- 116 Interview with Philips, Director of Public Information, Federal Court of Australia (n 107).
- 117 Interview with Associate Professor Jason Bosland, University of Melbourne Law School (19 May 2020).
- 118 ‘National Practitioners / Litigants Guide to Online Hearings and Microsoft Teams’ https://www.fedcourt.gov.au/__data/assets/pdf_file/0019/62416/National-Practitioners-and-Litigants-Guide-V5.pdf accessed 13 December 2020.
- 119 Federal Circuit Court of Australia, ‘Practitioner and Litigant Guide to Virtual Hearings and Microsoft Teams’ <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/covid/covid-parents/virtual-hearings> accessed 13 December 2020.
- 120 Interview with Philips, Director of Public Information, Federal Court of Australia (n 107).

Court user data

Court user data are not routinely collected by the federal courts. Some data on users are collected for operational, rather than data purposes; for example, it was explained to us that it was possible to identify applicants in native title matters as Indigenous. Data are also provided to external agencies – to the Australian Government Productivity Commission, for example, which publishes an annual report on government services with a chapter dedicated to court administration functions of the federal courts.¹²¹ Data are also provided to the Australian Bureau of Statistics, which publishes annual statistics using data on aggregate Australian offences.¹²²

3.3 States

As stated in the introduction to this chapter, the states have an important part to play in decisions around the administration of justice data. In particular, the states administer justice (and access to justice data) in their jurisdictions, both criminal and civil. States are dependent on government money to fund their court administration, and some of our interviewees felt that this was the reason that state jurisdictions fall short of the standards set by the federal courts when it comes to access to data. Both of the states we reviewed are in the process of considerable technological change and reform, much of which has been tested (and utilised) in the recent COVID-19 pandemic.

Listings are generally available online, to all groups, the day before, in all the state jurisdictions including the lower courts. Access to other administrative level data and case level data is patchy. All state courts at all levels have media managers acting as liaison officers between the judiciary and the media – this was felt to be a helpful intervention.

3.4 Victoria

Legal Infrastructure

Court services

Victoria has recently established an independent court administration authority, the Court Services Victoria (CSV). Victoria has therefore moved relatively recently from a more traditional executive model where court administration was controlled by the Department of Justice to an independent model: the Court Services Victoria Act 2014 established CSV as an independent statutory body, to provide services and facilities to the courts in Victoria at all levels. CSV's governing body is the Courts Council. As the Courts Council is composed of the judiciary, this move potentially increases the direct influence of the judiciary over court administration. Funding still comes from the Department of Justice.

While individual jurisdictions have a responsibility to manage their own data, from the initiation of a case to its conclusion, CSV also manage a centralised data repository which holds over two billion records extracted from each of the case management systems used by the courts.¹²³ CSV anticipates that in the future each court jurisdiction will move to its own, decentralised warehousing system and move away from the 'safety net' of the central CSV data warehouse.¹²⁴

The Victoria Courts Council is chaired by the chief justice of the Supreme Court of Victoria and comprises the heads of each court jurisdiction. All jurisdictions of court are governed by Rules of Court (practice directions) made by the Council of Judges, but each jurisdiction of court uses a different system and is governed by slightly different rules and practice directions. All levels of court also use different management systems: the Supreme Court uses CourtView; the County Court uses the Court Learning Management System (CLMS); and the Magistrates' Court uses Courtlink. The Supreme Court also uses an electronic filing system 'RedCrest', and the County Court uses eFiling provided by CITEC. The Magistrates' Court currently does not have electronic filing capability.

121 Australian Government Productivity Commission, 'Report on Government Services 2020' (29 January 2020) ch 7 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts> accessed 7 August 2020.

122 Australian Bureau of Statistics, 'Criminal Courts Australia' (27 February 2020) <https://www.abs.gov.au/ausstats/abs@.nsf/0/D8D460DDF174BC-36CA2582410016B417?Opendocument> accessed 7 August 2020. This data repository also has state specific statistics on offending.

123 Interview with Jenny Lee, Court Service Victoria (22 June 2020).

124 *ibid.*

The Magistrates' Court is in the least favourable position of the three, as it has the highest volume of cases, and the most outdated of the case management systems (Courtlink) which is shortly to be upgraded. It also currently has no electronic filing capability. We had on-the-ground reports of difficulties with Courtlink, with one technical expert who works with a legal aid firm in Victoria describing it as '30 years old, pre-relational and awful',¹²⁵ and another as a 'problematic DOS-based legacy system'.¹²⁶

Open justice

The Open Courts Act 2013 (Vic) enshrines principles of open justice into state law, making Victoria one of only two states (the other is New South Wales, discussed below) to give open justice principles a statutory footing at a state level. Part One of the Act sets out that its main purpose, which is to 'recognise and promote the principle that open justice is a fundamental aspect of the Victorian legal system' which 'maintains the integrity and impartiality of courts and tribunals', and which 'strengthens public confidence in the system of justice'.

Data protection

The Privacy and Data Protection Act 2014 establishes the common standard for data security for Victorian public bodies. CSV and the courts are not subject to this common standard because they do not fall within the definition of the bodies listed under section 84 of the Act. CSV has, however, as part of a recent initiative, laid out its data governance principles in a formal framework document which sets out agreed principles that courts as a group subscribe to in data management, and in the sharing and housing of data. CSV told us that it was felt that it was sensible to operate in a consistent way, and that it would make sense to adopt the principles of the data protection regime as 'best practice' despite being technically exempt from its remit.¹²⁷

Right to know

Freedom of Information requests are dealt with at a jurisdictional level. CSV is similarly exempt from the Freedom of Information Act 1982 which gives members of the public the right to apply for access to information held by government ministers, state government departments, local councils, public hospitals, and so on. The Act does not apply to courts and court officers in relation to all judicial and quasi-judicial functions and exempts any data held by CSV that relates to the exercise of a judicial (or quasi-judicial) function of a court.

Suppression orders

Suppression orders in Victoria are governed by the Open Courts Act 2013. Technically the Act allows for making a suppression order when it is necessary – unlike in England and Wales (and NSW, see below) there is no balancing act to be carried out by the judiciary. Australia's leading expert on suppression orders, Professor Jason Bosland, explained to us that in theory, this

...should lead to a more open approach for Victoria, because there is a presumed public interest in receiving all court information. It is not up to the court to determine how important it is for the public to get access – access is important. So then all the work is done rebutting that presumption, and that test is a high threshold.¹²⁸

125 Interview with O'Donnell, Digital Architect, Victoria Legal Aid (3 June 2020).

126 Interview with Nigel Balmer, Victoria Law Foundation (18 June 2020). DOS is a platform independent acronym for Disk Operating System which here is being used as a common shorthand for the disk-based operating systems typically found on IBM PC compatibles from the 1980s.

127 Interview with Lee, Court Service Victoria (n 123).

128 Interview with Bosland, University of Melbourne Law School (n 117).

In other words, an order is either necessary, or it is not, and the bar is set high. Privacy is not a consideration. The main grounds are to prevent a risk of prejudice (for example where there are back-to-back trials, as in the Cardinal George Pell case), national or international security, to protect safety of an individual, to avoid causing distress or embarrassment to a complainant or a witness in any sexual offence or family violence offence proceedings, and to avoid causing distress to a child witness.

In fact, the Open Courts Act 2013 was introduced partly to address concerns that too many suppression orders were being made in Victoria. However, our interviewees validated concerns expressed by the media that the regime is not working. Media reports observe, for example, that Victoria ‘definitely has more blanket bans than anyone else’.¹²⁹ (A blanket ban is where a so-called ‘super-injunction’ exists, so that even mentioning the existence of the suppression order contravenes the injunction).

It has been argued that there is an ‘entrenched culture of suppression in Victoria’ and that ‘Melbourne is known as the suppression capital of Australia’.¹³⁰ Gina McWilliams, Senior Editorial Legal Counsel at NewsCorp Australia, tracks the numbers of suppression order notifications News Corp receives. In 2018 there were 443 suppression orders issued in Victoria, compared to 189 in New South Wales, and 18 in Queensland.¹³¹ There were 259 issued in Victoria in 2012.¹³² It is not clear why so many more suppression orders are issued in Victoria than in other states with comparable population sizes. Commentators have speculated that a reduction in the number of reporters (and especially in the number of experienced court reporters) has meant that the courts’ confidence in the media’s ability to report carefully has declined, resulting in an increase in suppression orders.¹³³ The reduction in the number of reporters nation-wide would not in itself explain the higher numbers of suppression orders in Victoria, however.

An alternative explanation, put forward by some of our interviewees, linked it to the culture generated by the complicated web of interlinking trials (dealing with gangland wars) that took place in the 2000s.¹³⁴ The connections between the trials triggered a rush of suppression orders to protect the safety of witnesses and this ‘got people within the court system into the habit of issuing suppression orders ... the “cultural shift” that occurred at that time has been difficult for courts to shake off’.¹³⁵

In 2017 an independent review of the Open Courts Act 2013 was conducted by former Supreme Court of Appeal Judge Frank Vincent.¹³⁶ The review made a series of recommendations, including one that courts and tribunals should be specifically required to provide written reasons for making a suppression order, and another that there should be a public interest monitor whose role would be to make submissions and ask questions of judges imposing repression orders. Another recommendation was that all suppression orders should be treated as ‘interim’ in the first five days so that interested parties, including the media, can make submissions against the need for the order. A final recommendation was to create a central, publicly-accessible register of suppression orders made by all Victorian courts and tribunals.¹³⁷

Many of our interviewees were supportive of the concept of a public interest monitor, who would be independent and who could represent the public interest as judges consider making suppression orders. It is possible that, as suggested by interviewees, the culture of acceptance of suppression orders can be blamed in part on the limitations of adversarial justice. If the defence and the prosecution agree on the ‘need’ for a suppression order (as they often do), and in the absence of competing argument, the judge is perhaps too inclined to make the order. A lack of scrutiny exacerbates the situation. An ‘open justice advocate’ who would have standing to argue in favour of open justice at suppression order hearings would address some of these points.¹³⁸

129 Law Institute of Victoria, ‘Suppression Orders in the Open Courts Era’ <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/April-2019/Suppression-orders-in-the-open-courts-era>> accessed 6 July 2020.

130 *ibid.*

131 Kiriilly Schwarz, ‘The Storm around Suppression Orders - Law Society Journal’ LSJ Online (30 April 2019) <https://lsj.com.au/articles/the-storm-around-suppression-orders/> accessed 6 July 2020.

132 Law Institute of Victoria (n 129).

133 *ibid.*

134 Interview with McDonald, Victoria Law Foundation (18 June 2020).

135 Law Institute of Victoria (n 129).

136 The Honourable Frank Vincent, ‘Open Courts Act Review’ (2017) https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9215/2211/1859/Review_of_the_Open_Courts_Act_2013_-_March_2018.pdf accessed 6 July 2020.

137 *ibid.*

138 Jason Bosland and Judith Townend, ‘Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom’ (2018) 23 *Communications Law* 183.

Interviewees were also supportive of the proposal to oblige judges to give reasons for their decisions when granting a suppression order, and the suggestion was made that these reasons should form a separate, open access judgment.¹³⁹ The very act of giving reasons would force the judge in question to consider the necessity of the order because they would have to explain it, and that this would also bring transparency to the decision-making process which would improve public understanding of and respect for justice.

Professor Bosland used the furore over the George Pell case as an example: he told us that he felt that popular misconceptions over the George Pell suppression orders were affecting public confidence in the justice system unnecessarily. He said that ‘a misconception is that the suppression orders were sought to protect Pell’s reputation, or that of the Catholic Church’, and argued that ‘the court’s written reasons for suppression in the Pell trials – if they exist – should be easily available to the public to aid their understanding of this case’.¹⁴⁰

With regard to the Vincent Review suggestions on media involvement, our research supports the view that arrangements for communication to the media are, for all levels of court, a little ad hoc. The media has standing to appear and make submissions at an application for a suppression order, but section 11(1) of the Open Courts Act 2013 simply states that the court must take ‘reasonable steps’ to ‘ensure that any relevant news media organisation is notified of the application for a suppression order.’ In subsection 3 of the same section the Act defines ‘relevant news media organisation’ as ‘a news media organisation which the court or tribunal would ordinarily ensure was sent notice of the making of a suppression order’.

The ad hoc and somewhat circular nature of this arrangement is reflected in the Supreme Court Media Policy which says that ‘the court’s media team forwards that notice to self-nominated news media organisations at an email address they have provided’.¹⁴¹ This aside, news organisations in Victoria have claimed that even where there is notification (which has been criticised as being inconsistent)¹⁴² it is difficult to keep track of the suppression orders, and that it is not possible from a funding perspective to mount appeals against them (thus lending more support to the public interest monitor role).

Since the Cardinal George Pell trial, the Law Council of Australia has called for another review of court suppression orders and wants nationally-consistent reform. The Law Council argued that inconsistency in how suppression orders are being applied is leading to confusion, and that the regime is in any case inadequate in a digital age.¹⁴³ The trial highlighted ‘the difficulties faced by courts enforcing such orders in an age where information flows freely and immediately around the globe’.¹⁴⁴

Interestingly, Professor David Rolph, who is a media law specialist at the University of Sydney Law School, gave us a different perspective. He did not disagree with Professor Bosland’s point about giving reasons to aid public understanding but thought that the suppression order in the George Pell case did, in fact, serve a useful purpose. Even in the internet age, in other words, suppression orders can serve a purpose of protecting the administration of justice in a particular trial. Professor Rolph explained that he knew people who were involved with the trial, and so knew that there had been a hung jury and that a re-trial was taking place, but the fact that that information was not in the public domain was an indication of a suppression order serving its (appropriate) purpose. We return to suppression orders in our critical appraisal section, below.

139 Interview with Bosland, University of Melbourne Law School (n 117).

140 ‘Push for National Suppression Order Review’ (SBS News) <https://www.sbs.com.au/news/push-for-national-suppression-order-review> accessed 4 July 2020.

141 Supreme Court Victoria, ‘Supreme Court of Victoria Media Policy and Practices’ <https://www.supremecourt.vic.gov.au/for-the-media/media-policies-and-practices>.

142 Schwarz (n 131).

143 *ibid.*

144 Andrew Birmingham, ‘Data Reveals Over 150,000 Australians Circumvented a Victorian Suppression Order Last Week’ *Which-50* (17 December 2018) <https://which-50.com/cover-story-data-reveals-over-150000-australians-circumvented-a-victorian-suppression-order-last-week/> accessed 22 July 2020.

The Supreme Court

Access to court files

In the Supreme Court of Victoria civil and criminal proceedings are governed by different practice directions. Rule 28:05 of the Supreme Court of Victoria (General Civil Procedure) Rules 2005 (Vic) states that any person may inspect and obtain copies of any document, unless it has been made confidential by court order. Non-parties have an additional hurdle, which is contained in 28:05 (2)(b), which is that if the Prothonotary (Victorian registrar) thinks it ought to remain confidential, then the non-party needs leave of the court. This means in effect that in the case of non-parties, access is effectively at the court's discretion. Criminal proceedings are governed by the Supreme Court (Criminal Procedure) Rules 2008 (Vic). Order 1.11(4) and states that any document filed is only available with the leave of the court.

On 30 September 2019, the Supreme Court of Victoria moved to an electronic filing system known as 'RedCrest Electronic Filing'. A new rule (28A) was inserted into Rule 28 and deals with the new filing and access rules in the electronic era. Access remains at the discretion of the prothonotary (registrar). A username and password are needed for access, and they are provided by the prothonotary with any conditions as the prothonotary deems fit. Complete control is retained by the 28.13 'limited access' clause which allows the prothonotary to limit documents' accessibility. There is no reference in the new rule 28A to non-parties: in fact, the assumption throughout seems to be that only parties can receive the necessary login information. Otherwise, the general public and the media have to seek access at the registry in the usual way.

Exhibits/evidence

Exhibits and evidence in civil cases, unless they have been made confidential by court order, are not ostensibly treated differently to any other document on the court file. Technically they are open to inspection and for copying at the registry. In practice, however, the registrar is more likely to use his/her discretion to refuse access in the case of exhibits and evidence to non-parties. In criminal cases any access to exhibits or evidence would only be granted with the leave of the court.

Judgments

Written judgments from the higher jurisdictions are sent by the courts, on the same day that they are handed down, to the Supreme Court Library. The Supreme Court Library allocates a neutral citation and publishes them on the CSV website as well as the Supreme Court Library website. The Supreme Court Library, generally on the same day, provides the judgments (free of charge) to legal publishers such as LexisNexis and Thomson Reuters, and to the free online database resources JADE and AustLII. The Supreme Court Library has responsibility for the Supreme Court dataset storage. If there has been a suppression order then the Supreme Court Library will allocate an R or a W at the end of the neutral citation and then the judgment does not go to AustLII. Judgments are also redacted and judges are asked not to include unnecessary personal details in judgments and sentences.

Thomson Reuters publish the Victorian Reports, which have been the authorised reports for Victoria since 1875. Overseen by the Victorian Council of Law Reporting, they are still seen by some judges as of value, and have a monopoly to the extent that they are the only ones who are able to use the authorised report citations for judgments/reports from the Supreme Court, but not any of the other higher or lower courts in Victoria. They are arguably of less significance in an era of freely-available judgments on the Supreme Court website and on AustLII, but some courts still require lawyers to use authorised reports where possible.

Hearings/recordings

The Supreme Court of Victoria provides copies of transcripts of criminal trials free of charge to the media, with the approval from the presiding judge. The court reporter in question gets access to the transcript via one of the Supreme Court media liaison officers, who seeks permission from the presiding judge. Victorian Government Recording Services, who are part of government, supervise the recording and transcription for all courts. The data (the recordings and original versions of the transcripts) are stored by the court at jurisdiction level, and also in the central data warehouse managed by CSV. The same process is followed for civil trials – a member of the media makes the request to the Supreme Court of Victoria media team, and the media team seeks the approval of the presiding judge – but in civil cases fees are high. As AustLII told us, apart from in the High Court of Australia, ‘the production of transcripts in a way that allows for free access hasn’t happened yet, either pre or post COVID-19’.¹⁴⁵

The Supreme Court also streams audio/visual recordings of sentencing remarks live, that is, in real time. Judgments/summaries of judgments in civil proceedings and appeals ‘may’ also be audio broadcast. All audio broadcasting (in criminal and civil proceedings) is subject to the overriding discretion of the presiding judge. The Supreme Court has its own web-streaming facilities, which are recorded and uploaded to a URL. The public can listen to, but not download, the broadcast from the website.

The County Court

Access to court files

The rules are similar to the Supreme Court. Rule 28.05 of the County Court Civil Procedure Rules 2018 (Vic)¹⁴⁶ mirrors its Supreme Court equivalent. Any person may inspect any document that has been filed in a civil case. Criminal procedure, as with the Supreme Court, is more restrictive. Although the County Court does not have a specific rule governing access in criminal cases, it does have an ‘Access to Court Records’ policy which states that any person can seek permission to search a criminal file by completing the access to court records request form.

In April 2019 the County Court also moved to an electronic filing system, ‘eLodgement’. It also began using a case management system, ‘Court Connect’, which allows non-parties to search for management and information data in civil and criminal cases, but which does not give access to case level data. For criminal cases, users can search for names of the accused, and information about upcoming hearings only. While court orders in civil cases are available to registered non-parties via Court Connect, court orders in a criminal case can only be accessed via the request to the criminal registry (downloadable form) or in person at the registry at the Melbourne Court, or relevant circuit court. Interviewees from the court described the initial process of registering with Court Connect as light touch, and said that registration is unlikely to be refused, although each registration is ‘vetted’ to a degree.¹⁴⁷ If a suppression order has been made, the case details are not accessible.

To get access to case level data, therefore, once a request has been submitted on the relevant form, authorised attendance in person at the registry office is still necessary where hard copy files are available which can be photocopied, scanned and/or saved onto a USB stick. This would appear to be an attempt by the County Court to maintain the ‘practical obscurity’ shield despite the introduction of electronic filing and case management. Fees are payable for access but in criminal cases the judge can, on application by the parties, agree a fee waiver.

145 Interview with Greenleaf, Founding Co-Director and Senior Researcher, AustLII (n 89).

146 SR No. 170/2018.

147 Interview with Kate Gibson, Complicance Manager, Victoria County Court (22 July 2020).

Listings

Accredited journalists, (there is a process on the website for journalists to get accredited), have access to a media portal which gives them access to an enhanced daily list. In the criminal courts this enhanced daily list includes the criminal charges for each matter.

Exhibits/evidence

Interviewees told us that exhibits to affidavits and written submissions are more ‘closed’ and are filed in a ‘confidential’ folder.¹⁴⁸ Exhibits are kept by the judge’s associates at the time of the hearing, or otherwise by the registry. Professor Bosland told us that, ‘when it comes to exhibits judges have much more of a discretion: they can say, “I don’t think that that exhibit should be granted to the media because if it is portrayed in a particular way it might give a distorted impression of what the evidence was in the case.”’¹⁴⁹ Accredited media can request access to files via the media and communications team.¹⁵⁰ Every request for access goes via the media team to the judge.

Judgments

The County Court publishes some, but not all, sentencing remarks and written judgments on AustLII and JADE (the free-to-access legal publishing websites). Publishing of sentencing remarks is at the ‘discretion’ of the presiding judge, but the County Court told us that there has been a recent drive to publish the majority of written judgments online.¹⁵¹ For unpublished decisions it is necessary to email a request explaining reasons for wanting access.

Hearings/recordings

Criminal hearings are routinely recorded by the same government recording services as for the Supreme Court (Victorian Government Reporting Service), but permission from the judge is required before a transcript can be produced or audio can be released. For civil matters, transcription has to be arranged by the parties by agreement with the judge. Release is to parties only, and generally speaking is only given to parties considering an appeal.¹⁵² Accredited journalists can get access to audio recordings of recent sentences and some hearings via the media portal.

The Magistrates’ Court

Access to court files, evidence and exhibits

As stated in the introduction to this Victoria section of the report, we heard from interviewees that in the Magistrates’ Court the legacy case management ‘Courtlink’ (which interviewees called ‘dreadful’) is being replaced, but until that time serves as a reminder that court systems in Victoria ‘are on very different data journeys’.¹⁵³ There is currently no online registry for the Magistrates’ Court and both management and case level data have to be applied for at the registry in person. As stated above, journalists have to apply for all case level data, including exhibits and evidence, in person, by paper.¹⁵⁴

Interviewees working ‘at the coalface’ for legal aid law firms spoke of ‘paper based chaos’, and told us that a lack of availability of case level data even for parties was an issue.¹⁵⁵ Defendants sometimes find it difficult to get access to the police briefs in their own cases, and are reliant on the police handing them over in the courtroom if the court hasn’t provided access.¹⁵⁶ Even on the day, the police brief can be incomplete.¹⁵⁷ Active participation in pre-trial hearings with no access to police brief data is also highly problematic.¹⁵⁸ There is a multi-agency project in place to try to improve this by introducing an e-filing system.

148 *ibid.*

149 Interview with Bosland, University of Melbourne Law School (n 117).

150 ‘County Court of Victoria, County Court of Victoria Media Guidelines’ <https://www.countycourt.vic.gov.au/files/documents/2019-06/media-guidelines-2018.pdf>.

151 Interview with Amanda Davies, Senior Business Intelligence Analyst, County Court Victoria (8 July 2020).

152 County Court Victoria, ‘County Court Victoria Practice Direction on Recordings’ available at <https://www.countycourt.vic.gov.au/practice-notes> accessed on 10 July 2020.

153 Interview with Balmer, Victoria Law Foundation (n 126).

154 Lewis and Robinson (n 103).

155 Interview with O’Donnell, Digital Architect, Victoria Legal Aid (n 125).

156 *ibid.*

157 *ibid.*

158 *ibid.*

- 159 Interview with Philip Chung, Executive Director, AustLII (28 May 2020).
- 160 Supreme Court of Victoria, 'New Jury Trials Suspended from Monday, 16 March' <https://www.supremecourt.vic.gov.au/news/new-jury-trials-suspended-from-monday-16-march> accessed 22 June 2020.
- 161 Supreme Court Victoria, 'Supreme Court Changes in Response to COVID-19' <https://www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19> accessed 22 June 2020.
- 162 Supreme Court of Victoria, 'Accessing Virtual Hearings' <https://www.supremecourt.vic.gov.au/news/accessing-virtual-hearings> accessed 22 June 2020.
- 163 Nye Perram, 'Video Justice: 10 Years of Progress for Courts in Eight Weeks' (The Australian Financial Review, Melbourne, 15 May 2020) <https://www.afr.com/companies/professional-services/video-justice-ten-years-of-progress-for-courts-in-eight-weeks-20200513-p54spa> accessed 12 December 2020.
- 164 County Court of Victoria, 'Circuit Criminal and Appeal Listings: Covid-19 Response' [https://www.countycourt.vic.gov.au/practice-notes?filters\[keyword\]=coronavirus&sort=Updated](https://www.countycourt.vic.gov.au/practice-notes?filters[keyword]=coronavirus&sort=Updated) accessed 9 July 2020.
- 165 Karen Percy, "'Justice Hasn't Changed, Just the Mode of Delivery": How Courts Are Adapting to Coronavirus' (19 May 2020) <https://www.abc.net.au/news/2020-05-20/coronavirus-pandemic-for-victorian-courts-judges-justice-system/12258858> accessed 20 July 2020; See also: County Court of Victoria, 'Criminal Division Hearings – Webex Information Guide V3' https://www.countycourt.vic.gov.au/files/documents/2020-12/criminal-division-hearings-webex-information-guide_0.docx accessed 12 December 2020.
- 166 County Court of Victoria, 'County Court Victoria Common Law Division Corona Response' [https://www.countycourt.vic.gov.au/practice-notes?filters\[keyword\]=coronavirus&sort=Updated](https://www.countycourt.vic.gov.au/practice-notes?filters[keyword]=coronavirus&sort=Updated) accessed 3 July 2020.
- 167 Interview with Rolph, University of Sydney Law School (n 77).
- 168 County Court of Victoria, 'County Court Victoria Common Law Division Corona Response' (n 166).

Listings

CSV told us that journalists are less likely than in other jurisdictions to be aware that a suppression order exists. This is because 'silent listing' is enabled by section 136 of the Magistrates' Court Act 1989, which is a general provision allowing a magistrate to 'give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination'. In practice this can mean that cases disappear from the system altogether.

Judgments

Some Magistrates' Court judgments get sent to AustLII but only if they deal with a point of particular legal importance. This is the exception rather than the rule, as is to be expected with the judgments of the lower courts.

Hearings/recordings

Magistrates' court hearings are not routinely recorded.

COVID-19

Virtual proceedings pre COVID-19 were only held in remote communities, namely in specialist areas where it is very difficult to gain access. They were not standard working procedure.¹⁵⁹ The demands made by the COVID-19 pandemic were therefore not only sudden but also dramatic as courts across Victoria moved online.

In the Supreme Court of Victoria, all new jury trials were suspended from Monday 16 March.¹⁶⁰ On 20 March, the Supreme Court of Victoria announced all civil trials were to be moved online, and criminal trials were to be adjourned until after October 2020. It is encouraging that in the same announcement the chief justice emphasised that 'principles of open justice have been an important part of the Court's planning of its response to the coronavirus pandemic. The means of achieving this will be considered on a case-by-case basis.'¹⁶¹

The COVID-19 flag on the Daily Hearing List homepage linked to advice on how to access virtual hearings.¹⁶² Virtual hearings in the Supreme Court of Victoria took different forms: some were conducted with the judge in the courtroom, some were conducted on Teams with all of the participants at remote locations but displayed on screens in the courtroom, and some had no connection to a courtroom at all. Judges were using social messaging apps such as WhatsApp to communicate with their assistants.¹⁶³ Any virtual hearing making use of a courtroom appeared in the Daily Hearing List. Virtual hearings without any connection to a courtroom appeared in the daily list without a courtroom listed – members of the public wanting to access virtual hearings of this nature were directed to contact the associate to the relevant judge, or, in the case of the Court of Appeal, via the registry. The media also had the option of contacting the court media advisers who could put special arrangements in place for access.

Criminal trials in the County Court were suspended,¹⁶⁴ but what Chief Magistrate Lisa Hannan described as 'a learning exercise' took place. She said, 'we have transformed what has been largely a paper-based court to a court that is now hearing Webex hearings'.¹⁶⁵ Members of the public were not allowed to attend Webex hearings, and media representatives were allowed to attend only if authorised by the judge. Some civil hearings took place on Zoom as eHearings, but no reference was made in the guidance to access for non-parties – which means it was likely that the County Court trials were effectively closed.¹⁶⁶ Certainly we heard anecdotal reports from interviewees of journalists being refused access to hearings by presiding judges.¹⁶⁷ Written judgments were still sent to the Supreme Court Library and from there to AustLII.¹⁶⁸

- 169 Interview with Lee, Court Service Victoria (n 123).
- 170 SACStat, 'Sentencing Advisory Council Statistics' <https://www.sentencingcouncil.vic.gov.au/sacstat/home.html> accessed 13 December 2020.
- 171 Crime Statistics Agency Victoria, 'Publications' <http://www.crimestatistics.vic.gov.au/research-and-evaluation/publications> accessed 13 December 2020.
- 172 Interview with Davies, Senior Business Intelligence Analyst, County Court Victoria (n 151).
- 173 *ibid.*
- 174 Interview with O'Donnell, Digital Architect, Victoria Legal Aid (n 125).
- 175 Interview with McDonald, Victoria Law Foundation (n 134).
- 176 Judicial Commission of Victoria, 'Judicial Commission of Victoria Annual Report 2018-19' (2019) https://www.judicialcommission.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/04/5c/eb615db98/Judicial%20Commission%20of%20Victoria%20Annual%20Report%202018-19_Final.pdf accessed 13 December 2020.
- 177 'Feedback and Complaints' (Magistrates' Court of Victoria) <https://www.mcv.vic.gov.au/about-us/complaints> accessed 12 December 2020; 'Feedback and Complaints' (County Court of Victoria) <https://www.countycourt.vic.gov.au/contact-us/feedback-and-complaints> accessed 12 December 2020.
- 178 Magistrates' Court of Victoria, 'Annual Report 2017-18' https://www.mcv.vic.gov.au/sites/default/files/2019-11/Annual_Report_18-19.pdf accessed 12 December 2020; County Court of Victoria, 'Annual Report 2019-19' <https://www.countycourt.vic.gov.au/files/documents/2019-10/ccv-annual-report-2018-19.pdf#:~:text=COUNTY%20COURT%20OF%20VICTORIA%20ANNUAL%20REPORT%202018%E2%80%932019,Sexual%20offences%20List%2023%20County%20Koori%20Court%202026> accessed 13 December 2020; Supreme Court of Victoria, 'Annual Report 2017-19' https://www.supremecourt.vic.gov.au/sites/default/files/2019-11/supreme_court_of_victoria_2017-19_annual_report_0.pdf accessed 12 December 2020.

CSV told us that 'the level of adaption people have shown has exceeded expectations. There has always been a view that, "it has always been done like this", but this is changing ... it has been quite a marked, unexpected benefit of the lockdown.'¹⁶⁹ We come back to this in our critical appraisal section, below.

Court user data

Some data on court outcomes are routinely collected: the Sentencing Advisory Council, for example, collects data on sentencing decisions in all of the Victoria court jurisdictions,¹⁷⁰ and the Crime Statistics Agency publish research papers on a range of key topics in criminal justice such as drug and alcohol use, and youth crime.¹⁷¹ Court user data, however, are not a focus. Informally, we were told by CSV that although there is recognition at a governmental level of the potential usefulness (and importance) of data on, for example, court users with non-English language requirements, or court users with disabilities, there is currently little appetite to drive such a data collection project. Legacy systems such as CourtLink (Magistrates' Court) are not equipped to collect data on, for example, protected characteristics of court users. Data that are collected are not collected for data purposes, but are instead collected in connection with the business of the court. For example, there are indicators flagging court users with alcohol and/or drug dependencies, but these are in CourtLink because it has been mandated by the court process that they must undergo treatment. A sex offences indicator is used, but for list allocation purposes. Data that are collected for the business of the court rather than for operational purposes are harder to extract.¹⁷² There has been a growing appreciation of the benefit of capturing data for data purposes rather than operational purposes. Opportunities are being explored in all jurisdictions to add more indicators to the system, and to address data gaps in the case management system.¹⁷³

Peter O'Donnell, Enterprise Data Architect at Victoria Legal Aid, expressed frustration at the lack of court data, which he blamed on legacy court databases being unable to run sophisticated search queries. He said, 'it is just so hard for the courts to run a query against the underlying data source and extract it in any kind of meaningful way'. This impedes criminal justice reform. Peter O'Donnell gave the example of the tightening of bail laws as a knee jerk (governmental) response to a well-publicised murder case. Victoria Legal Aid suspect that the reforms have had a significant and negative impact on their clients, but without better access to data are unable to assess this.¹⁷⁴ Hugh McDonald, Principal Researcher at Victoria Law Foundation agreed. He said that, 'we do not have a good set of administrative data around court users ... we know relatively little about who those court users are, what they are using the courts for, what they are involved in doing and what outcomes they achieve and at what stages.'¹⁷⁵ This may change: data managers at all levels of court told us that they are actively looking for opportunities to improve the situation.

Accountability mechanisms

Complaints about judicial officers can be made to the Judicial Commission of Victoria, an independent organisation established under the Judicial Commission of Victoria Act 2016 to investigate complaints about judicial officers. The Judicial Commission publishes an Annual Report which contains details of all complaints received, and action taken.¹⁷⁶ There are additional feedback processes in the County Court and Magistrates' Court for complaints about court staff and process.¹⁷⁷ All jurisdictions produce an annual report: unlike in NSW (see below) none of the three jurisdictions' reports include sections on complaints received.¹⁷⁸

3.5 New South Wales

Legal infrastructure

Court services

The courts in NSW have less administrative autonomy than the federal courts, or the courts in Victoria. Court administration in NSW is controlled by the executive. The Courts, Tribunals and Service Delivery is not a statutory body: it is a division of the NSW Department of Communities and Justice. This follows a merger of the former Department of Family and Communities Services and former Department of Justice on 1 July 2019. In other words, unlike Victoria there is no separate court administrative body corporate.

The recent merge of departments has resulted in some changes in the management of data for courts and tribunals. At present, some data is managed centrally and some is managed within individual jurisdictions.¹⁷⁹ Just as with Victoria, all jurisdictions of court are governed by Rules of Court (practice directions), and each jurisdiction of court (Supreme Court, District Court, Local Court) uses a different system and is governed by slightly different rules and practice notes, as they are determined by the head of each jurisdiction. Unlike Victoria, all jurisdictions in NSW use the same case management data base (JustLink) and the lower courts use the same online registry facility.

Open justice

Section 6 of the Court Suppression and Non-publication Orders Act 2010 gives NSW the distinction of being the only other state apart from Victoria to give open justice statutory force at a state level. It states that ‘a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice’.¹⁸⁰

Data protection/copyright

The NSW data protection framework is set out in the Privacy and Personal Information Protection Act 1988 No 133. Section 23 deals with exemptions relating to law enforcement and effectively exempts courts services from the regime. Copyright for judgments in NSW is waived: while it continues to belong to the State, any publisher is authorised to publish any judicial decision.¹⁸¹

Right to know

The right to know legislation in NSW is in the Government Information (Public Access) Act 2009.¹⁸² Schedule 2 of this Act exempts courts-related data from the regime. Courts-related data includes information that relates to courts, judicial functions and prosecuting functions that is mandated as ‘excluded information’, and it is ‘conclusively presumed that there is an overriding public interest against disclosure of excluded information’.¹⁸³ Section 43 prevents an access application from being made to an agency for excluded information of the agency. Requests can be made to the NSW Department of Communities and Justice under the right to know legislation for information other than court records, such as management information.¹⁸⁴

179 Email correspondence from Kylie Nicholls, Director Data and Analytics, NSW Court, Tribunals and Service Delivery, NSW Government, ‘NSW Justice Data’ (31 July 2020).

180 Section 6, Court Suppression and Non-publication Orders Act 2010 No 106.

181 Copyright in Judicial Decisions New South Wales, 1995 No 105.

182 NSW Government, Government Information (Public Access) Act 2009 No 52 - NSW legislation.

183 *ibid.*

184 Nicholls, Director Data and Analytics, NSW Court, Tribunals and Service Delivery, NSW Government (n 179).

Suppression orders

The Court Suppression and Non-publication Orders Act 2010 is the state level law on suppression. Section 9 of the Act governs the procedure for making an order, and at subsection 9(2)(d) gives the media the right to appear and be heard by the court on an application. Academics in NSW have argued that this provision is too narrow; that it relies on an outdated understanding of ‘legacy media’, and that in an age where the definition of ‘journalist’ is coming under pressure it is more appropriate that any person with objections should have standing.¹⁸⁵ Furthermore, there are no specific provisions in the Act for notifying journalists that there is to be a hearing. This does not in itself mean that journalists are denied access but suggests that this important part of the process has not received sufficient legislative attention. The Supreme Court website has a media resources section where there is a reference to a ‘non-publication orders media distribution list’, with advice to journalists to email the media manager to ‘opt-in’ if necessary.¹⁸⁶ Media organisations have been vocal about the inconsistent nature of suppression order notification systems across jurisdictions, including NSW.¹⁸⁷

Unlike in Victoria, the Court Suppression and Non-publication Orders Act 2010 allows for a ‘balancing act’ test rather than the necessity test. Section 8 sets out the grounds for making an order, and after running through the options where an order is ‘necessary’ (the proper administration of justice, national or international security, safety of any person, to avoid causing distress or embarrassment to a party or witness in sexual offences proceedings¹⁸⁸), it adds a fifth ground at subsection 8(e): ‘it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice’. Professor Rolph regarded this as a ‘problem’; he said that ‘a balancing test like that has the capacity to undermine the strict test of necessity which is really what I think the test should be’.¹⁸⁹

Judgments that are subject to a suppression order are published with a neutral citation and the text ‘decision restricted’ in place of the case name on the website. In the wake of the recent media attention over the suppression orders issued with regards to the trial of Cardinal George Pell (discussed in the previous section on Victoria), the NSW Law Reform Commission is calling for preliminary submissions to review the operation of suppression and non-publication orders.¹⁹⁰

Court Information Act 2010

Finally, NSW has a ‘unique situation’¹⁹¹ in that, as explained in Chapter 2, the Court Information Act (CIA), drafted to improve access to court information, received bi-partisan support and received Assent in May 2010 but is not yet in force.¹⁹² The CIA has four objectives: to promote consistency in the provision of access to court information in NSW; to provide for open access to court information to promote transparency and a greater understanding of the justice system; to provide for privileged access to the media in certain circumstances and to ensure that access to justice does not obstruct justice by restricting some aspects. As explained in Chapter 2, the CIA divides all justice data into two categories: ‘open access information’ which is information that members of the public and the media have access to as of right, and ‘restricted access information’. Most administrative data and most case level data are open access information, which means that any person is entitled to access further to section 8(1). Transcripts of hearings are also open access information.

185 Jane Johnston and others <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/PCI26.pdf>. These arguments, although made in the NSW context, apply equally to the Victoria suppression order media provisions.

186 Supreme Court NSW, ‘Media Resources’ (12 May 2015) http://www.supremecourt.justice.nsw.gov.au:80/Pages/sco2_newscarousel/media_resources.html,c=y.aspx accessed 25 June 2020.

187 Schwarz (n 131).

188 In NSW the publication of any matter which identifies the complainant in certain sexual offence proceedings is prohibited further to Crimes Act 1900 (NSW) section 578A.

189 Interview with Rolph, University of Sydney Law School (n 77). For further discussion of the Court Suppression and Non-publication Orders Act grounds see Judicial Commission of NSW, ‘Criminal Trial Courts Bench Book – Trial Procedure’ [1-349]–[1-558] https://www.judcom.nsw.gov.au/publications/benchbks/criminal/closed_court_and_non-publication_orders.html accessed 9 December 2020.

190 Schwarz (n 131).

191 Interview with Rolph, University of Sydney Law School (n 77).

192 Court Information Act 2010 [24] 18.

Interviewees explained to us that the reason – as they perceived it – that the CIA has not been enacted is that there is an ongoing ‘dispute’ between the Attorney General’s Office and the courts as to who will pay for the measures it requires. Implementation, which will involve the opening up of much case level data which is, at the moment, mostly closed, will be expensive. In the absence of the implementation of the CIA, individual practice directions for each court dictate access rules, and our interviewees told us that this is extremely fragmented and unsatisfactory. The Law Society of NSW recently noted in a response to a government-led consultation on the CIA: ‘disparate legislation across various statutes and jurisdictions creates confusion and difficulties’.¹⁹³ Or, as one interviewee put it: ‘as a member of the public I have to either become friends with a party to the proceeding, or go and bug the registrar and pay all the fees that go with it.’¹⁹⁴

The Supreme Court

Access to court files

Practice Note SC Gen 2 commenced on 4 October 2019, applies to civil and criminal proceedings, and prescribes the procedures surrounding the provision of access to court data in the Supreme Court. The starting point is that nobody can search in a registry for any document except with leave of the court, and access to material is restricted to parties, except with the leave of the court. This is therefore more ‘closed’ than Victoria, where the presumption is in favour of access, and has been described as an ‘overly restrictive approach’.¹⁹⁵ However, paragraph 7 states that access will normally be granted in respect of pleadings in proceedings that have been concluded, (unless subject to a confidentiality order), and all documents that would have been heard or seen by any person present in open court, unless the judge or registrar considers that it should be kept confidential.

This process is complex: accessing the download requires navigating through three levels on the court website, and the instructions as to how or where to lodge the form are absent. Furthermore, the form itself presents with mixed messaging around open justice. It says in bold that, ‘access to material in any proceedings is restricted to parties, except with the leave of the Court’. This seems to contradict section 7 of the relevant Practice Note SC Gen 2 referred to above.

Non-parties have to complete an extra section on the form justifying their request and submit an application to access a court file request to the Supreme Court media manager, who refers the request to either the registrar or a judge for review. Unlike in the lower courts (see below), there is no online registry or electronic filing option – court documents still have to be lodged with the registrar.

In criminal cases even the media only get access to case level data once the trial has started, again by application to the media manager. This is because section 314 Criminal Procedure Act 1986 states that a media representative is ‘entitled’ to inspect ‘any document relating to criminal proceedings’ once the trial has started. In fact, interviewees told us that the most common way to get access in criminal cases is to have an informal arrangement with someone on the legal team, or with the police.¹⁹⁶ Professor Rolph told us that, in his view, the position with regards to access to case level data across the courts system was unsatisfactory. He observed that, ‘the lack of implementation of the Court Information Act is a real issue. It means that it is really hard to get access to case level information contemporaneously and that makes reporting on civil cases in particular very difficult’.¹⁹⁷

193 Elizabeth Espinosa, ‘Open Justice Review: Preliminary Submission’ (31 May 2019) <https://www.law-reform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/PCI31.pdf> accessed 9 July 2020.

194 Interview with Rolph, University of Sydney Law School (n 77).

195 Johnston and others (n 185).

196 Interview with Rolph, University of Sydney Law School (n 77).

197 *ibid.*

The media guide (separate to the practice direction) suggests that the media get preferential treatment over and above the access available to non-parties in general. It says that ‘the Court will generally grant access to originating processes and to pleadings before the matter goes to final hearing’.¹⁹⁸

Exhibits/evidence

All other material is strictly closed. Paragraph 7 of SC Gen 2 states that ‘access to other material will not be allowed unless a registrar or judge is satisfied that exceptional circumstances exist’. Our interviewees confirmed that this is the case: ‘getting any evidence before the case is determined is very difficult.’¹⁹⁹ The best method for getting this kind of data is generally accepted to be via private agreements with lawyers or police.

Listings

As is usual in Australia, listings are published online. The daily court list for all courts is updated at 3:30 pm every day and lists cases for the next business day. The Supreme Court also has a mobile app, downloadable from its website, which offers the same functionality as the online court list database. Another innovative feature of the daily court list in the Supreme Court is that it includes the names of specialist case management lists into which cases have been allocated, such as the Professional Negligence List, or the Defamation List. Other administrative data in all the courts are only available to parties via the NSW online registry portal.

Judgments

Judgments of the Supreme Court, the Court of Appeal and the Court of Criminal Appeal are all published on the Supreme Court Library Caselaw section of the website within 24 hours of being delivered, with a neutral citation. They are also sent free of charge (and on the same day) to AustLII and JADE, and also to private sector publishers such as LexisNexis and Thomson Reuters. The official law reports in NSW are the New South Wales Law Reports, published since 1970 by the Council of Law Reporting. The authorised versions have to go through a five-step review process and only capture cases that elucidate general principles or points of law, as decided by the editorial team. The position is much the same as in Victoria: the authorised reports are required citations for some courts. The Supreme Court also publishes helpful Judgment Summaries on its website for matters of interest and/or legal significance.

Hearings/recordings

Only parties, their legal representatives and journalists are entitled to obtain transcripts from hearings in the Supreme Court by applying to the Reporting Services Branch of the Supreme Court on forms which can be downloaded from the Supreme Court website. Journalists can apply for transcripts but have to pay a high fee as set out in the fees schedules listed on the court website: around A\$100 per page for the first ten pages and around A\$10 per page thereafter in both civil and criminal cases.²⁰⁰ Interviewees told us that transcripts are too unavailable, and too expensive. In particular, the costs associated with defendants’ ordering of transcripts in their own trials have been described by the New South Wales Bar Association as ‘oppressive’.²⁰¹ Interviewees pointed out that the provision of audio files rather than transcripts would make accessing hearings more affordable.²⁰²

Since 2014, the Supreme Court has allowed the live streaming of judges handing down judgments in civil proceedings and sentencing remarks in criminal proceedings.²⁰³ Media representatives can apply to broadcast via an application form which can be downloaded from the media resources section of the Supreme Court website. Permission to film is granted by the chief justice.

198 Supreme Court NSW, ‘Media Resources’ (n 186).

199 Interview with Rolph, University of Sydney Law School (n 77).

200 Supreme Court NSW, ‘Fee Schedule’ http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_formsfees/SCO2_fees/SCO2_fees.aspx accessed 9 July 2020.

201 New South Wales Bar Association (20 June 2019) <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/PCI41.pdf> accessed 9 July 2020.

202 Interview with Bosland, University of Melbourne Law School (n 117).

203 Supreme Court NSW, ‘Recording and Broadcasting of Judgment Remarks Policy’ http://www.supremecourt.justice.nsw.gov.au/Documents/Forms%20and%20Fees/Media%20Forms/recording_and_broadcasting_of_judgment_remarks_policy_1014v2.pdf accessed 25 June 2020.

District Court

Access to court files, exhibits and evidence

The rules in the District Court on access to management data are similar to those for the Supreme Court, but it is likely that it is even more difficult to get case level data in the District Court. While there is an online registry, only parties can register and get access to administrative data. There is no mention of access to case level data in the media resources for the District Court at all, either for journalists or indeed any other groups.²⁰⁴ Interviewees told us that it was necessary to apply to the registrar for access to case level data and it is very difficult: ‘a really unsatisfactory arrangement’.²⁰⁵

Judgments

Some District Court judgments are also published in the Caselaw section of the Supreme Court website: ‘the decision to publish is at the discretion of each individual judge’.²⁰⁶

Hearings/Recordings

Procedure in the District Court for getting transcripts is more open than the Supreme Court as non-parties can request transcripts. Non-parties must, however, provide a reason for their request in the application to the registrar or judge. Fees are set at a similar level to the Supreme Court.²⁰⁷ Parties in the District Court also have an option to request a copy of the daily transcript, which is sometimes ordered by the judge, and if so ordered, is prepared at the end of each day during a trial.

Just as with the Supreme Court, since 2014, the District Court have allowed the live streaming of judges handing down judgments in civil proceedings and sentencing remarks in criminal proceedings.²⁰⁸ Media representatives can apply to broadcast via an application form which can be downloaded from the media resources section of the District Court websites. Permission to film is granted by the chief justice.

Local Court

There are no media resources published for the Local Court, but access to administrative data is for parties only via the online registry. Access to case level data is the same as for the District Court – via the registrar’s office and only at the registrar’s discretion. Rule 8.10 of the Local Court Rules 2009 states that non-parties can have access to transcripts and administration level data but at the discretion of the magistrate or registrar. Some Local Court judgments are also published on the New South Wales Caselaw website: the Local Court publishes ‘a small selection of decisions that provide interpretations of legislation and legal principles’.²⁰⁹

COVID-19

Just as in Victoria, prior to COVID-19, remote proceedings were only held in remote communities. Trials were suspended in New South Wales in mid-March,²¹⁰ and were initially resumed in June 2020. Once trials had been suspended, as with other jurisdictions there was a rush to facilitate remote hearings. During this time the New South Wales Supreme Court stated on its website that, ‘the court will be reviewing all operations with a view to maintaining open justice, consistent with the current constraints and health advice’.²¹¹ There were problems: the most high-profile disaster being the attempt to live stream a ‘criminal trial of some notoriety’ on YouTube. The trial had to be adjourned part-heard due to technical glitches.²¹² Access to virtual hearings was unreliable, and there was no guidance for the general public on the website.

204 District Court NSW, ‘Media Resources’ http://www.districtcourt.justice.nsw.gov.au/Pages/practice_procedure/media-resources.aspx accessed 25 June 2020.

205 Interview with Rolph, University of Sydney Law School (n 77).

206 nsw.gov.au, ‘NSW Caselaw | Policy and Procedures’ <https://www.caselaw.nsw.gov.au/policy.html#restriction> accessed 13 December 2020.

207 District Court NSW and NSW Department of Justice, ‘Forms & Fees’ (2 December 2014) http://www.districtcourt.justice.nsw.gov.au:80/Pages/forms_fees/forms_fees.aspx accessed 25 June 2020.

208 Supreme Court NSW, ‘Recording and Broadcasting of Judgment Remarks Policy’ (n 203).

209 nsw.gov.au (n 206).

210 Lewis and Robinson (n 103).

211 *ibid.*

212 *ibid.*

The media were told that

Access details to court rooms are to be used only by accredited media observing and reporting on open court proceedings, and are not to be circulated or published for any other purpose. Persons accessing the system for inappropriate purposes or in a way that interferes with the proper administration of justice will be referred to be dealt with for contempt of court.²¹³

213 'District Court of NSW Virtual Court Media User Guide' [http://www.districtcourt.justice.nsw.gov.au/Documents/For%20Media%20-%20Virtual%20Court%20Fact%20Sheet.%20\(3\).pdf](http://www.districtcourt.justice.nsw.gov.au/Documents/For%20Media%20-%20Virtual%20Court%20Fact%20Sheet.%20(3).pdf) accessed 23 June 2020.

214 Lewis and Robinson (n 103).

215 Supreme Court of New South Wales, 'Release of Statistics, Data & Information' https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/policyrelease_of_court_statistics.pdf accessed 12 December 2020.

216 Supreme Court of New South Wales, '2018 Annual Review' <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Annual%20Reviews%20+%20Stats/2018AnnualReview.pdf> accessed 12 December 2020.

217 Department of Justice, 'Department of Justice Annual Report 2018-19' <https://www.justice.nsw.gov.au/Documents/Annual%20Reports/departement-of-justice-annual-report-2018-19.pdf> accessed 3 July 2020.

218 State Coroners Court NSW, 'Deaths in Custody 2019' (2019) <http://www.coroners.justice.nsw.gov.au/Documents/158632%20STATE%20CORONERS%20COURT%20Deaths%20in%20Custody%202019%20-%20WEB%20VERSION%20LR.pdf> accessed 9 July 2020.

219 *ibid.*

220 'Corrections Research Evaluation and Statistics' <https://correctiveservices.dcj.nsw.gov.au/csnew-home/resources/research-and-reports/corrections-research-evaluation-and-statistics.html> accessed 13 December 2020.

221 'Criminal Courts Statistics' https://www.bocsar.nsw.gov.au/443/Pages/bocsar_court_stats/bocsar-court-landing.aspx accessed 13 December 2020.

222 Law and Justice Foundation, 'Data Insights in Civil Justice' (2018) [http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/Supreme_Court_Report_2018.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/Supreme_Court_Report_2018.pdf).

223 *ibid.* 8.

224 *ibid.*

Guidance from the New South Wales Chief Justice on 8 May 2020 advised that, 'there are maybe circumstances where it is appropriate to limit remote non-party attendance in that there are capability or capacity issues in relation to the technology'.²¹⁴ This is a concern, as one academic said to us: 'we are having those types of judicial functions that would normally be required, as a matter of law, to be conducted in open court, now being conducted in a way that is not an open court... that raises constitutional questions in Australia'.

Court user data

Data on court users do not appear to be routinely collected in New South Wales. The Supreme Court practice note on 'release of statistics, data & information', for example, explains that 'the Court only collates information that is necessary to manage its cases, for example, numeric analysis of the Court's caseload by case type'.²¹⁵ This is the only statistical data available in its annual report.²¹⁶ To the extent that the Supreme Court does collect data it does not release it: 'the Court usually does not assist with information requests from private individuals'. It is prepared to grant access to 'genuine academic research projects' and requests have to be made to the registrar.

Neither the District Court nor the Local Court publish an annual report, but the Department of Justice annual report contains some basic data around offending rates and numbers of cases.²¹⁷ Some specialist courts publish specific reports, for example the Coroners Court publishes a report on deaths in custody²¹⁸ and domestic violence deaths.²¹⁹ Finally, the NSW Department of Communities and Justice has a research division, Corrections Research Evaluation and Statistics (CRES) which publishes research reports and data to inform criminal justice practice,²²⁰ and the NSW Bureau of Crime Statistics and Research publishes crime statistics and compiles (freely available) datasets of, for example, recorded crime by offence, or trends for major offences.²²¹

In 2018, the Department of Justice NSW engaged the Law and Justice Foundation of New South Wales, an independent not-for-profit organisation that seeks to improve access to justice, to conduct a review of the quality and utility of each jurisdiction's data. This review formed part of a broader (progressive) initiative on the part of the Department of Justice NSW to explore how justice data could be used as an evidence base to inform policy and practice. The report on the Supreme Court concluded that there were a number of barriers that would need to be overcome before NSW Courts and Tribunals Service could implement the policy recommendations.²²² These included: limitation in what data were available and how they are defined; problems with the accuracy of data entered into the system; difficulties with how data can be and are entered and stored; and finally, difficulties with how data are extracted. Interestingly the authors of the report concluded that most of the above problems 'have their foundation in the JusticeLink database' (which is the case management system used by all courts in NSW, as stated above).²²³ JusticeLink was found to be a defendant-driven system, first implemented in NSW courts for criminal law matters. As civil cases are primarily driven by claimants, 'a defendant-driven system makes the recording and management of civil cases more difficult and subject to error'.²²⁴ These are interesting findings which we come back to in our 'critical appraisal' section, below.

Accountability mechanisms

In order to make a complaint about process in the District Court and the Local Court, you are simply directed to make the complaint to ‘the relevant courthouse’ in question. There is no direct feedback form or contact on either the District Court or Local Court websites. There is a feedback form on the Supreme Court website for process complaints, and also a contact email and postal address for written complaints. In terms of transparency there is very little. Complaints/feedback is for the most part treated as ‘confidential’. There is a section headed ‘consumer response/complaints data’ in the Department of Justice Annual Report which records all complaints received by the different jurisdictions of courts. It summarises the complaints and publishes a list of ‘services improved/changed in response to complaints/suggestions’.²²⁵

As with Victoria, complaints about judicial officers are made to a central Judicial Commission, and information about complaints disposed of during the year is listed in the Annual Report of the Commission. Information listed in the report includes numbers of complaints received, summaries of what they were about and how they were dealt with.²²⁶

3.6 Critical appraisal

Complexity

The fact that it has only been possible to drill down into the open justice procedures in three of Australia’s many justice ecosystems: the federal court, Victoria and NSW, is a direct consequence of the complexity of the Australian situation. Overall we found a continuum from largely unrestricted (the High Court of Australia, for example) to more limited access subject to a significant degree of court staff discretion (the position in NSW). The lack of consistency between states, between jurisdictions (within states), between courts (within jurisdictions) and between civil and criminal divisions (within courts) means that piecing together the statute, rules and practice directions for each mini system is time consuming and difficult. The difficulty is exacerbated by the lack of visibility, with each new court website locating the different pieces of the access to court files regime in different places. Often the lack of visibility seems intentional, as courts retain a higher degree of discretion in the absence of articulated criteria or processes. As has been pointed out:

The combined effect of an obscure application process, and inadequate disclosure of the grounds on which access may be granted, seems designed (at worst) to limit access to any court file to the immediate parties to any proceedings and (at best) to privilege other application who can afford legal representation, and have the time and resources to devote to pursuing an application.²²⁷

The evidence of interviewees and key literature suggests that these features affect the public perception of how easy it is to understand the law or access the courts. Instead, judicial processes can feel secretive, and ‘these broad variations in norms and practices contribute to a perception that the control of access by courts officials and judges is arbitrary and secretive, a perception that can undermine public confidence in the courts and the judicial process’.²²⁸ This particularly applies in the digital age; the fact that current technology could be used to improve access makes time consuming registry ‘in person’ applications all the more frustrating. Practical obscurity, possibly maintained in an attempt to minimise public access to personal data, might come at a cost to public confidence in the justice system.

225 Department of Justice (n 217).

226 Judicial Commission of NSW, ‘Judicial Commission of NSW Annual Report 2018-19’ <https://www.judcom.nsw.gov.au/wp-content/uploads/2019/11/Judicial-Commission-Annual-Report-2018-19.pdf> accessed 12 December 2020.

227 Johnston and others (n 185).

228 Judith Bellis, ‘Public Access to Court Records in Australia: An International Comparative Perspective and Some Proposals for Reform’ (2010) 19 *Journal of Judicial Administration* 197.

Although outside of the remit of this project, there is much impressive outreach work undertaken by the courts which contributes to the building of confidence and understanding. The Supreme Court of Victoria has been particularly active with, for example, the media team responsible for developing a series of podcasts ('Gertie's Law') which are available on iTunes and which bring members of the judiciary and the public/media together for discussion of broad justice issues. One episode focuses on suppression orders and records a 'roundtable' of judges and journalists discussing the different priorities that make up judicial decision making in this area. This kind of insight is invaluable for dispelling popular misconceptions of 'secret justice' outlined in the paragraph on suppression orders, below.

Case level data

In particular, our interviewees told us that the nuanced approach to case level data that we found across the jurisdictions was problematic. Firstly, interviewees in NSW and in Victoria explained to us that in Australia, as elsewhere, the nature of trials are changing. Changes in practice and procedure place increasing reliance on statements of case and other written submissions including affidavits that may, (but crucially may not), be read out in open court. Trials are increasingly conducted on the bases of such documentary evidence alone. Even where a case does proceed to trial and where oral evidence is given, without access to court records relied on by parties and judges it is hard for observers to understand the nature of the case, the arguments put forward by each side, the importance of the evidence or the decision of the judge.²²⁹

Our review suggests that journalists cannot get such access and that this is a problem. Access to case level data showed some of the greatest variation in terms of process across courts, and it was also frequently the area with the greatest judicial discretion. Rule 7:07.4 of the High Court Rules 2004 gives open access to any document filed in any case to all groups, and we reported how this is favourably received by the media. Access to case level data is given to all groups (specifically including members of the public) via registration on the DLS Portal of the High Court website. At the other end of the spectrum, in the NSW District and Local Court, it is not possible to determine what the access procedures are without speaking to somebody in the Chief Magistrate's office. Interviewees told us that access is difficult, and dependent on the discretion of the court office on a case-by-case basis: 'a really unsatisfactory arrangement'.²³⁰ The best way to get access is frequently via a personal relationship with a barrister or a police officer. If journalists cannot get access to documents at a case level then the quality of their reports will be compromised. This is likely to have a knock-on effect on public understanding of and thus confidence in legal process.

Suppression orders

The recent trial of George Pell in the Supreme Court of Victoria highlighted the difficulties with the current suppression order regime in both Victoria and New South Wales. With reports that over 150,000 Australians had circumvented the suppression order in just one week due to the availability of content about his trial, both online generally, and on social media specifically, cast doubt on the efficacy of the regime. Commentary on the George Pell case raised questions about the nature of open justice and free speech in Victoria, with news outlets such as ABC reporting how 'legal secrets' were 'in contempt of the principle of open justice', and how the courts had become 'an Alice in Wonderland world where the media is not allowed to report anything at all about an upcoming trial'.²³¹

229 Interview with Rolph, University of Sydney Law School (n 77).

230 *ibid.*

231 Ep 15 – Legal Secrets (Australian Broadcasting Corporation, 2018) <https://www.abc.net.au/mediawatch/episodes/legal-secrets/9972226> accessed 22 July 2020.

Our interviewees suggested that the position was more nuanced, with commentary on the case exposing ‘a lack of understanding on the part of the media about the nature and purpose of suppression orders’.²³² Some academics commented that better communication from the courts on the need for suppression orders is required, for example providing more information on the purposes that they serve. Arguably steps in this direction are already being taken, as evidenced by the special edition of the ‘Gertie’s Law’ podcast referenced above. Academics also express concern that fragmentation of the ‘legacy’ media and the current ‘fragmented and pervasive digital media environment’²³³ means that non-legacy media interests need a more secure (legitimised by statute) standing to appear and be heard by a court on an application for a suppression order.

Digitisation

Another big shift is the move to digitisation that was in evidence in all of the courts that we reviewed. In many ways the Australian courts have capitalised on digitalisation to build new possibilities for access: listings, for example, are open access, online, and easy to locate for every court we reviewed. This is consistent across jurisdictions: listings are as accessible for the lowest courts (the Local Court in NSW, for example) as in the High Court of Australia.

The move to online filing has taken place in most but not all jurisdictions, but this is not consistent across lower or higher courts. In NSW, for example, while the District and Local Courts used an Online Registry, in the Supreme Court it is still necessary to lodge documents with the Registrar. Access to judgments is consistent for all higher courts, with both Victoria (via the CSV website) and NSW (via its Caselaw function on the Supreme Court website) making judgments from all their higher courts available in one place.

Judgments are also available on AustLII, where we found a commitment to using technology to make justice accessible which could pave the way for further innovation and change. There was recognition from the courts that making judgments and sentencing remarks available in this way was important for the public who needed to be able to understand how and why sentencing decisions were made. Understanding sentencing was felt to be particularly important from the point of view of public confidence in the justice system.²³⁴

Interestingly, where there has been a shift to electronic registry, access to data has not necessarily become any easier, as noted above. It has been noted that a key difference between paper-based and digital-based records is the fact that paper records provide a ‘practical obscurity’ shield of the information contained within them, because obtaining access in this way is time consuming, and therefore less likely to happen. Losing the ‘practical obscurity’ shield would mean that courts services and the judiciary would find themselves in relatively new territory (with implications for the widespread accessibility of personal data), and it is understandable in this context that courts are holding onto their control of data, either by restricting who can register on their online portals (parties only, for example) or by bypassing the online portal altogether on access to court documents and insisting on registry attendance (as in the Supreme Court, Victoria).

Apart from the High Court, where transcripts are posted online, access to transcripts is similarly restrictive, with some jurisdictions allowing this for parties only (for example in the County Court, Victoria or the Supreme Court, NSW) and most jurisdictions charging high transcription fees, at least in civil cases. A number of interviewees pointed out that one improvement would be to make audio files of hearings more available and searchable, which would reduce the need for expensive transcription services.²³⁵

232 Johnston and others (n 185).

233 *ibid.*

234 Interview with Davies, Senior Business Intelligence Analyst, County Court Victoria (n 151); Interview with Bosland, University of Melbourne Law School (n 117).

235 Interview with Chung, Executive Director, AustLII (n 159).

Court user data

Another area that has not (yet) benefited from the move to a more virtual registry is the ability of courts services to publish or even make use of court user data. While data on court outcomes were routinely collected by most courts, court user data has not been a priority. Case management systems used by courts often make this kind of analysis difficult. CSV told us that there is a growing recognition at a governmental level that data on courts could be transformational, with a potential impact on policy and practice. At the moment, however, they told us that ‘we have barely scratched the surface of being able to analyse the data at a proper level and use that for analysis and develop key, meaningful insights from it’.²³⁶ This is a particular frustration for those working ‘at the coal face’ in the legal aid sector, with the lack of availability of data thwarting the ability of the sector to ‘track’ trends and thus to recommend reform. This is true at a logistical and a policy level: the Victoria Law Foundation explained to us that better data would enable them to make recommendations on policy issues, such as the efficacy of recent reforms to bail process, but also on logistical issues, such as how many buses to provide to take remand prisoners to their custody hearings.

COVID-19: Challenges and opportunities

COVID-19 brought technology into sharp focus as it became necessary to make changes to process at very short notice. Prior to COVID-19, Australian courts did not make much use of available technology to live stream hearings, or to enable remote access to court proceedings. There were exceptions: the High Court of Australia makes some audio-visual recordings of hearings available on its website, for example, and the Supreme Court of Victoria live streams sentencing remarks and judgments in some civil proceedings. But, generally, remote court access to court proceedings was only enabled in remote communities where it is difficult to get physical access. When Australia went into lockdown in March, the subsequent move to online hearings across all courts presented what one Chief Judge described as ‘the most challenging crisis the courts have faced in recent history’.²³⁷

In fact, what is most notable about the crisis is that it showed what is possible. There were concerns about the technology which was more robust in some jurisdictions than others (NSW had particular problems with the adequacy of its technology) but glitches can be addressed with investment in infrastructure and COVID-19 has showed where this is needed. Most jurisdictions published a response to the virus, and instructions, online. Some jurisdictions – mostly the higher courts – showed that it was possible to move hearings online and welcome third-party observers, but others did not. The Supreme Court in Victoria, for example, put virtual hearings in the Daily List online with access instructions, but the District Court in NSW allowed access only to the media.

Journalists we spoke to were mostly very positive about the COVID-19 period, explaining that in some ways access to justice had been improved as it was ‘easier, economical and more efficient for journalists to follow hearings in different locations from their desk’.²³⁸ This could be an important step in an era which is witnessing a decline in the role of the media in open justice.²³⁹ Some commentators felt that more consistent attention should have been given to open justice principles across the board, with one judge observing that ‘no uniform approach has yet been adopted to safeguard open justice’.²⁴⁰ Our academic interviewees seconded this, with one commenting that, ‘I just find it astonishing that no one has sat down and developed some principles, even in the short space of time: I would have thought this is crucial.’²⁴¹ Going forward, one issue that will need to be considered is how to ensure that online courts are more consistently ‘open’, and whether or not it is possible to develop a uniform approach to this end.

236 Interview with Paul Sutherland, Manager, Data Analysis, Magistrates’ Court Victoria (7 July 2020).

237 Adam Cooper and Tammy Mills, ‘No Trials for at Least Six Months as Victorian Courts Face “Greatest Crisis”’ (The Age, 20 March 2020) <https://www.theage.com.au/national/victoria/courts-look-to-remote-technology-amid-virus-20200320-p54c85.html> accessed 20 July 2020.

238 Lewis and Robinson (n 103).

239 Bosland and Townend (n 138).

240 Lewis and Robinson (n 103).

241 Interview with Bosland, University of Melbourne Law School (n 117).

The COVID-19 period also made communication between the courts and the media even more important, and the prominence given in Australia to the role of media liaison officer paid dividends. A series of Australian research reports in the 1990s identified a breakdown in communication between the judiciary and the media, and the appointment by courts of media communication specialists in the 1990s was an attempt to resolve this. Journalists praised the proactive nature of many of the communication teams and appreciated getting access to updates and judgments even when courts were (physically) closed and communications staff were working from home. All courts that we reviewed, across all jurisdictions, had some form of this media representative role.

The possibility of reform was most pressing in New South Wales where the Court Information Act enjoyed bi-partisan support and Royal Assent but has not (yet) been enforced, which could be blamed on funding disagreement between the government and courts reported by interviewees, or perhaps other undeclared factors. Commentators described this as ‘frustrating’, as the consistency that would be provided by the CIA would address many of the problems identified in the opening paragraphs to this section. Clarity and consistency are much needed, especially in the area of access to case level data and transcripts, and the CIA would offer both. It could be that the COVID-19 pandemic and subsequent ability of the courts to embrace innovation and change has prompted a recognition of the need for a more consistent approach. There is a degree of optimism about progress, and about what could or should be achieved in the future. As NSW Chief Justice Tom Bathurst said as he re-opened his courthouses following a relaxing of restrictions, ‘the shift to a remote system of justice was not without its technical challenges, yet I am confident we are getting better each day, and I see an innovative and flexible future ahead’.²⁴² The Supreme Court of Victoria’s Chief Justice Anne Ferguson agreed, saying that ‘there’s a real upside, an opportunity to drop the barriers to look at different ways to do things because we’ve had to’.²⁴³

3.7 Summary

Overall, the position in Australia is one of technological progress, albeit (as some interviewees complained) slow technological progress. This progress is reflected by the way that courts across the country, both federal and state, are embracing the move to online filing and case management, if not more complete online access to justice data. There is a recognition that the move to online access to justice data would come with a privacy ‘price’ that understandably concerns courts and the judiciary. The NSW Court Information Act initiative suggests a way through, with its clear definitional structure and access mechanisms; the inability of the NSW legislature to get the Act in force is indicative of wider problems around funding that are yet to be resolved. We see some of the same issues crop up in our next case study, Canada, to which we now turn.

242 Supreme Court of New South Wales, ‘NSW Supreme Court Moves Towards Resuming Face-to-Face Hearings’ https://inbrief.nswbar.asn.au/posts/08b347d-11316f1372f3414b4c414743b/attachment/M20.5.20%20media%20release_NSW%20Supreme%20Court%20moves%20towards%20resuming%20face-to-face%20hearings_200520.pdf accessed 23 June 2020.

243 Percy (n 165).

4 Canada

This chapter provides an overview of justice system data in Canada, at the federal and provincial level. It offers context on the structure and key features of the Canadian justice system, before moving to more detailed accounts of selected courts, and an overall critical appraisal of justice system data management.

4.1 Background

Structure

Though there are certain structural similarities between the Canadian and Australian justice systems, Canada's justice system is – as its justice department explains on its website – ‘unique’: as it is both bijural, combining two legal traditions of common law and civil law, and bilingual, with two official languages, English and French. For reasons of practicality and comparison with our other case studies, this chapter focuses on the English common law aspects of the Canadian justice system, although we briefly discuss some aspects of justice system data in Québec. In this chapter, we focus on the province of British Columbia (BC), with briefer examples and discussion from other areas and the federal courts. We chose to focus on BC because of its size, accessibility of resources, attention in the academic and policy literature, and it was identified as interviewees as a province which was ahead in its approach to justice system data (including Canada's first online tribunal).²⁴⁴

As with Australia, the justice system combines regional and national elements. At the regional level, there are 10 provinces and 3 territories, each with their own courts that hear cases involving both federal or provincial/territorial laws.²⁴⁵ One important feature is that the Canadian Parliament has exclusive authority over the procedure in criminal courts that try criminal cases, in order to ensure ‘fair and consistent treatment of criminal behaviour across the country’.²⁴⁶

The range of matters heard by the provincial courts include, as explained on the Department of Justice website:

- most criminal offences, except the most serious ones;
- family law matters (e.g., child support, child protection, adoption, but not divorce);
- young persons from 12 to 17 years old in conflict with the law;
- traffic and bylaw violations;
- provincial/territorial regulatory offences;
- claims involving money, up to a certain amount (set by the province or territory in question);
- small claims (civil cases that resolve private disputes involving limited sums of money); and
- all preliminary inquiries (hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases).²⁴⁷

244 The Civil Resolution Tribunal (CRT) in BC, although the Condominium Authority Tribunal

245 An introductory guide can be found on the government's website: Department of Justice, ‘Canada's System of Justice’ (justice.gc.ca) <https://www.justice.gc.ca/eng/csj-sjc/index.html> accessed 28 July 2020.

246 Department of Justice, ‘The Judicial Structure’ (justice.gc.ca, 16 October 2017) <https://www.justice.gc.ca/eng/csj-sjc/just/07.html> accessed 1 August 2020.

247 Department of Justice, ‘Canada's Court System’ (justice.gc.ca) <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html> accessed 28 July 2020.

As well as the first level provincial court in different locations in the province, each province and territory also has:

- A superior court which hears the most serious criminal and civil cases, including divorce cases and cases of high monetary value. As courts of ‘inherent jurisdiction’ the superior courts can hear cases in any area except where authority is limited by a statute or rule. They tend to be split into different divisions, with specialised family courts in some provinces. A number of provinces have unified family courts, where a single court can deal with all aspects of family law.
- A court of appeal, which hears appeals from the decisions of the superior courts and the provincial/territorial courts, which can include commercial disputes, property disputes, negligence claims, family disputes, bankruptcies, and corporate reorganisations, as well as constitutional questions in cases involving individuals, governments, or governmental agencies.²⁴⁸

Running in parallel, the federal court system is composed of:

- The Federal Court, which hears cases involving federal statutes, including interprovincial and many federal-provincial disputes; immigration and refugee matters; intellectual property; citizenship appeals; Competition Act cases; and cases involving Crown corporations or departments of the Canadian government.
- Specialised courts including the Tax Court of Canada and military courts.
- The Federal Court of Appeal, which hears appeals from the Federal Court and the Tax Court of Canada, and judicial reviews of specified federal tribunals.
- The Supreme Court of Canada is the final court of appeal for all Canadian courts, with jurisdiction over disputes in all areas of the law (including constitutional, administrative, criminal and civil law).²⁴⁹

Finally, there are administrative tribunals and boards which deal with disputes over the application of laws, such as entitlement to employment insurance or disability benefits, refugee claims, and human rights. These bodies sit outside the courts system though their decisions are reviewable by the courts.²⁵⁰

The overall structure of the justice system and the relationships between federal and provincial/territorial levels inevitably affect and present challenges for the management of legal information. Although there are similarities between some federal courts and provinces (for example, use of custom software developed by legal data company Lexum), there is also great variety, with a wide spectrum of measures for the provision of legal data: from expensive paywalled services run by private legal information companies; to free access models such as that of the Canadian Legal Information Institute (CanLII); and open legal data released under an Open Government Licence that permits wide-ranging re-use subject to conditions and exemptions.²⁵¹ As one Canadian interviewee described, ‘the biggest challenge is jurisdiction and Canada ... has one of the most complex federations in the world. So what with the division of powers between the federal government and the provinces, add in different and antiquated information management systems ... and a dash of judicial independence and it is all very complicated’. One implication of this complex hybrid system is the difference in funding, and relationship with government in the provision of resources.

248 *ibid.*

249 Department of Justice, ‘Courts and Other Bodies Under Federal Jurisdiction’ (<https://www.justice.gc.ca/eng/cs-jc/ccs-ajc/03.html>) accessed 28 July 2020.

250 *ibid.*

251 Government of Canada, ‘Open Government Portal’ (https://search.open.canada.ca/en/od/?sort=score%20desc&page=1&search_text=&od-search-portal=Open%20Data&od-search-subjects=Law) accessed 31 July 2020.

252 Sean Fine, 'Supreme Court Has Ensured Independence by Obtaining Financial Security, Says Chief Justice Richard Wagner' *The Globe and Mail* (1 September 2019) <https://www.theglobeandmail.com/canada/article-supreme-court-has-ensured-independence-by-obtained-financial-security/> accessed 28 July 2020; Supreme Court of Canada, 'Accord to Strengthen the Independence of the Supreme Court of Canada' (scc.csc.ca, 22 July 2019) <https://www.scc-csc.ca/court-cour/accord-justice-eng.aspx> accessed 28 July 2020.

253 With regard to the superior courts in each province and territory, although administered by the province and territories, the federal government appoints and pays the judges.

254 Jacques Gallant, 'Ontario Courts Remain in Technology's Dark Ages, Chief Justice Says' (*thestar.com*, 24 June 2019) <https://www.thestar.com/news/gta/2019/06/24/ontario-courts-remain-in-technology-dark-ages-chief-justice-says.html> accessed 18 July 2020.

255 Jon Khan, 'Opinion: Our Justice System Needs to Be More than a "Zoom Court"' *The Globe and Mail* (2 July 2020) <https://www.theglobeandmail.com/opinion/article-our-justice-system-needs-to-be-more-than-a-zoom-court/> accessed 28 July 2020.

256 Jeremy Hainsworth, 'B.C. Courts Technologically Lacking: Chief Justice' (*North Shore News*, 30 April 2020) <https://www.nsnews.com/update-b-c-courts-technologically-lacking-chief-justice-1.24127249> accessed 28 July 2020; Eric Rankin, 'Top Judge Takes Rare Shot at B.C. Government over COVID-19 Court Closures' (*CBC News*, 30 April 2020) <https://www.cbc.ca/news/canada/british-columbia/top-judge-takes-rare-shot-at-b-c-government-over-covid-19-court-closures-1.5551487> accessed 28 July 2020.

257 Federal Court Canada, 'Federal Court Strategic Plan 2020-2025' (2020) <https://www.fct-cf.gc.ca/content/assets/pdf/base/2020-07-15%20Strategic%20Plan%202020-2025.pdf> accessed 5 August 2020.

Funding

Whereas the Supreme Court of Canada enjoys greater financial security and independence as the result of an accord between the chief justice and the Minister of Justice and Attorney General of Canada,²⁵² the position for the provincial courts is more precarious.²⁵³ Shortly before she departed office as Chief Justice of Ontario, Heather Smith drew attention to the issue of insufficient provincial government funding for development of the courts in Ontario, which, she said, was stymieing technological development.²⁵⁴ As Jon Khan has outlined, 'most Canadian courts don't control their budgets or administration', and 'lack funds and resources to gather data and design improvements'.²⁵⁵ This is acknowledged by British Columbia's Attorney General, David Eby, who agreed that 'governments of all stripes have not prioritized funding for the courts' following a claim by the Chief Justice of British Columbia's Supreme Court, Christopher Hinkson, that 'requests for the financial investments necessary to make the [technological modernisation] strategy a reality have gone unanswered'.²⁵⁶ Our interviewees confirmed this as an issue.

This is also an issue for the federal courts, supported by the Courts Administration Service (CAS). The latest strategic plan published by the Federal Court notes:

...until recently, [The Courts Administration Service] was chronically underfunded for many years. Among other things, this significantly undermined its efforts to provide the Court with the technology required to better connect with Canadians; to provide timely translations of its decisions; and to provide communications expertise to better inform Canadians about the Court's jurisdiction and its work. With the additional funding announced in the last two years, CAS is now better positioned to address these matters.²⁵⁷

Of the provinces, it cannot be assumed that larger courts, or bigger regions, have the best systems or practice. One interviewee noted that Nova Scotia (the seventh-largest province in terms of population) 'has – probably – the best provincial information management system that is seamless', showing that some provinces may be more agile and flexible in developing digital services. We also spoke to researchers in Saskatchewan (the sixth-largest provincial population), where plans are being developed for a justice 'data commons', and Manitoba (fifth-largest provincial population) was mentioned to us as an example of promising open data and access to justice data development.

Access to justice, technology and data

In reviewing the literature on courts and technology, we found a rich body of work by Canadian academics on access to justice. Canada has built up a notable number of provincial and national access to justice initiatives, within and outside academic institutions, which are relevant to the questions we ask in this report, including: access to justice themed academic centres and networks within University of Victoria, Université de Montréal, Osgoode Hall Law School of York University, and University of Saskatchewan; Access to Justice BC, a collaboration chaired by the chief justice of British Columbia; and the national Action Committee on Access to Justice in Civil and Family Matters which receives logistical support from the Canadian Institute for the Administration of Justice and the Department of Justice.²⁵⁸ The latter was established in 2007 by then Chief Justice of Canada, Beverley McLachlin, who continues to chair the steering committee, which works on furthering Canada's Justice Development Goals (JDGs) which are broader than, but encompass, data and technology issues.

The JDGs overlap to some extent with the objectives on UN SDG 16.3 to advance the rule of law and ensure equal access to justice for all (see Chapter 2, page 8). With specific regard to transparency and data, the Department of Justice has proposed a commitment to open justice in the next Open Government National Action Plan, with dedicated support from the Department Of Justice as part of broader work on open data.²⁵⁹ In the department's view, this would have a 'dual-pronged objective of advancing open government principles and the SDG agenda by building on existing programming'.²⁶⁰

Although there is such a strong body of work in this field, leading experts are not satisfied with Canada's performance on access to justice measures, nor do they feel that the governments at provincial and federal level are sufficiently funding technological development. Beverley McLachlin, argues that although the overall picture looks good (the World Justice Project Rule of Law ranks Canada 9 out of 128 countries for its justice system), 'justice on the ground' is less effective (with Canada listed at 56th for the index factor: 'people can access and afford civil justice').²⁶¹ In McLachlin's view, Canada is 'suffering from a justice crisis', exacerbated by the COVID-19 pandemic, which has exposed a system 'stressed beyond its means and unable to provide effective and timely solutions to legal needs'. As in other countries, owing to restrictions on physical contact, the provincial and federal courts have moved to an increased use of 'remote' technology and e-filing during the COVID-19 pandemic period; though not consistently across all court types and regions, as we shall see.

Further, those working on access to justice issues feel a 'data deficit' is inhibiting progress. Identified by the University of Victoria Access to Justice Centre for Excellence as the 'justice metrics problem', McHale argues that it manifests at both provincial and national levels, and in other countries:

What we are calling the 'justice metrics problem' has been described in numerous provincial and national reports in this country. In fact, its profile is rising world-wide, and it is actively being explored in many other jurisdictions, including the United States, the United Kingdom and Australia ... The problem revolves around the lack of reliable justice data, the lack of empirical justice research, inconsistent justice metrics and the inability of justice systems to measure the performance or effectiveness of their programs and processes. This problem also is frustrated by the difficulty of untangling access to justice data needs from the need to collect business data to support court administration. This lack of data and research capacity impairs policy development, handicaps effective planning and weakens claims for justice funding. It is, generally, a serious impediment to access to justice reform.²⁶²

Focussing on civil justice, McHale describes the Canadian justice data deficit as having five components:

- 1 A lack of data: 'Canadian justice systems collect only limited data, and what is collected is often incomplete, inconsistent and inaccessible ... We generally lack the data needed to answer even the most basic questions about how, or how effectively, justice systems function.'
- 2 Lack of coordinated, cross-sector data collection: 'We generally lack adequate mechanisms for data collecting, reporting or sharing. We do not have cross-jurisdiction agreement on a system-wide infrastructure or architecture to guide and coordinate the collection and utilization of data ... It also means that no one part of the system has an overarching vision or understanding of what data exists in the system.'
- 3 Weak qualitative data: 'Much of the justice data that is collected is useful only for monitoring operating efficiency. That is, the data is a by-product of operational business processes and it omits qualitative evaluations or outcome measurements.'

258 Other access to justice organisations and collaborations are listed here: Justice Development Goals, 'Justice Development Goals' (justicedevelopmentgoals.ca) <http://www.justicedevelopmentgoals.ca/> accessed 28 July 2020.

259 Department of Justice, 'Open Government at Justice' (justice.gc.ca, 1 June 2020) <https://www.justice.gc.ca/eng/trans/open-ouvert.html> accessed 28 July 2020.

260 Department of Justice, 'An Open Justice Commitment for Canada – Discussion Paper' (justice.gc.ca, 1 June 2020) <https://www.justice.gc.ca/eng/rp-pr/other-autre/trans/open-ouvert/ojcdp-eejodt.html> accessed 28 July 2020.

261 World Justice Project, 'WJP Rule of Law Index: Canada' (worldjusticeproject.org) <https://worldjusticeproject.org/rule-of-law-index/> accessed 29 July 2020.

262 Jerry McHale, 'The Justice Metrics Problem' (University of Victoria, 2017) <https://static1.squarespace.com/static/5532e526e4b097f30807e54d-t/590a60968419c273fe4d-d99c/14938523> accessed 24 June 2020.

- 4 Lack of defined objectives: ‘This paucity of outcome measures follows, in part, from our failure to explicitly define desired justice system outcomes. Canadian civil justice systems have neither articulated broad system objectives nor established clear outcome targets for themselves.’
- 5 Lack of an empirical research tradition: ‘[There is] limited interest, experience and capacity to conduct empirical research [in and between different institutions].’²⁶³

Technology policy

The Canadian Judicial Council, composed of 41 judges from across the Canadian justice system, has commissioned and published numerous reports and resources on electronic and digital technology over the past decades. One important initiative was the early appointment of a Judges Technology Advisory Committee (JTAC) with non-judicial members which considered, among other issues, the security of judicial information, which resulted in a blueprint, first published in 2004, now in its 5th edition. Adopted in every Canadian superior court, it has, as of 2018, led to the appointment of a Judicial Information Technology Security Officer (‘JITSO’) in at least eight of the ten provinces, two of the three territories, the federal courts and the Supreme Court of Canada.²⁶⁴ Its original purpose was to:

- 1 Provide guidelines to improve the security, accessibility and integrity of Judicial Information; 2. Define the respective roles and responsibilities of judges and administrators when it comes to information technology security and enhance the relationship between the two groups; 3. Provide judges across Canada with a model for the development of effective information technology security policies that take the principles of judicial independence into account.

A particular issue is that judges may not be involved in ‘policy-making’ roles, and therefore detached from Information Technology Security (ITS) policy which has a direct bearing on judicial independence, something the Council seeks to remedy through the guidance. It is perceived that this is a particular issue for Canada:

Information security for judges presents practical challenges because of Canada’s unique constitutional situation. For example, in most courts, non-judicial administrators provide all information technology (“IT”) services to judges. Not only is there often no clear dividing line between judges and non-judicial administrators or users, but there is also rarely any reporting relationship between them. This can make it as difficult for administrators to gain judicial co-operation with IT policy as it does for judges to direct the work of technical support staff.²⁶⁵

The Council suggests that ‘IT administrators, support and help desk staff working with Judicial Users be made aware of the nature of the judicial role and function within the administration of justice. IT administrators, support and help desk staff must differentiate between Judicial Users and non-judicial users to preserve the independence of the judiciary’.²⁶⁶ The guidance makes a distinction between ITS policy on judicial information as the responsibility of the judiciary, on the one hand; and management, operations and technical measures to safeguard judicial information, on the other. The latter are ‘administrative functions’, which in most courts would fall under the responsibility of the provincial government.²⁶⁷

While the original objectives and concerns still stand, in the latest edition, its author Martin Felsky who has advised law firms, governments, courts and corporations on law and technology over his 30-year legal career, explains that its remit now must be extended beyond security to issues of broader governance of judicial information.²⁶⁸

263 *ibid* 4–6.

264 For background, see: Jane Bailey and Jacquelyn Burkell, ‘Implementing Technology in the Justice Sector: A Canadian Perspective’ (2013) 11 *Canadian Journal of Law and Technology* 30; Jennifer Jordan, ‘Judges Technological Advisory Committee of the Canadian Justice System’ (2013); Martin Felsky, ‘Canadian Judicial Council Blueprint for the Security of Judicial Information - Fifth Edition’ (Canadian Judicial Council 2018) <https://cjc-ccm.ca/sites/default/files/documents/2019/Canadian%20Judicial%20Council%20Blueprint%20for%20the%20Security%20of%20Judicial%20Information%20-%20Fifth%20Edition%2C%202018.pdf> accessed 14 July 2020.

265 Felsky (n 264) 5.

266 *ibid*.

267 *ibid* 6.

268 *ibid* 4.

Judicial information is defined as:

... information stored, received, produced or used by or for a Judicial Officer. It also includes information stored, received, produced or used by staff or contractors working directly for or on behalf of judges such as executive officers, law clerks, law students, judicial clerks or assistants.

There are three main types of Judicial Information:

- Individual Judicial Information includes work product, research material and professional development information of Staff Lawyers, Law Clerks and Judicial Officers. This category would also include Judicial Office Information which includes judicial staff HR matters, judicial assignment information, statistics and court policies. Matters relating to judicial committee work could also fall under this definition.
- General Judicial Information includes information used by Chief Justices, committee materials, statistics, research material, and court-wide professional development information.
- Personal Judicial Information includes information produced by, on behalf of, or relating to a Judicial Officer that does not directly relate to the function or role of the Judicial Officer and is not associated with a Case.²⁶⁹

In its present form, the blueprint advises under Policy 15b that some types of judicial information may be publicly released to third parties ‘with prior written judicial approval and in accordance with applicable legislation’²⁷⁰ but the focus of the document is not arrangements for media or public access. The scope of this work has recently broadened beyond information that pertains to judges: ‘the main reason for the change is that courts are moving to the cloud [and their] information becomes more accessible’.²⁷¹ Judges are also concerned that as court information is handed over to commercial third parties (i.e. cloud hosting service providers), their ‘ability to make policy and oversee information management practices may be eroded’. There is, therefore, a need for more proactive involvement.²⁷² The Canadian Judicial Council (CJC) is currently reviewing the topic of justice system data and the impact on courts, ‘with the objective of developing guidelines that will assist superior courts to respond to requests for court information in a more consistent manner’.²⁷³

Such initiatives provide a useful model for how judiciaries can design general principles for data security and governance, bridging the gap between administrative and judicial functions, while preserving judicial independence. Similarly, the CJC’s model policy on access to court records illustrated an early effort to coordinate the judiciary’s approach to electronic data; its purpose was:

...to define principles of access to court records, consistent with applicable statutory and common law rules, so as to guide the judiciary in the exercise of its supervisory and protective power over court records. The principles stated in this policy are the result of a balancing of the constitutional requirement of open courts against other rights and interests of the public and participants to judicial proceedings, namely privacy and security of individuals and the proper administration of justice.²⁷⁴

Work on ‘public information’ is also being undertaken by a standing committee of the Canadian Judicial Council, which is concerned with the communications approach of the Council and targeted outreach/public education activities, as well as media engagement.²⁷⁵

269 *ibid* 7.

270 *ibid* 19.

271 Interview with Martin Felsky (14 July 2020), speaking in a personal capacity.

272 *ibid*.

273 Confirmed in correspondence with Canadian Judicial Council, 10 August 2020. Although the JTAC has now been disbanded, the Council created the Technology Committee (TechC) in 2018, an ad hoc sub-committee of the Executive Committee.

274 Judges Technology Advisory Committee, ‘Model Policy for Access to Court Records in Canada’ A-I https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_AccessPolicy_2005_en.pdf accessed 14 July 2020.

275 Canadian Judicial Council, ‘Public Information Committee Terms of Reference’ <https://cjc-ccm.ca/sites/default/files/documents/2020/PIC%20ToR%202020%20-%20Final.pdf> accessed 1 August 2020.

Additionally, in the Canadian context, the CJC model policy (although 15 years old now) and the updated blueprint is an example of how national initiatives – involving representatives across the provinces and territories – have some bearing on provincial as well as federal technology and data policy. However, the responsibility and organisation of these areas varies between court types and regions, as we shall see later in the chapter.

Open case law

A major player in the provision of country-wide justice system data is the Canadian Legal Information Institute (CanLII), connected to the LIIs in other jurisdictions as a founding member of the Free Access to Law Movement, but operating under its own particular model. CanLII publishes historical and contemporary judgments from all Canadian courts, including the Supreme Court of Canada, federal courts, and the courts in all Canada's provinces and territories, and many tribunals;²⁷⁶ it publishes legislation from every jurisdiction in Canada; and a companion website with case commentary and case summaries by the legal community.

Launched in 2001, it is funded by the members of the provincial and territorial law societies (the Federation of Law Societies of Canada) and other provincial and territorial organisations. Underlying its platform from the beginning was the organisation Lexum, which started as a legal informatics project at Université de Montréal, and is now a software company that provides legal information products to different jurisdictions inside and outside Canada. CanLII acquired the shares of Lexum in March 2018. CanLII provided an alternative to expensive legal information providers:

In the early 1990s when Lexum started publishing the Supreme Court of Canada decisions online, access to a single SCC decision online was priced at \$200-300. Prices like this were justified by estimating how long it would take a lawyer to pull a document from a library, and they were high enough that it encouraged the law societies to create CanLII to break the oligopoly in publishing of primary law.²⁷⁷

It was also involved in developing standards and good practice across the country. Lexum's founder, Daniel Poulin, led the Canadian Citation Committee (CCC), an informal consortium of members from academia, the courts, and legal and publishing industries, which worked on establishing standards and guidelines to streamline the preparation, distribution and publication of judicial information. Working with the Canadian Judicial Council (CJC), it supported courts and tribunals to adopt digital-friendly decision templates, a neutral citation and uniform distribution practices, for example.²⁷⁸ The CCC is no longer active, but its guidelines are still used. During its active years, it participated in numerous reports and policies published by the CJC on access to court records, privacy issues, and publication restriction notices.²⁷⁹

CanLII operates as a free-to-access site and legal materials can be copied and used free of charge with attribution; although users are warned that courts and government bodies may claim intellectual property rights relating to their documents. However, this does not extend to external indexing of published documents (by search engines, for example), or 'bulk or systematic downloading of documents'.²⁸⁰ This is a preventative measure to protect privacy; as Lexum's VP Legal Information explained: while the site has a policy to post all decisions including names of individuals unless there is legal restriction on publication, they minimise publicity via search engines, although – as one frequently-mentioned case that has attracted much attention, *AT v Globe24*, illustrated²⁸¹ – this is not always easy to implement.²⁸²

276 Practice varies between courts, but judgments are typically sent to CanLII via email or File Transfer Protocol (FTP).

277 Sarah Sutherland, 'The Pricing of Legal Information – Slaw' (Slaw.ca, 19 April 2019) <http://www.slaw.ca/2019/04/18/the-pricing-of-legal-information/> accessed 6 July 2020.

278 Email correspondence with Frédéric Pelletier (29 July 2020).

279 Judges Technology Advisory Committee (n 274); and other publications at: Canadian Judicial Council, 'Publications' (Canadian Judicial Council) <https://cjc-ccm.ca/en/resources-center/publications> accessed 4 August 2020.

280 'CanLII: Terms of Use' (Canlii.org) <https://www.canlii.org/en/info/terms.html> accessed 4 August 2020.

281 Complaints against Globe24h.com [2015] Privacy Commissioner of Canada 2015-002; *AT v Globe24h.com* [2017] Federal Court T-1248-15, 4 FCR 310.

282 (n 278).

Open justice and privacy

In general, civil and criminal courts are open to the public in Canada under the common law principle of open justice, unless orders are made otherwise (e.g. on grounds of national security). Mirroring English law and its typical approach to the use of personal names, ‘it is well established under the common law that criminal defendants have no right to have their identities banned from publication’.²⁸³ In the civil courts, although anonymity may be granted, it is used sparingly, and the Supreme Court of Canada has established that ‘the sensibilities of the individuals involved’ do not justify a departure from the principle of openness.²⁸⁴ However, a wide range of ‘publication bans’ (the equivalent of suppression orders in Australia, or reporting restriction orders in England and Wales) can be applied to proceedings, under statutory or non-statutory basis.

In the criminal context, the Criminal Code provides for postponement or prohibition of broadcast and publication of particular parts of proceedings, e.g. at preliminary or bail hearing stage. Some bans are mandatory and apply automatically, others are discretionary upon application. Publication ban orders can remain in effect even after the trial unless made temporarily (section 517, Criminal Code).²⁸⁵ As in English common law, criminal and civil courts have the authority to order restrictions where it is deemed necessary to prevent a serious risk to the proper administration of justice, but they must conform to principles provided in case law, and must take into account the right to freedom of expression under the Canadian Charter of Rights and Freedoms. Such consideration should also be undertaken when judges have the discretion to reject an application under the Criminal Code or other statute (i.e. for non-mandatory statutory bans).²⁸⁶

Again, similar to the English context, a contempt of court regime restricts the way courts can be publicly reported, especially with regard to the timing of disclosing certain information that may be prejudicial to a case’s outcome (for example, a defendant’s prior convictions). In Canada, contempt is a common law offence under section 9 of the Criminal Code, though prosecutions are rare and there should be a ‘real risk, as opposed to a mere possibility of interference with the due administration of justice’.²⁸⁷ But as Jobb identifies, restricting reporting does not necessarily prohibit the media and public from physically accessing court, especially as it may be possible to report material at a later date.²⁸⁸

Unlike England and Wales, where most family proceedings substantially restrict access and reporting (with an access scheme for accredited media and a limited class of legal bloggers, the latter on a pilot basis), family cases in Canada may be open to the public, unless a judge orders an in camera hearing, or sealing of some or all of the documents. However, this varies from provincial and territorial jurisdictions, with some courts more restricted than others. Most Canadian jurisdictions, however, restrict the reporting of child protection cases. Criminal youth courts are generally open, although the media are prohibited from identifying the children involved, under the Youth Criminal Justice Act.²⁸⁹

For access to documents across courts and case types, public scrutiny and access is permitted under the open justice principle and on freedom of expression grounds; these include pleadings in civil cases, criminal indictments, exhibits, transcripts, and judicial rulings.²⁹⁰ However, as with in camera orders for hearings, documents may be sealed to protect confidential information, national security, individuals’ privacy and other interests. These orders are subject to challenge however, and the court must show good reason for the curtailment of public access rights.²⁹¹ Details on how these are accessed will be discussed in the federal and provincial case studies below. Court rules and guidance govern the mechanisms for access to records. Though all provinces and territories have freedom of information laws, ‘many laws specify that they do not apply to a judge’s personal files, court administration records, or a prosecuting agency’s files about cases that are still before the courts’.²⁹² Some laws allow access to judicial administrative records.²⁹³

- 283 Dean Jobb, *Media Law for Canadian Journalists* (3rd edn, Emond Montgomery Publications 2018) 200.
- 284 *ibid* 238. Citing: *AG (Nova Scotia) v MacIntyre* [1982] Supreme Court of Canada 16045, 1 SCR 175, 185.
- 285 Information sourced from: Christopher Somerville and Wendy Sun, ‘Legal Systems in Canada: Overview’ (Practical Law) [http://uk.practicallaw.thomsonreuters.com/w-013-0460?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](http://uk.practicallaw.thomsonreuters.com/w-013-0460?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) accessed 28 July 2020. For a practical overview for reporting the Canadian justice system and the restrictions that apply, see Parts II and III of Jobb (n 283).
- 286 *Jobb* (n 283) 214–215. *Dagenais v Canadian Broadcasting Corp* [1994] Supreme Court of Canada 23403, 3 SCR 835; *R v Mentuck* [2001] Supreme Court of Canada 27738, 3 SCR 442.
- 287 *Jobb* (n 283) 228. Citing: *R v Chek TV Ltd* [1987] BC Court of Appeal CA005259.
- 288 *Jobb* (n 283) 192. Of course, this may present an issue in terms of designing mechanisms for public access to digital hearings; something that will be discussed in Chapter 6 (page 114).
- 289 *ibid* 233, 240, 249, 261.
- 290 The Canadian Judicial Council’s model policy devised in 2005 defines ‘court records’ as including: ‘any information or document that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings. It includes, but is not limited to: a) casefiles; b) dockets; c) minute books; d) calendars of hearings; e) case indexes; f) registers of actions; and g) records of the proceedings in any form’. Judges Technology Advisory Committee (n 274) A-II.
- 291 *Jobb* (n 283) 263, 279.
- 292 *ibid* 98–99.
- 293 ‘Canadian RTI Rating’ (Centre for Law and Democracy) <https://www.law-democracy.org/live/rti-rating/canada/> accessed 5 August 2020. Further information confirmed in email correspondence with Toby Mendel, Executive Director, Centre for Law and Democracy.

In terms of further data privacy protections, every province and territory has their own laws that apply to provincial government agencies and their handling of personal information.²⁹⁴ At a federal level, two Acts are enforced by the Office of the Privacy Commissioner of Canada (OPC): the Privacy Act and The Personal Information Protection and Electronic Documents Act (PIPEDA). PIPEDA does not prohibit public access to court documents but does restrict some commercial use, as explained by Bailey and Burkell in an important article on personal information and the open court principle:

There is obvious potential commercial value in the personal information in court documents for marketing purposes: mining of identity and contact information from divorce proceedings, for example, could be valuable to a real estate agent who wants to identify potential clients. The Privacy Commissioner of Canada (OPC) has, however, ruled that this type of use is a contravention of PIPEDA in that the commercial use of personal information in the court record is unrelated to the original purposes of personal information collection and disclosure. According to the ruling, secondary commercial use of personal information included in court documents requires explicit and independent consent, and without such consent is precluded under PIPEDA...

The OPC ruling clearly precludes law-abiding commercial organizations within the OPC's jurisdiction from collecting and using, for their own purposes, the personal information included in court files.²⁹⁵

Beyond privacy laws, other restrictions may apply to court materials in terms of defamation and copyright. For court proceedings, media reports are protected from defamation claims by 'qualified privilege'; they can report what happens in open court as long as it is not published with malice, and the report is 'fair and accurate'. The qualified privilege extends to reports on court documents, such as court rulings and documents that have been discussed in a court hearing.²⁹⁶

Copyright may also restrict secondary re-publication of court records (including documents) and recordings. Under the Reproduction of Federal Law Order of 1997, 'there is no requirement to seek permission to reproduce primary legal information of the Government of Canada and there are no applicable fees' and this applies to Government of Canada legislation, statutes, regulations, court decisions and tribunal decisions:

[it] authorizes anyone, unless otherwise specified, to copy federal legislation, statutes, regulations, court decisions and tribunal decisions without the usual restrictions that govern Crown copyright materials, provided that one is careful to ensure the accuracy of the materials reproduced and that the reproduction is not represented as an official version.²⁹⁷

However, it does not apply to any materials that have been copyrighted privately or separately by a third party; for example, 'the reproduction of added-value features such as the captions of headnotes, footnotes, summaries and additional comments which are added to decisions handed down by federally constituted courts and tribunals. These added-value features are not included in the Order and therefore, reproduction is prohibited without having secured written authorization'.²⁹⁸ A blog post by Benyekhlef and Vermeys raises further questions about the extent to which copyright could apply to court records and the documents they contain, which could limit e-access, as well as copying and re-distribution, even if many are readily available online in practice.

294 Office of the Privacy Commissioner, 'Provincial and Territorial Privacy Laws and Oversight' (priv.gc.ca) <https://www.priv.gc.ca/en/about-the-opc/what-we-do/provincial-and-territorial-collaboration/provincial-and-territorial-privacy-laws-and-oversight/#009> accessed 31 July 2020.

295 Jane Bailey and Jacquelyn Burkell, 'Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information' (2017) 48 *Ottawa Law Review* 1. Citing: Office of the Privacy Commissioner, 'Commissioner' Findings - PIPEDA Report of Findings #2015-002' (priv.gc.ca, 5 June 2015) <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-002/> accessed 31 July 2020; Office of the Privacy Commissioner, 'Interpretation Bulletin: Publicly Available Information' (priv.gc.ca, 11 December 2015) https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_06_pai/ accessed 29 July 2020.

296 Jobb (n 283) 57–58.

297 Canadian Heritage, 'Crown Copyright Request' (canada.ca, 24 October 2018) <https://www.canada.ca/en/canadian-heritage/services/crown-copyright-request.html> accessed 31 July 2020.

298 *ibid.*

In their analysis, documents, evidence and orders could constitute works under the Copyright Act and legislative modification may be required to technically permit e-access. This is only a theoretical question in relation to case law, they say, as this is generally published. However, an open question remains about other sorts of documents, in their view.²⁹⁹

In a separate paper, Vermeys discusses that the mining of court documents ‘to gather marketable data’ would most likely fall outside the fair dealing exception in the Copyright Act, citing a class action suit filed against Thomson Reuters for copying court documents authored by lawyers and reproduced on a database and search service known as ‘Litigator’. Vermeys observes: ‘although the reach of a settlement in the case has ultimately prevented us from obtaining a clear decision as to whether or not lawyers have a copyright in court documents, the class action authorization did, at the very least, hint at such a possibility’.³⁰⁰

In sum, academic and policy literature indicates many similarities between England and Wales and Canada in terms of the courts’ treatment of the balance between open justice and privacy and other restrictions that may apply to free dissemination and access of court materials. A thoughtful subset of academic literature has developed around this issue, with Canadian legal scholars examining the friction between, on the one hand, the need for transparency and openness in the court system, and, on the other, the practical implications for those whose personal data features in it.³⁰¹ A number of interviewees without prompt mentioned the concept of ‘practical obscurity’, the notion that the physical obstacles to acquiring information in analogue systems reduced publicity of personal information, and how this has changed with the advent of digital technology. Although some now question the feasibility of replicating ‘practical obscurity’ in digital environments, and propose alternative technological approaches,³⁰² it is a concept that has influenced judicial model policies and papers,³⁰³ and an issue we return to in the final section of this chapter (page 87).

This chapter now examines the features and arrangements in selected Canadian courts, before moving to a critical appraisal across the system.

4.2 Federal position

Courts services

The federal courts operate independently of the Executive, even if their funding is reliant on previously-agreed statutory funding and ‘voted’ expenditure by parliamentary authority (in the case of the Supreme Court) and Parliamentary appropriations (in the case of the other federal courts).³⁰⁴ As explained above, there was a strengthening of independence for the Supreme Court of Canada, following the signing of an accord between the chief justice and the Minister of Justice and Attorney General of Canada.³⁰⁵ The practical implication is that the Minister of Justice should pass budget requests ‘without alteration’ to the Finance Minister, protecting its funding and therefore judicial independence from the executive. The Chief Justice of the Supreme Court of Canada commented at the time that ‘we have to find ways to make sure the government or agencies can not directly or indirectly put pressure on judges through the administrative process’.³⁰⁶ In the same interview, he related the issue to technological management, explaining that the government had previously wanted to introduce new software to be purchased by a single federal agency. ‘The court was considered to be part of the government. We resisted that because we needed some independence as far as our computer information was concerned’.³⁰⁷ This is reflected in the Canadian Judicial Council guidance on the security of judicial information (likely to be broadened in future to include wider issues of data governance), for which a central motivating principle for judicial involvement in technological policy is the preservation of judicial independence.

The Supreme Court of Canada

299 Karim Benyekhlef and Nicolas Vermeys, ‘Does eAccess to Court Records Infringe on Copyrights?’ (Slaw.ca, 8 June 2016) <http://www.slaw.ca/2016/06/08/does-eaccess-to-court-records-infringe-on-copyrights/> accessed 31 July 2020.

300 Nicolas Vermeys, ‘Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-Examine Our Fundamental Values’ in Karim Benyekhlef and others (eds), *eAccess to Justice* (University of Ottawa Press 2016) 141; Waldman v Thomson Reuters Canada Limited [2016] Divisional Court ONSC 2622, CanLII.

301 Including, for example: Bailey and Burkell (n 295); Vermeys (n 300); Karen Eltis, ‘The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context’ (2011) 56 *McGill Law Journal/Revue de droit de McGill* 289; Andrea Slane, ‘Information Brokers, Fairness, and Privacy in Publicly Accessible Information’ (2018) 4 *Canadian Journal of Comparative and Contemporary Law* 249; Jamie Cameron, ‘Victim Privacy and the Open Court Principle’ (Department of Justice Canada 2003) https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr03_vic1/rr03_vic1.pdf accessed 1 August 2020.

302 See, for example: Vermeys (n 300).

303 For example: Judges Technology Advisory Committee (n 274).

304 Karim Benyekhlef, Cléa Iavarone-Turcotte and Nicolas Vermeys, ‘Comparative Analysis of Key Characteristics of Court Administration Systems’ (Canadian Judicial Council 2011) 205–206 <https://cjc-ccm.ca/cmslib/general/AJC/Comparative%20Analysis%20of%20Administration%20Systems%202013-03.pdf> accessed 1 August 2020.

305 Supreme Court of Canada, ‘Accord to Strengthen the Independence of the Supreme Court of Canada’ (n 252).

306 Cited in: Fine (n 252).

307 *ibid.*

Administration

The Office of the Registrar of the Supreme Court is the federal government institution that provides services and support to the court. It answers to the chief justice and is overseen by the Registrar of the Supreme Court, who is also deputy head of the court, appointed by the Governor in Council and who answers to the chief justice. This arrangement, it has been asserted by the Canadian Justice Council, means the court has reached ‘de facto autonomy’, despite the reliance on executive funding and that the Minister of Justice is responsible and answerable to Parliament for the administration of the court. Information management, the library, and IT services fall within the Court Operations Sector, overseen by the Deputy Registrar.³⁰⁸

Access to court files

A court record policy on the court’s website describes what is meant by the court record, and the procedure for obtaining access. The following materials can be accessed via the court’s website:

- judgments on appeals
- docket information
- factums on appeal
- webcasts of appeal hearings
- case summaries.

For records which cannot be accessed remotely, members of the public can apply for access to the Registrar. If regular access to records is required, or a user wishes to access multiple records and files, registration is recommended. Fees may apply for photocopies.³⁰⁹

As of 2016, the Court has an agreement in place to transfer ownership to Library and Archives Canada (LAC) of its case files older than 50 years; this includes Collegial files of the judges of the Supreme Court of Canada which will – after 50 years – provide the public with ‘insights into the inner deliberations of the Court’. The SCC ‘will continue to control its active case files and closed files until 50 years after a judgment has been rendered’, however.³¹⁰

Approach to personal data

Although the Supreme Court of Canada is not subject to the Privacy Act, the court’s record policy takes privacy concerns into consideration, specifying that ‘records containing Personal Information, even if they may be accessed, may be subject to publication bans or other limitation on use’. According to its definition:

‘Personal Information’ means information about an identifiable individual, including date of birth, identifying numbers such as telephone numbers, social insurance numbers or bank account numbers, addresses, biometrical information such as fingerprints, but does not include the individual’s name if he or she is a party to the proceeding or the name and business address of a lawyer who is acting as counsel or agent for any party to a proceeding’,³¹¹

308 Source: Benyekhlef, Iavarone-Turcotte and Vermeys (n 304) 39–40.

309 Supreme Court of Canada, ‘Policy for Access to Supreme Court of Canada Court Records’ (scc-csc.ca) <https://www.scc-csc.ca/case-dossier/rec-doc/pol-eng.aspx> accessed 3 August 2020.

310 Library and Archives Canada, ‘Supreme Court of Canada and Library and Archives Canada Sign Agreement on Transfer, Preservation and Access to Case Files’ (bac-lac.gc.ca, 9 June 2017) <https://www.bac-lac.gc.ca/eng/news/Pages/2017/supreme-court-agreement.aspx> accessed 11 August 2020.

311 Supreme Court of Canada, ‘Policy for Access to Supreme Court of Canada Court Records’ (n 309).

Guidance specifies that some documents (Factums on Appeal and Memorandums of Argument on an Application for Leave to Appeal) may require a redacted electronic version, if they contain ‘personal information that should not be made widely available over the Internet (for example, an individual’s home address, social insurance number or bank account number)’. Information that is subject to a publication ban will also have to be redacted for publication on the website.³¹²

Hearing recordings

Audio and video recordings are available via the website. Copies of an audio recording, video recording or webcast of a hearing of the court for personal, commercial or educational purposes are available for a fee by completing the Request to Use Court Photographs, Videos or Webcasts. Copyright conditions may apply.

Live and archived ‘webcasts’ of appeal hearings are available on the court website. The webcasts audio files of Supreme Court of Canada proceedings may not be broadcast by another party, ‘except in accordance with the Copyright Act or with the written authorization of the Court’.³¹³

Federal Court and Federal Court of Appeal

Administration

The Courts Administration Service, a statutory body, was established in 2003 to coordinate services between the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada. As well as improving efficiency and cooperation between the courts, the object was to increase judicial independence by creating more distance between the administrative layer and government, and to clarify judicial roles. By way of example, the chief justices of the Federal Court, Federal Court of Appeal, Tax Court and Court Martial Appeal Court may issue binding directions in writing to the Chief Administrator of the Courts Administration Service with respect to any matter within their authority. Other independence, or ‘arms-length’ mechanisms, include involving the chief justices of the courts in the appointment of Courts Administration Service positions such as the Chief Administrator and Judicial Administrator, and accountability to Parliament through reports and appearances. Information management and IT services are provided by the Corporate Services Branch within the Courts Administration Service, which would include database services.³¹⁴ The courts sit in locations around the country; the provincial offices/registries provide a service to the Federal Court of Appeal and the Federal Court under a Memorandum of Understanding with the former Federal Court of Canada.

Access to court files

The two court websites provide details of basic media and public access policies, and a search facility for court proceedings. Users can search electronic records of court files by:

- last name of person
- name of corporation
- name of ship (for maritime cases)
- court file number
- intellectual property name/reference name
- related cases.

312 Supreme Court of Canada, ‘Additional Information about Court Records Available on This Website’ <https://www.scc-csc.ca/case-dossier/rec-doc/additional-supplement-eng.aspx> accessed 3 August 2020.

313 Supreme Court of Canada, ‘Terms and Conditions’ <https://www.scc-csc.ca/terms-avis/notice-enonce-eng.aspx#cr-da> accessed 3 August 2020.

314 Information drawn from: Benyekhlef, Iavarone-Turcotte and Vermeys (n 304) 41–42.

The result allows users to view:

- court file number
- names of all parties and legal counsel
- type of case
- filing date and city
- related cases
- summary of case history ‘recorded entries’.³¹⁵

In general, all court documents are a matter of public record unless a legislative provision or court order prohibits public access. The Federal Court records policy states:

Non-statutory publication bans are rarely sought or imposed in Federal Court proceedings. However, if counsel make a motion for a publication ban, the motion will appear in the proceeding Docket on the Court’s Web site. Media representatives interested in a particular case are encouraged to follow proceedings closely through the Court Index and Docket. When a motion is filed, they will have an opportunity to challenge it in court.³¹⁶

The Federal Court maintains original court files in the principal office in Ottawa, but certified copies of documents on certain files are kept in local offices in other cities. Document viewing is free if the user makes their own copy (e.g. with camera), or C\$0.40 per page for hard copies. Documents may be viewed in a designated area and are not to be removed from the premises under any circumstances.³¹⁷

The court has acknowledged that there is room for improvement here. In its latest strategic plan, it observes that physical travel is required to access files, with costs incurred by the registry for sending files for viewing/copying: ‘In 2020, this is unacceptable. The Court is actively exploring how to provide electronic access to non-confidential documentation in its records.’³¹⁸ Among its principal areas of focus will be ‘providing the parties to disputes before the Court with an ability to electronically access non-restricted documents in the Court’s record’; and ‘providing the public and the media with electronic access to non-confidential Court records, as well as to the non-confidential portion of electronic hearings’.³¹⁹ It acknowledges some of the privacy and confidentiality issues around online provision of materials and intends to proceed ‘cautiously’.³²⁰

315 ‘Federal Court of Appeal Canada’ https://www.fca-caf.gc.ca/fca-caf_eng.html accessed 3 August 2020; ‘Federal Court Canada’ <https://www.fct-cf.gc.ca/en/home> accessed 3 August 2020.

316 Federal Court Canada, ‘Policy on Public and Media Access’ <https://www.fct-cf.gc.ca/en/pages/media/policy-on-public-and-media-access#cont> accessed 3 August 2020.

317 *ibid.*

318 Federal Court Canada, ‘Federal Court Strategic Plan 2020-2025’ (n 257) 14.

319 *ibid.* 4.

320 *ibid.* 5.

321 Federal Court Canada, ‘Federal Court of Appeal: FAQs’ https://www.fca-caf.gc.ca/fca-caf_eng/faq_eng.html#ACCESS_COURT_RECORDS accessed 3 August 2020.

Listings

Basic information about forthcoming hearings in the different court locations is available to view on the court websites, including case names, number, case type and hearing details.

Exhibits/evidence

The Federal Court of Appeal FAQ states that evidence may be available to the public, ‘to be confirmed by the Registry’.³²¹

Judgments

Decisions can be searched and viewed on both court websites, using Lexum’s ‘Decisia’ tool. Decisions are available in HTML or PDF format. It is possible to sign up to a mailing list to be alerted when new material is updated.

Recordings and transcripts

If a transcript is available, it can be purchased directly from the transcription provider, external to the court service. Most Federal Court hearings are recorded with a Digital Audio Recording System (DARS); the Court's written consent is required for broadcast of any recording. Public users wishing to access recordings must apply formally to the court; in the Federal Court of Appeal, the application form specifies that a court order is required to receive a copy (rather than listen at court).³²²

Accredited members of the media may record proceedings to verify their notes of what was said and done in court, but not for broadcast. Others (i.e., counsel or members of the public) must seek permission of the presiding judge; requests should be directed to court personnel or commissionaires.

The media may apply to film and broadcast proceedings in both courts.

Reproducing materials in the federal courts

According to the Supreme Court website's terms and conditions, reproduction of materials is permitted, for non-commercial purposes, as long as otherwise specified, and that the following conditions are met:

- Exercise due diligence in ensuring the accuracy of the reproduced material;
- Indicate the complete title of the reproduced material and identify the Supreme Court of Canada as the source; and
- Indicate that the reproduction is a copy of the version available at [URL where the original document is available].

The reproduction must not be represented as an official version of the reproduced material, or as having been made in affiliation with or with the endorsement of the Supreme Court of Canada.³²³

Reproduction for commercial purposes is more limited and requires prior written permission from the Supreme Court of Canada.

Decisions and reasons for decisions of the Supreme Court of Canada fall under the *Reproduction of Federal Law Order*, P.C. 1996-1995, December 19, 1996, SI/97-5, which states:

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

However, the Supreme Court notes that the headnotes and other editorial features and material on the site do not fall within the terms of the Order. The court sets out which items and under what conditions they can be reproduced for non-commercial purposes without further permission.³²⁴

For the Federal Court of Appeal and Federal Court, as with the Supreme Court, non-commercial reproduction of online materials is permitted under certain conditions; for commercial use, permission must be sought.

322 Federal Court Canada, 'DARS Notice' [https://www.fct-cf.gc.ca/content/assets/pdf/base/DARS%20Notice%20feb-6-2015%20\(ENG\).pdf](https://www.fct-cf.gc.ca/content/assets/pdf/base/DARS%20Notice%20feb-6-2015%20(ENG).pdf) accessed 3 August 2020; Federal Court of Appeal Canada, 'FCA Notice to Profession' <https://www.fca-caf.gc.ca/fca-caf/pdf/FCA%20Notice%20to%20profession%20April%2015,%202019.pdf> accessed 3 August 2020.

323 Court of Canada, 'Terms and Conditions' (n 313).

324 *ibid.*

Impact of COVID-19 in federal courts

A series of notices have been posted on the court site with regard to changes during the COVID-19 period, including practice directions for remote hearings.

The Federal Court of Appeal advises that members of the public and media seeking access to a remote hearing should email an advertised address to receive instructions on how to join a particular remote hearing; a similar process is in place for the Federal Court, provided two days' notice is given for the request.

Additionally, the Federal Court directs that members of the media and general public may request electronic copies of non-confidential documents while registries are closed.

Accountability mechanisms

We sought to ascertain what measures were in place either for proactive publication of information about the justice system, or to support applications or appeals for information disclosure.

The Supreme Court publishes:

- Planning Reports; Performance Reports; Financial Statements; Future-Oriented Statements of Operations; Quarterly Financial Reports; Audits; Client Satisfaction Research; and Transparency [Disclosure of Travel and Hospitality Expenses and Contracts] reports on its website.

The Federal Court of Appeal and Federal Court publish:

- Basic statistics about cases; strategic plans (Federal Court only).

The Courts Administration Service (CAS)³²⁵ publishes:

- Departmental Results Reports and Departmental Performance Reports; Departmental Plan and Reports on Plans and Priorities; Annual Reports; Quarterly Financial Reports; Internal Audit Reports; and its Management Accountability Framework.

325 The CAS provides administrative services to the four federal courts of law (the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada).

326 Blaine Calkins, 'Review of the Access to Information Act' (House of Commons Standing Committee on Access to Information, Privacy and Ethics 2016) Second report 15 <https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP8360717/ETHIrp02/ETHIrp02-e.pdf> accessed 5 August 2020.

327 Centre for Law and Democracy, 'Canada: Note on Bill C-58 Amending the Access to Information Act' 5 https://www.law-democracy.org/live/wp-content/uploads/2018/05/Canada.RTI_18-02.TM_-1.pdf accessed 5 August 2020.

328 Information source: email correspondence with Toby Mendel, executive director, Centre for Law and Democracy.

Under the Canadian Access to Information Act, there are no provisions for access to court records. Amendments introduced in 2019 made new proactive publication requirements for the Office of the Registrar of the Supreme Court of Canada, the Courts Administration Service and Office of the Commissioner for Federal Judicial Affairs, for various expenses and contracts information, but did not add any obligations to respond to disclosure requests. Additionally, a provision was added to allow an exception if 'the publication, even in the aggregate, could interfere with judicial independence'.

In 2016 the Parliamentary Standing Committee on Access to Information, Privacy and Ethics recommended, echoing an earlier recommendation by the Office of the Information Commissioner, that although the Act's application should be extended to court administration bodies, this should not include 'court files, the records and personal notes of judges, as well as communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity'.³²⁶ The Centre for Law and Democracy disagreed, arguing 'it is far preferable presumptively to cover all of the information held by all public authorities, and then to protect legitimate interests such as the integrity of the judicial process and administration of justice through harm-tested exceptions (rather than as class exclusions)'.³²⁷ This issue may be re-visited in the government's Review of Access to Information, announced in June 2020, but that remains to be seen.³²⁸

4.3 Provinces and territories

The provinces administer justice in their jurisdictions, which includes administration of the civil and criminal provincial courts and civil procedure in those courts (with criminal procedure designated a federal responsibility). As noted above, the funding situation in the provinces means these courts are generally reliant on provincial government support for their infrastructure and technology resource, although particular funding may be derived from federal budget.³²⁹ Administrative and funding structures may vary from province to province, as documented – as things stood in 2011 – in a comparative paper commissioned by the Canadian Judicial Council.³³⁰

4.4 British Columbia (BC)

Background

British Columbia (BC) is one of the larger provinces and was mentioned to us frequently as an example of where data access systems and technology were ahead of other provinces; for example, BC's Court Services Online has enable electronic filing and access since 2005. Additionally, there is a strong interest in the legal community to innovate in this area. A coalition of organisations have come together as Access to Justice BC (A2JBC), chaired by the chief justice of BC. Fifty organisations have committed to its 'Access to Justice Triple Aim' initiative, which aims for:

- Improved population access to justice
- Improved user experience of access to justice, and
- Improved costs.³³¹

The 'triple aim' is closely connected to the issue of justice system data, as it promises to be 'user-centred and measurable' with plans for a cost-benefit analysis. Even more directly related to the themes of this report, Access to Justice Centre for Excellence (ACE) at the University of Victoria, in the province's capital, hosted the Justice Metrics Colloquium 2020 (#justicedata2020), following previous events and publications on the empirical measurement in the justice sector, and access to justice metrics for 'informed, evidence-based decision making around justice'. The most recent event in February 2020 focused on the concept of a 'justice data commons' and the possible application of a Data Innovation Program run by the BC Ministry of Citizens' Services, to justice metrics.³³² We return to these proposals in more detail below, after setting out the context for the existing system.

BC is also notable as home to Canada's first wholly-online tribunal, the Civil Resolution Tribunal, which has received international recognition for its pioneering work in the area of small-value civil claims. For all the features described above, it made sense to look in closer detail at how data is managed in BC than we were able to do for other provinces within the scope of this project. Before examining how justice system data is managed in the different courts in BC, we first provide some background on court services in the province.

329 The federal government appoints and pays the judges in the superior courts in the provinces.

330 Outlined in: Benyekhlef, Iavarone-Turcotte and Vermeys (n 304).

331 Access to Justice BC, 'The A2J Triple Aim' <https://accesstojusticebc.ca/the-a2j-triple-aim/> accessed 2 March 2021.

332 Access to Justice Centre for Excellence, 'Justice Metrics Colloquium 2020 Report' <https://static1.squarespace.com/static/5532e526e4b097f30807e54d/t/5ef067dac08b727c334378/1593050753689/Data+Colloquium+2020+-+Final+Report.pdf> accessed 2 August 2020.

Court services

As noted above, the majority of funding for provincial courts is allocated via the provincial government, with the latter also having administrative responsibility for their operation. In BC, the Ministry of Attorney General is in charge of courts administration through its Court Services Branch; the distinctions between funding and administrative arrangements in each court are described below and institutional responsibilities are clarified in a Memorandum of Understanding between government and the judiciary.³³³ Although there are common resources for three court types – Court of Appeal, Supreme and Provincial – each has its own policy on public access,³³⁴ and guides for media inquiries via their websites.

The British Columbia Courthouse Library Society (known as Courthouse Libraries BC) is responsible for law library services and provides services to the legal community, the judiciary and general public. Funded by a non-profit foundation, the Law Foundation of BC has a mission ‘to help lawyers and the community find and use legal information’.³³⁵ It is physically located in 28 courthouses, with seven larger libraries with staff who can assist with information requests.³³⁶ Additionally, it provides legal educational and informational resources online on its site Clicklaw³³⁷ and plain language legal publications in Clicklaw Wikibooks.³³⁸

BC’s Court Services Online is the main portal for access to court documents and the e-filing service across courts in the province. Various disclaimers apply, in which the Province does not warrant the ‘accuracy of completeness of the data’, and states that a specific court registry should be contacted for confirmation of information (the detail of publication bans, for example). Additionally, restrictions apply to the use of the material:

Court record information is available through CSO for public information and research purposes and may not be copied or distributed in any fashion for resale or other commercial use without the express written permission of the Office of the Chief Justice of British Columbia (Court of Appeal information), Office of the Chief Justice of the Supreme Court (Supreme Court information) or Office of the Chief Judge (Provincial Court information). The court record information may be used without permission for public information and research provided the material is accurately reproduced and an acknowledgement made of the source. Any other use of CSO or court record information available through CSO is expressly prohibited. Persons found misusing this privilege will lose access to CSO and may be subject to legal action, including prosecution.³³⁹

It is described as an electronic service that ‘forms part of the overall government strategy to provide alternative options and added convenience for access to government services’. It offers eSearch and eFiling services for a fee, and some court lists. According to the website, the volume of documents available in the electronic format is limited as the service continues to build its repository of electronic documents through eFiling and scanning. Access is based on publicly-available information. Some files may offer the user only limited information and in some cases none at all. The website notes that ‘due to changes made to case tracking systems and the associated conversions of data, there may be some variations in the quality and amount of historical data you are able to access’. Users have the ability to purchase copies of documents that are not available in an electronic format, via the Purchase Documents Online (PDO) service, for C\$10 per document. An initial search for case details (e.g., file number) incurs no fee and users do not necessarily need to register to access search services. However, some services such as eFiling require a registered subscription. CSO is part of a BC government registration system, so only a single User ID and password is needed to sign into any participating Government of British Columbia website.³⁴⁰

- 333 BC Courts, ‘Memorandum of Understanding’ [https://www.bccourts.ca/documents/Memorandum%20of%20Understanding%20\(April%203%202013\).pdf](https://www.bccourts.ca/documents/Memorandum%20of%20Understanding%20(April%203%202013).pdf) accessed 11 July 2020.
- 334 BC Court of Appeal, ‘Record and Courtroom Access Policy’ https://www.bccourts.ca/Court_of_Appeal/practice_and_procedure/record_and_courtroom_access_policy/PDF/Court_of_Appeal_Record_and_Courtroom_Access_Policy.pdf accessed 3 August 2020; BC Supreme Court, ‘Court Record Access Policy’ https://www.bccourts.ca/supreme_court/media/BCSC_Court_Record_Access_Policy.pdf accessed 3 August 2020; Provincial Court of BC, ‘Access to Court Records’ <https://www.provincialcourt.bc.ca/downloads/public%20and%20media%20access%20policies/ACC-2%20-%20Access%20to%20Court%20Records.pdf> accessed 3 August 2020.
- 335 The Law Foundation of BC is a non-profit foundation established through legislation in 1969; the Foundation receives the interest on funds held in lawyers’ pooled trust accounts and distributes these funds to public interest activities through grant programmes. ‘About Us’ (Law Foundation of BC) <https://www.lawfoundationbc.org/about-us/> accessed 2 August 2020.
- 336 Courthouse Libraries BC, ‘Courthouse Libraries BC: About Us’ (courthouselibrary.ca) [h/about-us](https://www.courthouselibrary.ca/h/about-us) accessed 2 August 2020.
- 337 ‘Clicklaw’ <https://www.clicklaw.bc.ca/> accessed 2 August 2020.
- 338 ‘Clicklaw Wikibooks’ https://wiki.clicklaw.bc.ca/index.php?title=Clicklaw_Wikibooks accessed 2 August 2020.
- 339 ‘BC Court Services Online’ (justice.gov.bc.ca) <https://justice.gov.bc.ca/cso/index.do> accessed 2 August 2020.
- 340 ‘About CSO’ (justice.gov.bc.ca) <https://justice.gov.bc.ca/cso/about/index.do> accessed 3 August 2020.

Additionally, there are some time limits on certain data types. Following a consultation exercise in 2015, as to whether to extend access to certain criminal case data that was not currently available, CSO was directed by the Chief Judge of the Provincial Court of BC to prevent electronic access to criminal case information regarding acquittals, dismissals and withdrawals after 30 days from the entry of the acquittal, dismissal or withdrawal; adult criminal case information regarding stays of proceedings after one year; and to information regarding peace bonds issued once the peace bond has expired on its terms.³⁴¹ This was a variation of the status quo arrangements; previously, there had been no limitation on what information could be viewed on CSO's criminal search regardless of the charge outcome. There had, however, been significant concern expressed by a number of parties that displaying information for matters that did not result in a guilty outcome was prejudicial. As a result, the Provincial Court of BC undertook a broad consultation of all of its access policies during this period.

In terms of the availability of historical files, court registries generally destroy files after 15 years, however court records categorised for permanent retention are transferred to the BC Archives at the end of their retention period.³⁴² Policies can be found in the approved records schedule for Court Services. Prior to the 1980s, there were no record schedules, and there was variation in practice between each court, meaning there is inconsistency in what is available from the Archives.³⁴³

Audio recording and transcripts

As noted above, each court level has its own court access policy and particular guidance on how to access audio recordings and transcripts of cases, for particular case types, which are not detailed in full here.

Audio in the BC provincial, supreme and appeal courts are recorded according to a Digital Audio Recording System (DARS), introduced in 2006. In general, for publicly-open hearings, members of the public can visit a court (if it has appropriate facilities) to listen to an audio recording of a hearing and view the clerk's log notes. The three court access policies³⁴⁴ detail the restrictions, or specific conditions, on further access to audio, e.g. the supply of a physical CD. In the Court of Appeal, the Supreme Court and the Provincial Court of British Columbia, accredited media may use electronic devices to audio record a proceeding 'for the sole purpose of verifying their notes and for no other purpose' subject to various restrictions.³⁴⁵

Where transcripts are deemed to be publicly accessible, they can be ordered for a fee from a private transcription company listed on the court services website.³⁴⁶

Privacy and Data Protection

A privacy statement can be found on the CSO website, where the majority of BC courts information can be located. It explains that the Government of British Columbia 'is committed to protecting the privacy of people whose personal information is held by government through responsible information management practices'. Further, 'any personal information provided to the Government of B.C. is collected, used and disclosed in accordance with the Freedom of Information and Protection of Privacy Act or other applicable legislation'. The policy explains that records in a court file are exempt from the Freedom of Information and Protection of Privacy Act (FIPPA). Access to and disclosure of the court record information published on CSO is governed by legislation, court rules and judicial policy.³⁴⁷

341 Office of the Chief Judge, 'Provincial Court Post-Consultation Memorandum: Provincial Court Policy Regarding Criminal Court Record Information Available through Court Services Online' <https://www.provincialcourt.bc.ca/downloads/Archive/Provincial%20Court%20Post-Consultation%20Memorandum%20-%20CSO%20Criminal%20Information.pdf> accessed 9 August 2020.

342 'Court Documents at the Provincial Archives' (Courthouse Libraries BC, 6 January 2020) <https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/court-documents-provincial-archives> accessed 11 August 2020.

343 Royal BC Museum, 'Court Records Guide' <https://royalbcmuseum.bc.ca/sites/default/files/sites/default/files/images/Work/Court-Records-guide.pdf> accessed 11 August 2020.

344 BC Court of Appeal (n 334); BC Supreme Court (n 334); BC Provincial Court (n 334).

345 BC Court Services, 'Policy on Use of Electronic Devices in Courtrooms' https://www.bccourts.ca/supreme_court/media/PDF/Policy%20on%20Use%20of%20Electronic%20Devices%20in%20Courtrooms%20-%20FINAL.pdf accessed 3 August 2020.

346 BC Courthouse Services, 'Order a Court Transcript' <https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-transcript> accessed 3 August 2020.

347 'CSO - Privacy Statement' <https://justice.gov.bc.ca/cso/privacy.do> accessed 3 August 2020.

When performing an eSearch for traffic/criminal cases in the provincial court part of the site, a pop-up information box informs users that a court record search is not the same as a criminal record search. It explains its approach to publication of information:

An open and transparent judicial process is important in order to preserve public confidence in the courts and the administration of justice. The principles governing access to the court record balance the right of the public to transparency in the administration of justice with the right of the individual to privacy. The courts and the legislators recognize the need to protect the privacy of vulnerable individuals involved in court proceedings. As a result, much of the court record information is not available through Court Services Online or at the court registry.³⁴⁸

The time limits for electronic access to certain criminal case records, mentioned above (page 69) were established following a public consultation to help decide whether the OCJ should expanding the category of court record information that was not available on CSO. Concerns had been ‘expressed by affected individuals about the significance of such expanded internet access to information when no criminal conviction has occurred’; for example, when employers and landlords used online services as a form of criminal record check.³⁴⁹ In conclusion, following over 60 submissions, the Office of the Provincial Court found, on balance, ‘the need to protect individuals who have not been convicted from misuse of court record information outweighs the desirability of broad online public access to information about such cases and the individuals affected’.³⁵⁰

With the use of such access restrictions, we see how ‘friction’ has been built into the system, partly by the design of the search functions (whether intentional or not), and partly by the removal or only partial publication of some records.

In terms of the personal data of requesters or users of the site (a question which falls outside the main scope of our research), the Government of British Columbia website explains that information may be requested by ‘personal contact’, fax or mail, rather than electronic means. Personal information processed by a BC government website is done so under the authority of the Freedom of Information and Protection of Privacy Act (FIPPA) or other relevant legislation, with complaints handled by the BC Information and Privacy Commissioner.

Removal of records

The site explains that ‘court records are public unless legislation, rules of court or court orders require that information not be available to the public. Information that is not available to the public includes; youth matters and matters sealed under a court order’. The latter is only possible if a judge grants an order to seal a file, following a successful application. The site’s policy is to remove a record suspension (formerly known as pardon) file from the public record when the registry receives notice of the record suspension from the federal authorities, e.g. the Parole Board of Canada. It is also policy to remove a matter that has been stayed one year after the stay is ordered. Contact details and instructions are provided for people who have received a record suspension but whose information still appears on the site.³⁵¹

Copyright

A separate privacy statement on the BC Courts website (a separate site from CSO) explains that the BC Court of Appeal and the BC Supreme Court are the copyright owners of the information unless otherwise stated. However, reproduction of materials is permitted as follows:

- The decisions and reasons for decision of the British Columbia Superior Courts may be reproduced, in whole or in part without further permission from the individual court.

348 ‘BC Court Services Online’ (n 339).

349 Office of the Chief Judge, ‘Provincial Court Consultation Memorandum: Consultation Regarding Criminal Court Record Information Available through Court Services Online’ 4–5 <https://www.provincialcourt.bc.ca/downloads/announcements/Announcement-July-28-15%20Provincial%20Court%20Consultation%20Memorandum%20-%20CSO%20Criminal%20Information.pdf> accessed 9 August 2020.

350 Office of the Chief Judge (n 341) 5.

351 BC Court Services Online (n 339).

- The official version of the reasons for judgment is the signed original in the court file. In the event that there is a question about the content of a judgment, the original of the judgment in the court file takes precedence. Copies of the original judgment can be obtained by contacting the local registry. A photocopying charge is payable.
- Other information on the site is also available for use and may be reproduced, in part or in whole and by any means without charge or further permission from the individual court.³⁵²

It is requested that:

- Users exercise due diligence in ensuring the accuracy and currency of the materials reproduced;
- The Court, identified by name, be identified as the source and,
- The reproduction is not represented as an official version of the material reproduced, or as having been made in affiliation with or with the endorsement of the British Columbia Superior Courts.

However, reproduction of ‘multiple copies of any material contained on this site, in whole or in part, for the purposes of commercial redistribution, is prohibited except with written permission’.³⁵³

Publication bans

The CSO warns users that ‘publication or disclosure of information contrary to a court-ordered ban may result in legal action, including prosecution’. It provides the following disclaimer, making clear that users have responsibility to check with a particular court whether information is subject to any publication or disclosure ban:

Every effort is made to ensure that the court record information is or remains consistent with statutory and court-ordered publication and disclosure bans. However the posting of court record information on this site in no way is a representation, express or implied, that the information conforms with publication and disclosure bans. As bans may be granted at any stage in the proceeding, the court record information will not include details of a ban granted in court on that day. It is the responsibility of persons using or relying on the court record information to personally check with the applicable court clerk or registry for bans and ensure that they comply with any bans on publication or disclosure.³⁵⁴

Privacy in tribunals

A different approach to openness and privacy applies in the administrative tribunals in British Columbia. As explained previously, tribunals are not part of the court system in Canada though their decisions are reviewable by the courts (and therefore their records may become subject to the relevant rules of a court). In BC, guidance issued by the Office of the Information and Privacy Commissioner (OIPC) explains that because tribunals are not courts:

...the public’s right to attend a tribunal hearing or to access records in the tribunal’s files does not automatically ‘trump’ an individual’s right to privacy about personal information held by the tribunal. For this reason, administrative tribunals are obliged to engage in a finer balancing of these competing interests. This balanced consideration should be done in advance, by developing and implementing policies that appropriately address privacy concerns both when conducting hearings and in providing access to tribunal records.³⁵⁵

352 ‘Permission/Privacy Statement’ (bccourts.ca) <https://www.bccourts.ca/Privacy%20Statement.html> accessed 3 August 2020.

353 *ibid.*

354 BC Court Services Online, ‘Disclaimer’ <https://justice.gov.bc.ca/cso/index.do> accessed 2 March 2021.

355 Office of the Information and Privacy Commissioner for British Columbia, ‘Access and Privacy Issues: A Guide for Tribunals’ 4.

Additionally, while court records are excluded from BC's Freedom of Information and Protection of Privacy Act (FIPPA), 'tribunal records are covered by the FIPPA, unless the record is specifically excluded'. Exclusions under section 61 of the Administrative Tribunals Act (ATA) apply if adopted in the tribunal's own enabling legislation. The implications of these legislative provisions are discussed in the guidance; additionally, a separate OIPC practical guide on the electronic availability of tribunal discussions recommends that tribunals, should, among other measures:

- Develop decision-writing policies for members of the tribunal to minimize, anonymize or remove personal information that may identify parties...
- [e]mploy technological means of protecting privacy on the Internet by using robot exclusion protocols and eliminating the option of public search queries by name. This makes it more difficult for search engines such as Google to locate and display search results of a tribunal's decision pertaining to a specific individual.³⁵⁶

The Court of Appeal

Funding/administration

Although the Ministry of Attorney General is in charge of court administration in BC, under the Court of Appeal Act, the chief justice is the administrative head of the court. Further, as noted above, federal government funds and appoints judges at the superior court level. A chief administrator of court services is directed by the chief justice on judicial administration, and by the Attorney General on other aspects.³⁵⁷

Access to files

In its records policy, the Court of Appeal defines the court record as containing:

- records filed or sent to the court
- records of the court or tribunal under appeal
- orders made or granted by the court, and supporting or related documents, such as reasons for judgment
- scheduling or other internal court records, such as those used for case management or through case tracking systems
- transcripts of proceedings if prepared
- audio recordings of court proceedings
- clerks' notes from court proceedings.

If these are not available online via CSO, there is an application procedure for accessing civil and criminal records from the court. Though access is 'presumed' there may be restrictions on particular information. With regard to family proceedings, an application must be made to a judge in chambers, owing to the sensitive nature of information.

The court also specifies the process for 'bulk access' whereby access might be given to all or a subset of the electronic court record. Applications should be made to the Judicial Access Policy Working Committee and restrictions apply: '[e]ach application requires the execution of an agreement restricting the use of the information to protect the privacy interests of those whose personal information may appear within the court record'.³⁵⁸

356 Office of the Information and Privacy Commissioner for British Columbia, 'Balancing Privacy and Openness: Guidelines on the Electronic Publication of Decisions of Administrative Tribunals' 3-4.

357 Benyekhlef, Iavarone-Turcotte and Vermeys (n 304).

358 BC Court of Appeal (n 334).

Via CSO, for a C\$6 service fee, a user can view details for a file (initially located by a free search). Depending on a file's access restrictions, the information a user can view for Court of Appeal files includes:

- file number
- type of file
- date the file was opened
- style of cause
- names of parties and counsel
- list of filed documents
- court appearance details
- chamber appearance details
- disposition.³⁵⁹

Listings

A weekly list of hearings can be downloaded as a PDF from the Court of Appeal website, with basic information (case number, case name, brief case details, hearing location, judge).

Judgments

A PDF document is uploaded to the website, with upcoming judgment details. Recent judgments are available to download on the court website, and older judgments accessed via a search facility.³⁶⁰ Alternatively, judgments can be located via other legal information providers, including CanLII. However, as noted earlier, the court site states, in its copyright policy, that the 'official version of the reasons for judgment is the signed original in the court file. In the event that there is a question about the content of a judgment, the original of the judgment in the court file takes precedence'. Copies of the original judgment can be obtained by contacting the local registry; a photocopying charge is payable.³⁶¹

Publication bans

Details of publication bans do not appear to be available on the court website, as for the Supreme Court and some provincial court cases. The judgment page states that some of the Court's judgments may be subject to publication bans and that the Court of Appeal 'will not publish reasons for judgment on its website without ensuring that information that is subject to a publication ban has been removed or redacted from the judgment (e.g. through the use of initials)'.³⁶²

The Supreme Court

Funding/administration

Approval for the Supreme Court's budget is decided in a separate vote within the Attorney General's budget, though once approved the Supreme Court can decide its allocation, without government approval. A chief administrator of the court directs and supervises court registries, under the direction of the Attorney General and, with regard to judicial administration and use of courtroom facilities, under the direction of the chief justice.³⁶³

And, as a superior court, federal government funds and appoints its judges.

359 'About CSO' (n 340).

360 'The Courts of British Columbia: Search Judgments' (bccourts.ca) https://www.bccourts.ca/search_judgments.aspx accessed 3 August 2020.

361 'Permission/Privacy Statement' (n 352).

362 'Court of Appeal - Recently Posted Judgments' (bccourts.ca) https://www.bccourts.ca/court_of_appeal/recent_judgments.aspx accessed 3 August 2020.

363 Benyekhlef, Iavarone-Turcotte and Vermeys (n 304) 52–53.

Access to files

The court's record policy sets out what is contained in the court file:

- the pleadings, affidavits, and other documents filed or sent to the court by the parties and, in criminal proceedings, charging and related documents
- records of orders made or granted by the court, and supporting or related documents
- scheduling or other internal court documents in the court file
- transcripts of proceedings if prepared
- court exhibits
- audio recording of court proceedings, and court clerk's log notes from court proceedings.³⁶⁴

The application process, and level/nature of access, depends on the type of requester and item.

Via CSO, for a C\$6 service fee, a user can view details for civil files (initially located by a free search). Depending on a file's access restrictions, the information that can be viewed in Supreme civil files includes:

- file number
- type of file
- date the file was opened
- registry location
- style of cause
- names of parties and counsel
- list of filed documents
- appearance details
- terms of order
- caveat or dispute details.

eSearch does not provide access to any of the following:

- criminal matters (Supreme)
- Supreme family files (divorce)
- Supreme adoption files
- any Supreme Court file subject to a judicial order restricting access
- information from files prior to 1989
- information on Victoria Supreme Court files prior to 2002.

eSearch will show the style of cause, file number, and date the file was opened, but no further details for:

- Supreme family files (divorce)
- any Supreme file subject to a judicial order restricting access.

364 BC Supreme Court (n 334) 5.

The following Supreme Court civil electronic documents are available on CSO eSearch for viewing and printing:

- writ of summons
- notice of civil claim
- petition
- writ of summons
- statement of claim
- statement of defence/reply
- response to civil claim
- counterclaim
- third party notice
- appearance
- notice of motion
- notice of application
- orders.

Documents from Supreme Court files that are 12 years or older, and documents for Small Claims files that are 15 years or older cannot be ordered online. Information is available for Supreme Court files from 1989 onwards for all court locations across the province.³⁶⁵

Listings

Hearing details for each Supreme Court location can be searched on either the Supreme Court website³⁶⁶ or a separate government site,³⁶⁷ with basic information (case number, case name, case type indicated by abbreviation, hearing location, judge). These are published as PDF documents. Abbreviations are explained in full on the hearing listings page.

Exhibits/evidence

Members of the public can apply to access court exhibits (which can be documents or physical evidence) via a specified process in the court records policy, with distinct forms for the accredited media. When an exhibit is being viewed, 'the registry staff will supervise the viewing to ensure the integrity of the exhibits is maintained.'³⁶⁸

Judgments

As for the Court of Appeal, a PDF document is uploaded to the website, with upcoming judgment details. Recent judgments are available to view via the court website, and older judgments accessed or browsed via a search facility.³⁶⁹ Alternatively, judgments can be located via other legal information providers, including CanLII. However, as noted above, the court site states, in its copyright policy, that the 'official version of the reasons for judgment is the signed original in the court file. In the event that there is a question about the content of a judgment, the original of the judgment in the court file takes precedence'. Copies of the original judgment can be obtained by contacting the local registry; a photocopying charge is payable.³⁷⁰

365 'About CSO' (n 340).

366 'Supreme Court - Hearing Lists' (bccourts.ca) <https://www.bccourts.ca/supreme_court/hearing_list/> accessed 3 August 2020.

367 'British Columbia Criminal Court Lists' (www2.gov.bc.ca) <https://www2.gov.bc.ca/gov/content/justice/courthouse-services/daily-court-lists/criminal-court-lists> accessed 3 August 2020.

368 BC Supreme Court (n 334) 26.

369 'The Courts of British Columbia: Search Judgments' (n 360).

370 'Permission/Privacy Statement' (n 352).

Publication bans

Under the ‘Publication Ban Notification Project’, information about publication bans is available on the Supreme Court website. Listings of bans may include the following data: registry number; case name; date; registry; order by; statute; details. In some cases, the detail is provided (e.g., an instruction not to identify the victim in the case), in others, it specifies to contact the court registry to ascertain details about the specific nature of the publication ban. An RSS feed is available for subscribing to updates on the page.

As with other court information, there is instruction that it is the responsibility of members of the public to ensure compliance with publication bans, and that the service is limited in the following ways:

- Publication ban orders will be posted as soon as possible upon being made. However, orders made late in the day may not be posted until the following business day.
- The precise terms of a publication ban order may not necessarily be posted to this site. If you require the precise terms of an order, please contact the registry.
- Information regarding automatic publication bans which are in effect by operation of statute is not included on this website. Members of the public are expected to inform themselves of the circumstances under which automatic bans are in effect.³⁷¹

First level provincial courts*Funding/administration*

For the first level provincial court, the Office of the Chief Judge (OCJ), which includes the Executive Committee of the Court and management staff, is the main headquarters. Since 2002, the Attorney General and Chief Judge of BC have agreed a protocol for their roles and responsibilities, with regular meetings to discuss aspects of court administration, including technology. This agreed protocol means that budgetary control is delegated to the Chief Judge, but the budget is voted on, within the Ministry of Attorney General. IT planning and services are provided by the OCJ staff.³⁷² However, the Provincial Court of BC website states that the OCJ does not act as a registry for the court, and does not process requests to access court records.³⁷³

371 ‘Supreme Court Publication Bans’ (bccourts.ca) https://www.bccourts.ca/supreme_court/publication_bans/search.aspx accessed 3 August 2020.

372 Benyekhlef, Iavarone-Turcotte and Vermeys (n 304) 50–52.

373 ‘Answers to Common Questions’ (provinciacourt.bc.ca) <https://www.provinciacourt.bc.ca/Locations-Contacts-Landing/Common-Questions#cq12> accessed 3 August 2020.

Access to files

The permitted access levels to different document types are set out in a table in the court's record policy; the process depends on the type of requester and item.³⁷⁴

Via CSO (rather than the OCJ), for a C\$6 service fee, a user can view the details for provincial files (initially located by a free search). Depending on a file's access restrictions, the information that can be viewed in provincial files includes:

- file number
- type of file
- date the file was opened
- registry location
- style of cause
- names of parties and counsel
- list of filed documents
- appearance details
- terms of order
- caveat or dispute details.

A user can view details for one of the provincial traffic and criminal court files in their search results. Depending on a file's access restrictions, a user can view some basic case profile for provincial traffic and criminal court files such as:

- file number
- type of file
- date the file was opened
- registry location
- name of participant
- charges
- appearances
- sentences/dispositions
- release information.

There is no charge to view provincial criminal and traffic files. It is not possible to view court documents within the traffic/criminal eSearch service. eSearch does not provide access to any of the following:

- provincial family files
- any provincial file subject to a judicial order restricting access
- information from files prior to 1989
- information on Victoria Supreme Court files prior to 2002.

Additionally, as noted above, there is a time restriction on some criminal court records; the current policy was established following a consultation in 2015.

374 Provincial Court of BC (n 334) 3.

Small claims electronic documents are available on CSO eSearch for viewing and printing:

- notice of claim
- reply
- third party notice
- orders.

Documents for small claims files that are 15 years or older cannot be ordered online. Information is available for provincial files from 1989 onwards for all court locations across the province. eSearch will show the style of cause, file number, and date the file was opened, but no further details for any provincial file subject to a judicial order restricting access.³⁷⁵

Listings

Via CSO, daily listings for Small Claim hearings can be found as PDF documents containing basic case information. For Provincial Court criminal cases, a separate page provides links to Adult Court Lists.³⁷⁶ A PDF is available for each location of the court.

Exhibits/evidence

According to the Provincial Court's record policy, exhibits can be accessed only by Crown counsel, defence counsel, and accused, unless otherwise ordered by the Court upon application. Members of the public can make an application to the relevant judge:

If an order is granted providing access for viewing an exhibit, the viewing shall only occur under the supervision of registry personnel. The need for an application for access by the public to exhibits in a criminal proceeding is based on the need, established by the law, to consider the competing interests in respect of public access, distribution and broadcast of court exhibits.³⁷⁷

Judgments

The Provincial Court website explains that Provincial Court may issue 'judgments', 'reasons', 'decisions' or 'oral judgment'. Written reasons will be placed on the court file. Some of the written reasons are sent to CanLII 'particularly in cases of public interest or involving a point of law'. In a high-profile case, written reasons may be posted on the home page of the court website, though at the time of checking for this research, recent judgments included links to CanLII, with a search option linking to CanLII's search tool. Information about accessing judgments is provided in an FAQ.³⁷⁸

Publication bans

Some information regarding publication bans ordered in provincial court which apply to evidence presented in Supreme Court proceedings may be available via the Supreme Court publication ban service. However, bans ordered in provincial court pursuant to s. 539 of the Criminal Code are not available.³⁷⁹

The Civil Resolution Tribunal

The Civil Resolution Tribunal (CRT), notable in both Canada and globally as a pioneer in online dispute resolution, deals with small claims disputes (C\$5,000 and under); strata property disputes (any amount); motor vehicle accident and injury claims (up to C\$50,000); and societies and cooperative association disputes of any amount. It is Canada's first online tribunal, and began operating in 2016, four years after the passing of the Civil Resolution Tribunal Act.

375 'About CSO' (n 340).

376 'British Columbia Criminal Court Lists' (n 367).

377 Provincial Court of BC (n 334) 4.

378 'Answers to Common Questions' (n 373).

379 'Supreme Court Publication Bans' (n 371).

It is not a court, but as an administrative tribunal it is part of the Canadian justice system and it is required to apply the law and make enforceable decisions. It is worthy of brief discussion here, as a different model for the processing of ‘justice system data’, particularly as it was able to design its process from scratch.

Tribunals in BC are subject to their own legislative provisions and guidance by the Office of the Information and Privacy Commissioner (OIPC), distinct from that of the courts.³⁸⁰ The CRT has developed its own Access to Information and Privacy Policy which describes the context for the Tribunal, its approach to protecting personal information, anonymisation, sealing of records, security of records, and access to information arrangements.³⁸¹ As this policy explains, the CRT is unlike public court in that the public cannot usually watch hearings in-person (most disputes involve electronic, written submissions) and there is no physical registry that can be visited to search records; ‘[a]s a result, it is important to provide transparency for the tribunal’s decision-making process in other ways’.

Transparency is ‘partly realized’ by the requirement, in section 85(1) of the Civil Resolution Tribunal Act (CRTA), that the CRT post its final decisions on its website. Additionally, subject to some restrictions, the public can access evidence and submissions by submitting a request form and paying a fee. However, it states, ‘there is some information that is not appropriate for public access, and disclosure of that information is not necessary to support transparency’. By way of example, it says that confidential settlement may form part of the dispute resolution process (e.g., a settlement conference outside the tribunal process), and ‘parties in CRT disputes are entitled to a similar level of privacy and confidentiality for their facilitated settlement discussions’. Non-parties will not be able to access dispute records that ‘involve discussions or communications regarding settlement of the dispute or that include medical or financial information’.

Typically, parties will be named in published decisions, but in ‘extraordinary’ circumstances, the CRT may anonymise personal data if ‘the need for protection of personal information outweighs the goal of transparent CRT proceedings’. Unredacted records may be used, however, in any subsequent court proceedings. The Access to Information and Privacy Policy also includes a detailed table, explaining the types of records that are commonly found in a CRT dispute. Using a key, it shows who can have access to each record type and, if so, what limitations may apply to the access. Another feature is a brief overview of its approach to information sharing with other organisations.³⁸²

Another means of transparency is through its anonymised user data and user surveys, which are published on the CRT site and reported in the annual report, available publicly. It collects systematic data about the process of dispute resolution, for example, capturing the detail of the number and types of cases, and how long they take. This, according to Professor Katie Sykes, who is conducting independent research on the CRT, makes it very easy to access data.³⁸³

Impact of COVID-19 in BC courts

Physical hearings were interrupted during the COVID-19 period, but from 13 July 2020, there was an expansion of ‘in-person’ operations. Nonetheless, registries continued to accept remote filings, via CSO, mail, email or fax. An update in July stated that ‘increased in-person attendance supplements existing telephone and videoconferencing facilities that support hearings and remote hearing alternatives, such as web-based videoconferencing and Microsoft Teams that are currently in use’.³⁸⁴

380 Office of the Information and Privacy Commissioner for British Columbia (n 355); Office of the Information and Privacy Commissioner for British Columbia (n 356).

381 Civil Resolution Tribunal, ‘Access to Information and Privacy Policy’ <https://civilresolutionbc.ca/wp-content/uploads/2019/02/Access-to-Info-in-CRT-Case-Records-20190220.pdf> accessed 3 August 2020.

382 *ibid.*

383 Email Correspondence with Katie Sykes, Associate Professor, Thompson Rivers University (23 July 2020).

384 BC Court Services, ‘COVID-19 Court Recovery Operations - Province of British Columbia’ (gov. bc.ca, 17 July 2020) <https://www2.gov.bc.ca/gov/content/justice/covid-19/covid-court-operations> accessed 3 August 2020.

385 BC Court of Appeal, 'Notice to the Public Regarding Videoconference Proceedings in the Court of Appeal' https://www.bccourts.ca/Court_of_Appeal/documents/Updated_Notice_to_Public_re_Access_to_Court_Proceedings_July_7_2020.pdf accessed 3 August 2020.

386 BC Supreme Court, 'Notice to the Media Regarding Access to Supreme Court Proceedings' https://www.bccourts.ca/supreme_court/documents/COVID-19_Notice_No.37_Notice_to_Media_Regarding_Access_to_Court_Proceedings_July_13_2020.pdf accessed 3 August 2020.

387 Provincial Court of BC, 'Guide to Remote Proceedings' <https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/NP%2021%20Guide%20to%20Remote%20Proceedings.pdf> accessed 3 August 2020.

388 McHale (n 262).

389 British Columbia's Office of the Human Rights Commissioner, 'Disaggregated Demographic Data Collection in British Columbia: The Grandmother Perspective' (2020) https://bchumanrights.ca/wp-content/uploads/BCOHR_C_Sept2020_Disaggregated-Data-Report_FINAL.pdf accessed 7 December 2020.

390 'BC Courts Data' (gov.bc.ca) <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/justice-data/courts-data> accessed 6 August 2020.

391 'Dashboard Datasets' (gov.bc.ca) <https://app.powerbi.com/view?r=eyJrjoiMDIiODg2MmWQQtMzkzNS00ZGM3LTkyN2UtZjNhM-TI5Y2U5YjIwIiwidCI6IjZmZGI1M-jAwLTNkMGQtNGE4YS1iMDM-2LWQzNjg1ZTM1OWFkYyJ9&pageName=ReportSection1> accessed 6 August 2020.

392 'Courts Datasets' (gov.bc.ca) https://catalogue.data.gov.bc.ca/dataset?q=Courts+data-&sort=score+desc%2C+record_publish_date+desc accessed 6 August 2020.

393 'Justice Data Definitions' (gov.bc.ca) <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/justice-data/data-definitions> accessed 6 August 2020.

All three court websites published regular information on changes to arrangements, and the use of remote hearings. The Court of Appeal said that public links to join remote hearings would be included in its online lists; public observers would not be visible to or heard by others participating in the video conference. Otherwise arrangements for accessing data remained the same, with requests for post-hearing access to court audio recordings by the media to be made via the usual form and undertaking. It stated that the Court would continue processing requests for access to the court record in the usual manner as prescribed under the Court of Appeal's Record and Courtroom Access Policy.³⁸⁵

The Supreme Court directed members of the accredited media wishing to attend a particular proceeding to contact the Superior Courts Communications Officer for details on how to join.³⁸⁶ The Provincial Court guidance on remote hearings reiterated that no-one could record any portion of a remote proceeding and that transcriptions could be ordered the usual way.³⁸⁷

Court user information in the BC courts

Less evident on the Court Services and court websites was anonymised data about users. As Professor Sykes explained, it can be difficult to get information from the Provincial and Supreme Court in BC. The courts do not collect data on user experience, and there is no information publicly available, for example, on what has happened to caseloads and time to resolution during the COVID-19 period. McHale has outlined the lack of user data at a national level, particularly with regard to civil data – points which also apply at the provincial level.³⁸⁸

However, as further discussed below, initiatives including A2JBC and the Access to Justice Centre for Excellence at University of Victoria have been working on a research framework to address data needs, and other data initiatives in collaboration with government. Such projects could be complemented and supported by broader provincial initiatives. For example, a recent report by the BC Office of the Human Rights Commissioner makes recommendations on disaggregated demographic data collection with the objective of improving the data needed to develop policy that effectively addresses systemic inequalities.³⁸⁹ Though the report's scope is broader than 'justice system data', the recommendations could align with proposals that are more specifically focused on justice and courts.

In terms of other types of operational data, the Court Services Branch data dashboards and datasets³⁹⁰ provide access to provincial, regional and local court statistics operations and progress in the BC justice system, across all levels of court and court type, since fiscal year 2007/2008; showing case numbers, length, session hours, and number of documents filed in different courts and case types, for example.³⁹¹ Data on courts can be viewed in maps, graphs and pie charts, or downloaded in different file formats (e.g. csv, xls). Example datasets include: number of court appearances by centre, gender, ethnicity, marital status, age group in BC Corrections adult custody centres; and the court finding on prosecutions completed by the BC Prosecution Service.³⁹² One helpful feature is a list of 'justice data' definitions.³⁹³

Data accountability mechanisms

A memorandum of understanding exists between the three BC courts and the Ministry of Attorney General that governs, among other things: the use of ‘business intelligence’ relating to judicial and courts administration; court records; and information technology.³⁹⁴

Protocols are in place between court services and the judiciary with regard to the control and use of judicial data and administrative data. An application process, involving legal officer/counsel representatives of all three courts and court services, the Judicial Access Policy Working Committee, governs requests for access and use of court records (beyond what is ordinarily permitted under court rules) to determine the legitimate purpose of the request and conditions for use. The chief justice(s) and/or chief judge ultimately provide instructions on approving applications for access to court records.³⁹⁵

As already noted, BC court records are exempt from the Freedom of Information and Protection of Privacy Act (FIPPA). Access to and disclosure of the court record information published on CSO is governed by legislation, court rules and judicial policy. Beyond the court record, the Court of Appeal court record policy notes two other records which may be accessible to the public:

- **Court Administration Records:** The Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996 c. 165 (‘FIPPA’) regulates court administration records. Court administration records include information gathered or produced for the purpose of managing programs and services of the Court Services Branch of the Ministry of Justice. You may access these records by making an access request under FIPPA to the Ministry of Justice.
- **Administration Records:** FIPPA defines judicial administration records as those records relating to a judge. Judicial administration records, including records created by judges, or those records that relate to support services provided to judges may be accessible at the discretion of the Chief Justice of British Columbia.³⁹⁶

Other mechanisms for accountability include the annual reports of judicial bodies and the courts, which include statistics. As outlined and discussed in a presentation for the University of Victoria Access to Justice Centre for Excellence colloquium on ‘justice metrics’ in 2020, FIPPA and the Statistics Act each authorise ‘fairly broad data collection’ that could be used for improving the collection and use of justice data:

FIPPA authorizes collection of personal information under several heads of authority, including where the information ‘relates directly to and is necessary for a program or activity of the public body’ or where it is ‘necessary for the purposes of planning or evaluating a program or activity of a public body.’ The Statistics Act authorizes the Director of Statistics to collect statistical information ‘respecting the commercial, industrial, financial, social, economic and general activities and conditions of British Columbia,’ including collaborating with ministries to collect statistics (and inclusive of statistics derived from those ministries’ activities). The minister responsible for the Statistics Act may authorize the Director to collect ‘other statistics or statistical information the Lieutenant Governor in Council considers desirable.’³⁹⁷

394 BC Courts (n 333).

395 See for example: BC Court of Appeal (n 334) para 1.9.

396 *ibid* 4.

397 Access to Justice Centre for Excellence (n 332).

These legal mechanisms could present a response to the ‘justice metrics problem’ and the Canadian justice data deficit.³⁹⁸ At the colloquium, participants explored the notion of a ‘justice data commons’ and the potential application of the Data Innovation Program (the DIP) to be operated by the BC Ministry of Citizens’ Services. The DIP gathers together data collected by individual public sector organizations, links it together, de-identifies it and makes it available to researchers in a secure environment. It already holds 29 datasets in other areas, and attendees of the event and BC access to justice stakeholders can see the potential in extending its work to the justice field, authorised by both FIPPA and the Statistics Act.³⁹⁹

398 McHale (n 262).

399 Access to Justice Centre for Excellence (n 332)

400 Kate Gower, ‘Ontario Courts Launch CaseLines E-Trial Platform’ (Gower Modern Law, 30 July 2020) <https://gowermodernlaw.com/2020/07/ontario-courts-launch-caselines-e-trial-platform/> accessed 6 August 2020; Ontario Superior Court of Justice, ‘Supplementary Notice to the Profession and Litigants in Civil and Family Matters’ (29 July 2020) <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/supplementary-notice/> accessed 6 August 2020.

401 Toronto Star, ‘Star Launches Legal Challenge to End Secrecy in Ontario Tribunals’ (thestar.com, 7 February 2017) <https://www.thestar.com/news/canada/2017/02/07/star-launches-legal-challenge-to-end-secrecy-in-ontario-tribunals.html> accessed 11 July 2020.

402 Kenyon Wallace, ‘How the Star’s Legal Affairs Reporter Navigates Ontario’s Complex Justice System’ (thestar.com, 12 January 2018) <https://www.thestar.com/trust/2018/01/12/how-the-stars-legal-affairs-reporter-navigates-ontarios-complex-justice-system.html> accessed 6 July 2020.

403 Superior Court of Justice Ontario, ‘Superior Court of Justice: Toronto’ <https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/> accessed 4 August 2020.

404 Lenczner Slaght, ‘Commercial List: Resources’ (commercialist.com) <https://commercialist.com/resources> accessed 4 August 2020.

405 Anita Balakrishnan, ‘Lenczner Slaght Launches Centralized Website for Commercial List’ (Law Times, 21 June 2019) <https://www.lawtimesnews.com/practice-areas/litigation/lenczner-slaght-launches-centralized-website-for-commercial-list/266900> accessed 4 August 2020.

4.5 Other provinces: snapshots

In this section, we provide a very brief overview of a few notable initiatives and characteristics of other provinces without detailing their systems in depth, as we have done for the Federal and BC courts.

Ontario

Several interviewees commented that there was much room for improvement in terms of how Ontario manages its justice system data, and court record access, in comparison with other provinces. Time will show if there is improvement with the introduction of Ontario’s new electronic document and storage system, which will be provided by a UK-based service, Thomson Reuters’ CaseLines.⁴⁰⁰

A particular issue in Ontario is access to tribunal information. A campaign and legal challenge launched by the Toronto Star newspaper in 2017 urged for more ‘clear and consistent’ rules for tribunal documents; ‘a patchwork of disparate rules that reveal a system without common standards or legal foundation’ was identified by journalists seeking documents from the province’s tribunals. A primary issue is that the tribunals – outside the courts system – are subject to Freedom of Information and Protection of Privacy Act, which has introduced delay, rather than increased transparency; according to one of the newspaper’s lawyers, ‘[i]ronically, the application of the Freedom of Information Act to tribunals severely hinders public scrutiny, putting roadblocks in the way of getting information and, when information is disclosed, important information is deleted’.⁴⁰¹ More generally, the Toronto Star’s legal correspondent has described how Ontario courts and tribunals ‘seem to have secrecy as their default setting’ with public documents ‘not readily accessible to the public’, including, on occasion, basic listings information, as well exhibits, and other files.⁴⁰²

Amid the criticisms, an initiative on commercial litigation was flagged as an interesting and superior way of navigating information about court proceedings and process. The Commercial List was established in Toronto in 1991 and comprises a number of judges who have experience in complex commercial litigation; it is not a separately-constituted court, ‘but more like a division of the Superior Court in Toronto’, with a Commercial List users’ committee. Information about how it operates can be found in a section of the Superior Court of Justice website.⁴⁰³ This information, however, is difficult to navigate. As a result, a private law firm Lenczner Slaght, has set up its own resource, gathering materials relating to the list’s business.⁴⁰⁴ One of the incentives for creating the site – which has no formal affiliation with the court – was explained in an interview with one of Lenczner Slaght’s partners promoting its launch:

although a lot of high-profile commercial litigation takes place through the Superior Court of Justice’s commercial list, it previously took five or more filters to find these cases through the Canadian Legal Information Institute’s online database.⁴⁰⁵

As well as links to key resources (such as court guidance and protocol documents), it links directly to relevant decisions, model orders, and publishes ‘sample precedents from publicly-available cases’, as well as commentary and a newsletter. We consider the potential issues associated with such a model in the final section of this chapter.

Québec

Québec was described to us initially as one of the most technologically-advanced jurisdictions in Canada (and even in the world) from the late 1970s and early 1980s onwards, with electronic dockets at the courthouse and online access to case law, well in advance of other courts and with the creation of the Société québécoise d’information juridique (SOQUIJ) in 1976 by an act of the Québec National Assembly.⁴⁰⁶ This was primarily a result of provincial government interest and financial investment in technological development. The province also benefited from the fact that Québec is the base for pioneering academic research on law and technology, which has led to legal information services (such as SOQUIJ). For instance, the University of Montréal was among the first universities in the world to offer a law and IT masters programme, and hosts the Cyberjustice Laboratory, formally established in 2010, having developed out of cyber projects in the mid-1990s onwards.⁴⁰⁷

In 1999, the government announced plans to develop the *Système intégré d’information de justice* (SIJ), i.e. an integrated justice system. As a result, various actors – working in what is now known as legal tech – decided to adopt the wait-and-see approach since they were reluctant to develop tools that would be redundant or incompatible with the SIJ; a long hiatus in technological development followed. In 2012, however, the project was abandoned following a report that claimed that C\$75 million had been spent with little to show for it.⁴⁰⁸

As a result, the province is no longer leading the way in court innovation as it once was, though a Supreme Court decision in 2016⁴⁰⁹ prompted renewed investment in the courts and technology.⁴¹⁰ Different proposals ensued, with the COVID-19 outbreak prompting the courts to finally offer e-filing and video-trials. Despite the reduction in technological development, various features are worth highlighting. SOQUIJ has played a major part in opening up justice system data in Canada, namely by publishing court judgments and English translations of some of these decisions. Self-funded through the sale of products and services, it operates under the authority of the Québec Minister of Justice. It acts a ‘wholesale’ provider of case law to other legal information providers at cost-based rates, in an arrangement established following a Court of Appeal decision in 2001.⁴¹¹ In the view of Colin Lachance, former CEO of CanLII and specialist in open access law, ‘current access is fair and cost-effective for commercial providers and not out-of-reach for niche players or those with smaller budgets’:

Simply put, the hurdles to gaining wholesale access to case law in the rest of Canada are almost completely absent in Québec ... Courts and governments looking to make a strong commitment to truly freeing the law, would do well to examine and maybe even emulate the SOQUIJ approach.⁴¹²

Another notable feature for Québec is that its ‘data deficit’ may not be as pronounced as other provinces. McHale notes that Québec is ‘relatively active’ with regard to empirical and measurement work in the area of civil access to justice,⁴¹³ and metrics work has been undertaken by the ADAJ (*Accès au droit et à la justice*) research partnership.⁴¹⁴

406 With thanks to Nicolas Vermeys for providing considerable background information informing this section.

407 cyberjustice.ca, ‘History’ (Laboratoire de cyberjustice) <https://www.cyberjustice.ca/en/laboratoire/historique/> accessed 6 December 2020.

408 Reported, for example, in Renaud Beauchard, ‘Cyberjustice and International Development: Reducing the Gap Between Promises and Accomplishments’ in Karim Benyekhlef, Jane Bailey and Jacquelyn Burkell (eds), *eAccess to justice* (University of Ottawa Press, 2016) 40.

409 *R v Jordan* [2016] Supreme Court of Canada 36068, 1 SCR 631.

410 The case stated that the accused in a criminal trial had a right to have his or her trial within a certain delay or be freed.

411 *Wilson & Lafleur inc c Société québécoise d’information juridique*, 2000 CanLII 8006 (QC CA).

412 Colin Lachance, ‘What Does It Really Mean to “Free the Law”? Part 2 – Slaw’ (Slaw.ca, 9 November 2015) <http://www.slaw.ca/2015/11/09/what-does-it-really-mean-to-free-the-law-part-2/> accessed 4 August 2020.

413 McHale (n 262) 7.

414 ‘ADAJ: Accessing Law and Justice’ <http://adaj.ca/home> accessed 14 July 2020.

Court user information: Pan-Canadian initiatives

As numerous access to justice studies have noted, there is insufficient data collection on user experience in the justice system.⁴¹⁵ This is a particularly acute problem for civil justice; as McHale notes:

The positions with respect to quality and availability of data in the civil and the criminal contexts are not identical. While neither system is working with adequate data, the criminal system does provide some end-to-end data on a participant level, and is yielding increasingly rich micro data sets. Civil data are not nearly as strong and we have much less information about the progress of civil matters.⁴¹⁶

With regard to court decisions and user feedback specifically, there is a ‘paucity of data’ on trial and appeal decisions and ‘no data on what litigants and stakeholders actually require from decisions’.⁴¹⁷

A recent study in Saskatchewan⁴¹⁸ identified that there was a lack of understanding about what data is being collected about the civil justice sector. They surveyed local justice sector organisations, providing civil justice services,⁴¹⁹ to identify what data was being collected, to identify impediments or gaps to data collection and to identify whether any organisations that participated in the survey appear to be collecting and using data in ways that may be helpful to other organisations. They found that almost all the 19 organisations surveyed were collecting ‘some’ data, but that there were notable gaps, such as user feedback data and demographic data relating to ethnicity, level of education, sexual orientation, and housing status. The most common impediments included time, personnel and technology resource. These findings will now feed into a new, larger project which will identify further legal needs and gaps; and survey legal professionals and social service providers in the province.⁴²⁰ The ‘ultimate’ goal is to establish a ‘data commons’ that would allow for centralised access to, and analysis of, identified data sources, which will assist with the researchers’ overall objective for ‘data informed decision-making’ on resource allocations and systemic improvements in the justice sector.⁴²¹

Despite the reported insufficiencies in data collection, we have identified some national level/pan-Canadian initiatives that are designed to gather more data and fill knowledge gaps across the country, through social science research at the Department of Justice and Statistics Canada.

Canadian Government initiatives

The National Justice Statistics Initiative (NJSI) has existed since 1981 as a collaboration between deputy justice ministers at federal, provincial and territorial level, and the Chief Statistician of Canada. The Canadian Centre for Justice and Community Safety Statistics (CCJCSS),⁴²² part of Statistics Canada, operationalises this work.⁴²³ It is oriented towards the criminal justice system, conducting surveys on police, courts and corrections, as well as self-reported victimization, and surveys on other victim-related areas like shelters (transition homes), with some surveying of civil justice cases. Its dashboard lists all its datasets, including those based on courts data.⁴²⁴

Other initiatives include:

- The Canadian Legal Problems Survey: building on previous national legal needs surveys, Statistics Canada will survey 10 provinces on citizens’ legal problems, with a target response of 30,000 people.⁴²⁵
- Legal problems qualitative studies: alongside the quantitative survey, qualitative research commissioned by the Department of Justice will focus on certain population groups, including gender and sexual minorities, black Canadians, Indigenous peoples, immigrants, and persons with disabilities.⁴²⁶

415 See, for example: McHale (n 262).

416 *ibid* 5.

417 Jon Khan, ‘“The Life of a Reserve”: How Might We Improve the Structure, Content, Accessibility, Length & Timeliness of Judicial Decisions?’ (LLM thesis, University of Toronto 2019) 69.

418 CREATE Justice, ‘Justice Sector Data Inventory’ (CREATE Justice/University of Saskatchewan, 2019).

419 Including: information/advice; dispute resolution forum; representation; investigation, enforcement/collection; conflict resolution training; early resolution services; collecting small claims court information; providing administrative support; court security; and referrals to other organisations.

420 The project, awarded funding in 2020, is titled ‘Access to Justice: Legal Data Scan and Needs Assessment’, and will be led by CREATE Justice at the University of Saskatchewan.

421 Interview with Brea Lowenberger and Heather Heavin (5 August 2020); CREATE Justice (n 418) 1.

422 Formerly known as the Canadian Centre for Justice Statistics (CCJS).

423 Statistics Canada, ‘Crime and Justice Statistics’ https://www.statcan.gc.ca/eng/subjects-start/crime_and_justice accessed 2 June 2020.

424 *ibid*; Statistics Canada, ‘Courts Statistics’ https://www.statcan.gc.ca/eng/subjects-start/crime_and_justice/courts accessed 17 July 2020.

425 The survey was initially planned to include the three territories, but this is no longer possible owing to disruption to testing during the pandemic period. Department of Justice presentation in Open Government Partnership, Open Response + Open Recovery: Access to Justice (2020) <https://www.youtube.com/watch?v=P-kfPICGD90Q&feature=youtu.be> accessed 6 August 2020.

426 *ibid*.

- Legal Aid Report: data from legal aid plans in each province and territory is submitted to the Department of Justice and reported publicly.⁴²⁷
- Access to Justice Index for Federal Administrative Bodies: tested by a few federal tribunals; the Social Security Tribunal also used the index, along with tools developed in British Columbia, and posted the results online.⁴²⁸

4.6 Critical appraisal

In this final section, we review some of the main themes that transpired from our literature review and empirical work that relate to the comparative factors that will be discussed in Chapter 6: judicial independence, public understanding and confidence, innovation, and the efficiency/attractiveness of the justice system.

Justice system complexity and culture

In approaching this case study, we found similar, if distinct, constitutional and geographic difficulties described in the last chapter on the Australian justice system. The nature of the provincial/territorial justice systems is such that each region and court is subject to different administrative and funding arrangements, with differing roles for judiciary and government with regard to the processing and control of justice system data. Thus we had to be careful not to generalise about justice data management; as one interviewee commented, it was more appropriate to talk about ‘pan-Canadian’ than national or federal initiatives. Despite the overall population size of Canada being smaller than the UK, the variation within the justice system meant that we had to concentrate on selected courts. Nonetheless, some of the examples described may reflect issues in other provinces and territories. Additional preliminary surveying of other provincial court websites and background materials shows some similarity with the systems described in more depth, though we cannot conclusively comment on their features within the scope of this project.

The constitutionally unique nature of the justice system presents a problem for national-level or coordinated initiatives on justice system data. A number of interviewees spoke favourably – and even enviously – of the court reform initiatives they had observed developing in the UK; which they perceived to be easier to introduce through a centralised courts service, than multiple different provincial/territorial and federal court services and justice systems.⁴²⁹ The flip-side of that is, of course, that provinces are potentially more flexible to develop their own initiatives, without waiting for national-level agreement, which may be an advantage for provinces such as British Columbia and Saskatchewan as they begin to develop their ideas for justice ‘data commons’ projects to help advance access to justice, by the use of ‘data informed decision-making’.

Funding

As well as the decentralised nature of the justice system, funding was discussed by interviewees as a major factor inhibiting technological and data innovation; a point that was reflected in the media materials reviewed, which reported the comments of senior judges and academics who have drawn attention to longstanding deficiencies of the justice system. Without adequate funding for courts administration, it is impossible to develop more efficient technological and data management systems. While former Chief Justice Beverley McLachlin has acknowledged that technology is not a ‘magic cure’ and there are issues in terms of users’ access to appropriate devices and internet connections, she argues ‘there is a growing consensus that we need to equip our justice institutions with the infrastructure required to do justice in the modern world’.⁴³⁰

427 Department of Justice, ‘Legal Aid in Canada, 2018-19’ (30 June 2020) <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1819/p1.html> accessed 5 August 2020.

428 Susan McDonald, ‘Development of An Access to Justice Index for Federal Administrative Bodies’ (justice.gc.ca, 2017) <https://www.justice.gc.ca/eng/rp-pr/jr/fab-eaf/index.html> accessed 5 August 2020; Social Security Tribunal, ‘Social Security Tribunal Index Scores Measuring Access to Justice’ (10 June 2020) <https://www1.canada.ca/en/sst/innovation/a2j-framework.html> accessed 23 July 2020.

429 See, for example Khan, ‘Opinion’ (n 255).

430 Beverley McLachlin, ‘Why You Should Care about Access to Justice’ (thestar.com, 29 June 2020) <https://www.thestar.com/opinion/contributors/2020/06/29/why-you-should-care-about-access-to-justice.html> accessed 30 June 2020.

Cultural issues also came to the fore. As in England and Wales, the hybrid number of providers involved in the collection, storage and dissemination of justice data has arguably frustrated some attempts for improvements and innovation. Though this multi-actor landscape can lead to productive collaborations (e.g. the creation and development of CanLII or, on a smaller scale, the provision of Commercial List informational resources in Toronto), it also means that responsibility is divided between different institutions, without roles being always clearly understood or demarcated, and leads to disagreement about how data should be disseminated.

Judicial independence

It is clear from the various guidance and protocol documents for different parts of the justice system that Canadian justices have been keen to preserve and delineate their role with regard to the control of justice system data; this has been a central concern, for example, in the extensive work undertaken by the Canadian Judicial Council on the use of technology and data security. It follows, therefore, that judicial independence was a distinct talking point with regard to justice system data mechanisms, and within the academic and policy literature surveyed.

This had several aspects to it. First, that it was perceived by interviewees (none of whom, it should be noted, were judges) that judges were nervous about the impact of large scale analytical data that could undermine their position and unduly influence their decisions, if the data use was seen as a form of performance management ‘against a government standard and not an independent standard’, and therefore a form of political independence.⁴³¹ Additionally, there may be fears about the development of predictive tools, for example, that could change legal behaviours. However, from a second perspective, articulated in a recent paper by Canadian academics, that improved and more reliable data could bolster independence by showing the public how the system functions in practice (that frequency of judicial dissent and successful appeal, for example) and helping to improve aspects that do not work so well (by making a case for more funding and increasing efficiency, for example).⁴³²

There may also be sensitivity around particular types of judicial data. One interviewee, attempting to gather more data on how courts were approaching written decisions, and the written decision process, discovered that concerns about the confidentiality of the deliberative process (the principle of deliberative secrecy), and judicial independence, led to non-disclosure of certain information, limiting the data he was able to collect: on how judges spend their time in the decision writing process, for example. In his view, while courts may be concerned that increased transparency will compromise the administration of justice or judicial independence, ‘no concern justifies the current lack of standardized checks and balances and transparency’, and that the ‘deliberative secrecy’ principle was being applied too broadly.⁴³³

In a similar vein, Johanne Blenkin, director of the Access to Justice Centre for Excellence in BC observed: ‘courts do need to be independent, but they also are publicly funded, and some aspects of their administration do need to be measured’. In her view, the issue of judicial independence was currently ‘enmeshed’ with the administrative aspect of the courts and needs ‘disentangling’ in order to move forward with better data practices in the interests of improving access to justice.⁴³⁴

431 Interview with Johanne Blenkin (13 July 2020).

432 Jena McGill and Amy Salyzyn, ‘Judging by Numbers: How Will Judicial Analytics Impact the Justice System and Its Stakeholders?’ 2020–13 Ottawa Faculty of Law Working Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3652468 accessed 20 July 2020.

433 Jon Khan, ‘Working Paper: Deliberate Design: Why Judicial Independence Likely Requires It’ 1–2, 9; Interview with Jon Khan (7 July 2020).

434 Interview with Blenkin (n 431).

Privacy concerns

Although our interview sample was by no means an exercise to ascertain a representative sample of views, it was notable that of the people we did speak to – with a specialism in this topic – the ‘practical obscurity’ of court records was often mentioned independently of any specific question. This concept, described earlier in the chapter, explains that although there is a historic tradition of public access to court records, the personal data they contain is not readily available in practice (i.e. searchable to users via the open web, or able to be harvested for analytical and algorithmic purposes). There was awareness among experts, reflected in the Canadian academic and policy literature on court digitisation, that the wholesale transition from traditional paper-based records to online environments – and their use for public search or commercial analytic tools – was problematic in terms of protecting user privacy, reputation and safety.⁴³⁵

However, the courts needed to not only focus on privacy but also access to justice and public confidence in the justice system – in the view of Professor Karen Eltis at University of Ottawa – core values of the justice system. Additional exposure could, and did, deter potential litigants from pursuing legitimate cases, in her view.⁴³⁶ There was a fear, observed by one academic interviewee, that public information about an individual’s participation in a court process could affect their access to or cost of insurance policies, for example, if insurance companies were able to use algorithms to mine court data.⁴³⁷

Such fears are not purely hypothetical: the provincial court in BC has reported claims of how its online data services were being used for criminal record checks by employers and landlords, with an undue effect on those acquitted of charges, before some online records were restricted.⁴³⁸ A case in Alberta concerned a member of the public’s wish to access listings data for the purposes of commercial sale via the internet; the Alberta Court of Queen’s Bench upheld the Attorney General’s refusal to supply such listings, noting that the ‘mischief which could be created by allowing ready public access to the names of unconvicted’ could be easily imagined.⁴³⁹

We gathered a divergence in views, from those who questioned the value in wholly-open justice (in tribunals, for example), to those who were more sanguine about accessibility of personal data in records. Among those questioning traditional approaches to open justice, Darin Thompson, one of the architects of BC’s Civil Resolution Tribunal, shared his view that the courts’ approach to the question of openness is ‘too blunt and overreaching’ and based on tradition rather than rationality; he is interested in more ‘surgical and practical applications’ that recognise, as he argues in a draft paper, ‘most or nearly all of the private information in court records may not need to be there in the first place for judicial purposes or to support the openness principle’ (after all, he told us, 99% of BC Supreme Court civil cases never make it to trial and therefore do not necessarily need to be open to full scrutiny). Further, as he explores in the paper, technical solutions could be found to ‘segregate different types of information that would then be associated with levels of access, keeping private information hidden from public view’.⁴⁴⁰

While sympathetic to the legal principle of open justice and in favour of more rather than less access to justice data, Vermeys also contends that technology can help strike a balance between transparency and privacy.⁴⁴¹ Rejecting the notion that ‘practical obscurity’ can be revived in digital environments, he argues that ‘technology is actually better suited to [achieving a balance] than paper documents’;⁴⁴² access to a document can be controlled by means of a ‘restricted view technique’ such as blanking text, for example, or to ‘set constraints on consultation periods, to block aggregation tools, or to simply limit research functions within certain types of documents’.⁴⁴³

435 For example, see: Bailey and Burkell (n 295); Vermeys (n 300).

436 Eltis (n 301); Interview with Karen Eltis (20 July 2020).

437 Interview with Nicolas Vermeys (26 June 2020).

438 Office of the Chief Judge (n 349).

439 Alberta (Attorney General of) v Krushell (2003) ABQB 252 CanLII (Court of Queen’s Bench).

440 Interview with Darin Thompson (22 June 2020) speaking in a personal capacity; Darin Thompson, ‘Working Paper: Rationalizing Openness: Access to British Columbia Court and Tribunal Records in a New Era of Technology and Privacy’.

441 Interview with Vermeys (n 437).

442 Vermeys (n 300) 142.

443 *ibid* 138.

It was also emphasised that investment is needed in better systems for privacy management at source, rather than expecting third-party publishers (including not-for-profit organisations of limited means) to solve the issues. CanLII's CEO and President urged for some sort of 'safe harbor' protection in law for publishers of legal information. As he and others have argued, it is unreasonable to expect non-state actors to assume all the risks of wider distribution, and privacy issues must be managed at the source of the information.⁴⁴⁴

One part of the problem is the personal data that is captured in court records; to address this, Khan suggests that courts and publishers could remove personal information – superfluous to the administration of justice – instead of limiting access to decisions, bulk downloading, and content scraping.⁴⁴⁵ Professor Eltis, while not calling for anonymity across the board, also questioned why certain personal information was included in public documents for the purposes of administration of justice.⁴⁴⁶ This is where there could be a difference in view within the media industry and among journalists; as discussed above (see 4.1. Background), personal details are often seen as crucial to the reporting of a case and the delivery of open justice, and efforts to further restrict them may be resisted.⁴⁴⁷ Such a viewpoint is evident in reported responses by the media and representative organisations to the decision of the Provincial Court of BC to continue some degree of restricted access to certain online criminal case records following a public consultation in 2015.⁴⁴⁸

Data gaps

Case level data

We identified some common patterns in the distribution of case level data in Canada: although the COVID-19 pandemic has pushed many courts to accepting documents electronically, and to use remote court technology, many courts still rely on paper-based system – within the federal as well as provincial courts. This means that in some courts, users must physically travel to a particular court to access the documents to which they are entitled; a situation that is 'unacceptable' according to the Federal Court's senior judges.⁴⁴⁹ The lack of consistent and complete electronic records also inhibits the development of data analytics and therefore the understanding of systemic patterns and issues, as identified by the various access to justice collaborative initiatives and academic projects around the country.

Access issues to case level data is worse in the tribunals, as illustrated by The Toronto Star's campaigning reports and legal challenge to access provisions in the Ontario tribunals. As mentioned, tribunals sit outside the courts system and therefore different access principles and systems apply. The advent of wholly-online systems, however, provide an opportunity to develop a transparency and privacy protocol from scratch, without the legacies that burden the traditional courts and tribunals; the Civil Resolution Tribunal in BC provides a best practice example here, with an accessible and orderly policy, documenting the data types it holds and access permissions. Professor Katie Sykes, whose team at the University of Victoria is researching users' experiences of the CRT, noted that one survey respondent had found it useful to have all the CRT decisions easily accessible online and 'written in plain language'.

444 Interview with Xavier Beauchamp-Tremblay (29 June 2020); par Xavier Beauchamp-Tremblay, Pierre-Paul Lemyre and Ivan Mokanov, 'Innovation Juridique et Données : La Responsabilité Des Sources' (d'Options politiques, 1 February 2019) <https://policyoptions.irpp.org/fr/magazines/february-2019/innovation-juridique-et-donnees-la-responsabilite-des-sources/> accessed 9 August 2020.

445 Khan, 'Working Paper: Deliberate Design: Why Judicial Independence Likely Requires It' (n 433) 50; Interview with Khan (n 433).

446 Interview with Eltis (n 436); Eltis (n 301).

447 See, for example, Jobb (n 283) 200, 238.

448 Sunny Dhillon, 'Restrict Online Access to Court Cases Not Resulting in Conviction, B.C. Judge Says' theglobeandmail.com (1 April 2016) <https://www.theglobeandmail.com/news/british-columbia/restrict-online-access-to-court-cases-not-resulting-in-conviction-bc-judge-says/article29602849/> accessed 9 August 2020.

449 Federal Court Canada, 'Federal Court Strategic Plan 2020-2025' (n 257).

Court user data

Additionally, the tribunal has incorporated methods for user data collection from the beginning, in contrast with traditional courts. Sykes has struggled to access baseline court data with which to compare the process in the CRT. Although some statistical information is available, there is a time delay in its publication, meaning that it is impossible to know what has happened to caseloads during the COVID-19 period, for example. ‘Accessible data is important to open justice and improving the system’, in her view, even if individual tribunal users may be more concerned with their individual case and less interested in systemic issues.⁴⁵⁰

The deficit of court user data emerged in the literature and in interviews as a major concern at provincial and federal levels; although there are commendable efforts to provide anonymised statistical data on court activity (e.g. through the BC court data dashboard, and the Department of Justice website), there is scope for better collection of court user data by legal service providers, and more nuanced and timely publication of datasets: a need that justice data commons stakeholder initiatives in BC and Saskatchewan would address. More generally, Khan believes there should be ‘more data readily available to increase the chance of legal analytics and empirical legal research’ as part of a legal data commons, given that Canadian researchers have ‘hardly any pre-existing, public, open-source data sets in formats amenable to statistical analysis or data modeling’.⁴⁵¹ In his view, all Canadian courts should partner to design a ‘comprehensive, unified data program’.⁴⁵²

Public engagement

One notable feature – though outside this report’s direct interest – was the emphasis of many justice and court service websites on public engagement, with a variety of outreach initiatives, such as judicial public engagement and public court tours, and BC’s Clicklaw resources explaining the justice system to public users. This type of resource could help both build public confidence in the justice, but also efficiency, if users better understand how the system works.

Digitisation and innovation

The court websites surveyed for the case studies were somewhat outdated in design and often difficult to navigate effectively. The government justice resources – e.g., in BC and at federal level – were more modern in design and accessible. This is probably explained by the points about deficiencies in funding, explained above, but also the decentralised nature of the justice system, with its divisions in responsibility between judiciary and executive. To some extent the deficiencies of online resources and systematic data provision have been addressed by independent initiatives, such as the creation of CanLII, primarily sustained by the law societies; and now emerging work on ‘justice data commons’ project in BC and Saskatchewan. However, it is possible for a court or tribunal to take its own innovative approach; for example, BC’s Court Services Online provision of electronic access to some court documents, and the CDT in BC shows how a tribunal can help users navigate legal resources effectively, with better site design, navigation tools and user materials.

450 (n 383).

451 Khan, “‘The Life of a Reserve’: How Might We Improve the Structure, Content, Accessibility, Length & Timeliness of Judicial Decisions?’ (n 417) 107.

452 Khan, ‘Working Paper: Deliberate Design: Why Judicial Independence Likely Requires It’ (n 433) 49; Interview with Khan (n 433).

In terms of the culture of technological development, one longstanding expert and legal technologist in the field and former CEO of CanLII, Colin Lachance, feels that early innovation, such as the creation of CanLII 20 years ago, could be a contributory factor in a lack of technological development in recent years and a culture of ‘complacency’. In his view, there is a ‘calcification’ of some other elements of the justice data system; ‘CanLII has led most people to assume there isn’t a problem, that access is great’. But in the past four or five years, ‘more and more people are waking up’ to the obstacles in the way of justice data use, asking “wait a minute if the data is there, why can’t I do this, why can’t I do that, why can’t I do this list of innovative things I’m seeing in other jurisdictions?”⁴⁵³

In view of this, Lachance is setting up a new not-for-profit venture, the ‘Legal Innovation Data Institute’ (LIDI), that will offer bulk data for re-use to its members and collaborators. Launched in September 2020, it will operate a data trust on behalf of LIDI members and research partners (the ‘LIDI Data Trust’). The founding members include legal publishers, machine learning tech companies and a translation firm. The organisation’s objectives aim to improve legal education, advance legal analysis, and enhance access to justice. Its activities will include increasing the availability of bulk legal data, including primary law such as court and tribunal opinions, statutes, and regulations, as well as metadata, and application programming interfaces (APIs) for non-commercial and internal uses through partnerships with case law databases. It intends to collaborate on artificial intelligence (AI) techniques and other methods to develop tools; extract value and insights unachievable through traditional manual research and analysis methods; and generate further content and metadata.⁴⁵⁴ LIDI aims to advance public interest objectives in four areas: protection of personal privacy; data clean-up and normalization to accelerate innovation; development of free public legal apps; and advancing French language access to justice, innovation and legal artificial intelligence. At the time of writing, the website outlines the base collection that is available to its first members: judgments published by 43 Canadian courts over the past 30 to 50 years with case law metadata, including 200,000 case law headnotes and over 580,000 topic digests ordered using a legal research indexing system (the ‘Key Number System’).⁴⁵⁵

Covid-19: Challenges and Opportunities

Though reliable data is not yet available – if it will be at all – on the use of technology for court proceedings during the COVID-19 period, it is evident that many courts have moved to the use of remote technology for hearings,⁴⁵⁶ and have allowed more widespread use of e-filing. As the Chief Justice of the Ontario Superior Court of Justice told a remote event, ‘if there is one positive that is going to come out of this crisis [it] is that we have been forced, and the Ministry has been forced, to accelerate its plans on moving to electronic hearings and also electronic filings and we cannot go back’.⁴⁵⁷

453 Interview with Colin Lachance (16 July 2020); Also see, for example: Colin Lachance, ‘CanLII’s Future as a Canadian Primary Law Cooperative – Slaw’ (Slaw.ca, 10 December 2018) <http://www.slaw.ca/2018/12/10/canliis-future-as-a-canadian-primary-law-cooperative/> accessed 10 August 2020; Colin Lachance, ‘We Have Pizza, But How Will We Get Grilled Cheese?’ (Slaw.ca, 7 October 2016) <http://www.slaw.ca/2016/10/07/we-have-pizza-but-how-will-we-get-grilled-cheese/> accessed 10 August 2020.

454 Interview with Lachance (n 453) and in subsequent email correspondence.

455 ‘Legal Innovation Data Institute - About’ (lidi.ca) <https://lidi.ca/about/> accessed 8 December 2020.

456 Shea Coulson and others, ‘Litigating During COVID-19: Still Possible’ <https://mcmillan.ca/insights/litigating-during-covid-19-still-possible/> accessed 2 March 2021.

457 Amanda Jerome, ‘“Paper-Based System Is Not Going to Exist Anymore,” Chief Justice Morawetz Says of Post-COVID-19 Court’ (15 April 2020) <https://www.thelawyersdaily.ca/articles/18576/paper-based-system-is-not-going-to-exist-anymore-chief-justice-morawetz-says-of-post-covid-19-court> accessed 18 July 2020.

While there are existing and ongoing frustrations with technology development and data provision within Canada at federal and provincial levels, legal commentators and judges are perceiving a great opportunity for digital innovation and improvement of data methods, and therefore strengthening of the justice system. One interviewee, commenting on the opening up of public legal information, described how the pandemic has ‘blown out and revealed all the cracks in the system, and the inequity of access... [we now have] the opportunity to open it up’. Further, in her view, data ‘doesn’t have to be used as a sword. Ideally, we would have a legal culture where data is not viewed as a threat or a weapon, but rather a tool for learning and improvement for everyone in the justice sector. This can be achieved.’⁴⁵⁸

Perhaps indicating such a cultural shift, there appears to be increased attention on justice data in the latter part of 2020, with some developments possibly accelerated by the pandemic. In July 2020, the Canadian Association of Chiefs of Police and Statistics Canada announced that they would start collecting more data on race and Indigenous identity and the criminal justice system, following years of discussion.⁴⁵⁹ Additionally, a federal/provincial/territorial working group will report back to the Deputy Ministers on measuring the impact of COVID-19 on access to justice in family and poverty law matters.⁴⁶⁰

New considerations arise from these recent technological and data access developments, for example, the question of how public access is provided to remote hearings. Interviewees discussed the implications of access to synchronous and asynchronous recordings of proceedings; for example, for partially-restricted proceedings (via Zoom, for example) a member of the public would have to identify themselves, which they wouldn’t have to do in the physical setting; this has its own privacy issue for the observer: ‘when it’s online then there’s a trace of who you are’.⁴⁶¹

4.7 Summary

Although interviewees indicated frustration with slow technological development of court services and a justice ‘data deficit’ in Canada, this chapter has identified examples of best practice and inclusive approaches to justice system data at both provincial and federal level: publication of model and court policies, public consultation, and early innovation on open access to case law, for example. There is an interest among stakeholders, particularly those working on access to civil justice, for greater collection and use of court user data, and more systematic provision of court records. In terms of furthering this goal and opening up electronic access to court records, the literature reveals widely-held concerns about a detrimental effect on privacy and access to justice for court users, as well as tensions between judiciary and executive in securing adequate funding and preserving judicial independence. However, some practitioners and specialists working in this area perceive an opportunity for technological innovation to achieve a balance between legal principles of transparency and privacy.

458 Interview with Blenkin (n 431).

459 Statistics Canada, ‘Collection of Data on Indigenous and Ethno-Cultural Groups in Canada’s Official Police-Reported Crime Statistics’ (15 July 2020) https://www.statcan.gc.ca/eng/about/smr09/smr09_106 accessed 5 December 2020.

460 Source: Representative of Department of Justice, Canada.

461 Interview with Vermeys (n 437).

5 Ireland

This last case study chapter provides an overview of justice system data in Ireland. It follows the same structure as the previous two case studies, beginning with the legal context, before moving on to a review of each jurisdiction in turn, and finishing with a critical appraisal of justice system data management in Ireland.

5.1 Background

Ireland has a common law legal system which is, on the face of it, a more straightforward proposition than either of our previous two case studies, Australia or Canada, in that it is not a federal system. The court jurisdictions in Ireland consist of the Supreme Court, the Court of Appeal, the High Court, the Circuit Court, the District Court and the Special Criminal Court.

The Supreme Court, as the highest court in Ireland, is the court of final appeals. It has appellate jurisdiction on constitutional matters, including the constitutional review of Irish legislation. Ireland's 'additional' appellate court, the Court of Appeal, has been in existence since 2014. It creates a new jurisdictional tier between the High Court and the Supreme Court. It was established to clear the backlog building up behind the Supreme Court, and its main function is to hear appeals from the High Court, both civil and criminal. The High Court is based in Dublin and sits as both a criminal court (the Central Criminal Court or the Special Criminal Court) and a civil court. For civil matters, it hears cases where the claim exceeds €75,000 (€60,000 in personal injury cases).

For criminal matters, the Central Criminal Court tries the most serious offences such as murder and rape, which the Circuit Court does not have jurisdiction to hear. The Circuit Court is organised on a regional basis. It deals with civil cases that do not meet the High Court €75,000 threshold and it deals with all but the most serious criminal cases. The Circuit Court also hears appeals from the District Court (civil and criminal). Finally, the lowest court, the District Court, is organised on a local basis throughout the country. It deals with minor civil actions (below €15,000) and minor criminal matters.⁴⁶²

Open justice principles

A recent judgment handed down by Mr Justice Hogan confirms the importance of open justice principles in Ireland:

The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse... 'the public are entitled to have access to documents which were accordingly opened without restriction in open court'.⁴⁶³

As this judgment suggests, and as with our other two case studies, the common law starting point in Ireland is that civil and criminal courts are open to the public. Furthermore, open justice has a constitutional footing: Article 34.1 of the Irish Constitution states that 'justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public'.⁴⁶⁴ The main derogations from open justice principles are set out in section 45, Courts (Supplemental Provisions) Act 1961. These relate mainly to the sorts of exemptions that are set out in the previous chapters, namely family proceedings, confidential trade secrets and so on.⁴⁶⁵

462 For a diagram mapping the different jurisdictions, see Courts Service of Ireland, 'Courts Service Annual Report 2019' 17.

463 Allied Irish Bank Plc -v- Treacy (No. 2) [2013] IEHC 242 (21 March 2013)[22] <https://www.bailii.org/ie/cases/IEHC/2013/H242.html> accessed 24 June 2020.

464 'Constitution of Ireland' <https://www.gov.ie/en/publication/d5bd8c-constitution-of-ireland/> accessed 6 August 2020.

465 A reform initiative in the family courts has resulted in (limited) attendance by the media in family hearings to draw up and publish reports. See section 40, Civil Liability and Courts Act 2004, as amended by section 5, Courts and Civil Law (Miscellaneous Provisions) Act 2003.

In camera hearings

The two issues identified by Mr Justice Hogan in this extract from his judgment, however – the existence of ‘secret court hearings’, and access to documents which have been opened in open court – were flagged up by our interviewees as being points of concern. The Special Criminal Court was originally set up pursuant to Article 38.3 of the Constitution and section 41, Offences Against the State Act 1939. Article 38.6 exempts courts set up under Article 38 from the principle of open justice in Article 34; and section 4 is widely enough drafted to permit the court to make orders on hearing the case in private or to impose reporting restrictions as it sees fit. Professor Eoin O’Dell told us that ‘such orders are routinely made by the Court’.

The Special Criminal Court is now used for, among other things, the prosecution of organised crime, and does seem to be exactly the ‘system of secret court hearings’ warned against by Mr Justice Hogan above. The Courts Service Annual Report 2019 recorded 70 prosecutions in the Special Criminal Court in 2019.⁴⁶⁶ Justice Minister Helen McEntee has commissioned a review of the Special Criminal Court and told Senators that she is ‘fully committed’ to it.⁴⁶⁷ As the provisions for the Special Criminal Court have just been extended for another year, Minister McEntee expressed her support: ‘the renewal of these provisions sends a very clear message to those who wish to threaten or to intimidate that this State will not tolerate those wedded to violence or those who oppose peace, democracy and the rule of law’.⁴⁶⁸ The Special Criminal Court is unlikely to be disbanded any time soon.

Other recent developments are a cause for concern. In particular, a recent Supreme Court ruling set a precedent to the effect that ‘the court’s power to control its own powers must extend to departing from a hearing in public’.⁴⁶⁹ This is a recognition that the court has an inherent power to regulate its own proceedings which entitles it in certain circumstances to rule that a hearing must be held in camera, even where the usual circumstances for in camera hearings do not apply. In other words, the Supreme Court has added an inherent jurisdiction to hear in camera where it feels it is necessary. It is not clear yet what the repercussions of this decision might be.

Access to the court file

In relation to Mr Justice Hogan’s second point – the availability of documents that have been referred to in open court – there is conflicting messaging around access to the court file in Ireland. In theory, any member of the public should be able to go in person to the registry of the relevant court and request a copy of a document that has been referred to in that court. In practice, however, we have been told that this often simply does not happen. We come back to this in more detail in our court-specific section below, but as Professor O’Dell told us, the Mr Justice Hogan judgment referred to above is ‘honoured more in the breach than the observance ... I’ve heard it from three different practitioners complaining about judges who simply refused to allow them access to pleadings’.⁴⁷⁰

466 Courts Service of Ireland (n 462).

467 ‘Scoping Exercise under Way for Review of Laws Underpinning Special Criminal Court’ (Irish Legal News, 30 June 2020) <https://www.irishlegal.com/article/scoping-exercise-under-way-for-review-of-laws-underpinning-special-criminal-court> accessed 13 December 2020.

468 *ibid.*

469 *Gilchrist and Rogers v Sunday Newspapers Ltd* [2017] IESC 18 (23 March 2017) [45].

470 Interview with Professor Eoin O’Dell, Trinity College, Dublin (12 June 2020).

Data protection

The General Data Protection Regulation (GDPR) came into force across the European Union in May 2018. The Data Protection Act 2018 came into force in Ireland the day before the GDPR and, together with associated Statutory Instruments, made the necessary changes to the Irish data protection framework to ensure compliance with the new regime. These changes do not affect the judiciary or the courts, which continue to qualify for an exemption in order to protect judicial independence and judicial proceedings.⁴⁷¹ Article 23(1) of the GDPR lists allowed restrictions, which are broad, in essence ‘when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society.’ ‘The protection of judicial independence and judicial proceedings’ is specifically listed as an example of where the GDPR may be appropriately restricted.⁴⁷²

Courts at every level in Ireland make processing rules in respect of personal data,⁴⁷³ and provide for an ‘assigned judge’ to be the ‘supervisory authority’ for GDPR purposes.⁴⁷⁴ Courts are authorised to disclose personal data to the media ‘for the purpose of facilitating the fair and accurate reporting of the proceedings’.⁴⁷⁵ Furthermore, all court jurisdictions are allowed to make ‘material comprised in a court record’ available ‘to a party to the proceedings concerned (or their legal representative) or to another person, if applicable, where the practice of the court so permits’.⁴⁷⁶

Unlike most member states of the EU, court decisions are not anonymised unless so required by statute or directed by the court.⁴⁷⁷ Publications of judgments or decisions of the court and listings are exceptions under the GDPR and the Courts Service is right to conclude that there is no obligation under Irish data protection regulation to anonymise judgments.⁴⁷⁸ Cases heard in camera would be anonymised, and those in which it has been decreed by statute that the name of the victim may not be disclosed. Decisions which contain sensitive personal data may also be anonymised.

Right to know legislation

The Freedom of Information Act 2014 gives the public access to records held by a government department or certain public bodies, but it is a difficult and unwieldy piece of legislation. As with Australia, there is an exemption for the courts (in this case section 31) which gives Ireland (as Australia) a low RTI rating.⁴⁷⁹ The Courts Service, were, as is to be expected, wary of the FOI regime and told us that it ‘brought challenges’. This is because the Courts Service are comfortable that while proceedings are ongoing, they can claim the judicial authority exemption in section 31, but once proceedings have finished, they are subject to the FOI regime in the usual way, as a government body. Professor O’Dell told us that the Courts Service in general resist FOI requests and tend to rely on the section 31 exemption ‘strongly’ – the provision of justice data might thus not be well supported by the FOI regime.

471 Courts Service of Ireland, ‘Access to Court Records under Data Protection’ <https://beta.courts.ie/access-court-records-under-data-protection> accessed 23 June 2020.

472 *ibid.*

473 Section 159 Data Protection Act 2018 which allows for Statutory Instruments to be made regarding the processing of personal data by each jurisdiction.

474 Section 157 Data Protection Act 2018.

475 Irish Statute Book, ‘Processing of Personal Data Where Court Is Controller’ <http://www.irishstatutebook.ie/eli/2018/act/7/section/159/enacted/en/html#sec159> accessed 23 June 2020.

476 Irish Statute Book, ‘S.I. No. 658/2018 - Data Protection Act 2018 (Section 158(3)) Rules 2018’ <http://www.irishstatutebook.ie/eli/2018/si/658/made/en/print> accessed 24 June 2020 (emphasis the authors’).

477 Marc van Opijnen and others, ‘On-Line Publication of Court Decisions in the EU’ <http://bo-ecli.eu/uploads/deliverables/Deliverable%20WS0-D1.pdf> accessed 12 December 2020.

478 Interview with O’Dell, Trinity College, Dublin (n 470).

479 The Right To Information tracker is available at <https://www.rti-rating.org> accessed 5 August 2020. Ireland and Australia both score a low 1 (out of a possible 4) points due to the broad exclusion for judges and courts.

Open case law

The British and Irish Legal Information Institute (BAILII) was established by AustLII as a pilot project in early 2000 at the University College Cork School of Law.⁴⁸⁰ In October 2002, data was transferred to servers located at the Institute of Advanced Legal Studies (IALS) in London. By 2004 it had grown to over 50 databases covering most of the decisions from courts and tribunals in the United Kingdom and Ireland.⁴⁸¹ Digitisation of past years of United Kingdom and Ireland legal materials and of the most frequently-cited cases is ongoing, as are improvements to the BAILII search engine and user interface. A new website was launched in 2007, and a joint initiative with the Incorporated Council of Law Reporting for England and Wales (the ICLR) launched in 2012, linking for the first time the two services of those organisations to provide ‘a seamless delivery of context to the legal community’.⁴⁸² This improved functionality means that ICLR users can link to BAILII judgments and open them within the ICLR browser, and similarly BAILII users can link to the ICLR site if the BAILII judgment indicates an ICLR law report or a summary exists of the BAILII judgment in question on the ICLR site. BAILII continues to use the software and innovative search tools developed by AustLII,⁴⁸³ which keeps the intellectual property rights of those tools.⁴⁸⁴

BAILII continues to be hosted by the Institute of Advanced Legal Studies, London and the Law Faculty, University College Cork. Just as with AustLII, BAILII operates as a charity and is funded by a mix of organisations and individuals from the legal professions, universities and academic institutions, government agencies, organisations from business and industry, and courts, tribunals and regulators. Legal materials can be copied and used free of charge with attribution; although users are warned that BAILII, just as with AustLII, is not the copyright owner in the source documents that it publishes and is not therefore able to give permission for reproduction of documents.⁴⁸⁵ Furthermore, again just as with AustLII, BAILII is not a data repository, or re-supplier of source documents to other publishers, and also blocks automated collection from potential re-publishers for this reason.⁴⁸⁶

Additional, exclusively Irish (as opposed to British and Irish) functionality is offered by the Irish Legal Information Initiative (IRLII) which was established in 2001 and re-launched in 2019, at University College Cork’s School of Law. An ‘initiative’ rather than an ‘institute’, IRLII is currently run by a team of student researchers, one of whom explained to us that once BAILII has published an Irish judgment, an IRLII researcher reads the case, summarises key words for that case and then provides a link to the original BAILII judgment on the IRLII website.⁴⁸⁷ IRLII does not have additional research or re-publishing functionality.

Reform

Finally, it is worth pointing out that that courts in Ireland are going through ‘substantial technological reform’ at the time of writing. This reform, which had an unanimously positive reception from everybody we spoke to, is being driven by the energetic new Chief Justice Frank Clarke,⁴⁸⁸ and the new CEO of the Courts Service, Angela Denning. Specifically, the Change Programme Office (which sits within the Strategy and Reform Directorate) is managing a five-year reorganisation and reform programme looking at radically changing the approach to management of court data. While our interviewees told us that this reform is much needed – that the functionality of many of the jurisdictions in Ireland (including the Court of Appeal and the Supreme Court) are in need of improvement – there is no doubt that reform, when it is complete, will dramatically improve access to justice data in Ireland.⁴⁸⁹ This chapter now examines the access to court data arrangements in selected Irish courts, before coming back to the question of reform in the critical appraisal section at the end of the chapter.

480 BAILII, ‘BAILII - The First 20 Years’ <https://www.bailii.org/bailii/timeline/> accessed 12 December 2020.

481 *ibid.*

482 *ibid.*

483 BAILII, ‘About BAILII’ <https://www.bailii.org/bailii/> accessed 12 December 2020.

484 BAILII, ‘Reproduction and Copyright’ <https://www.bailii.org/bailii/copyright.html> accessed 12 December 2020.

485 *ibid.*

486 *ibid.*

487 Interview with Luke Noonan, IRLII, UCC School of Law (10 June 2020).

488 Interview with Gavin Sheridan, Founder and CEO, Vizlegal (20 May 2020).

489 Interview with Laura Butler, Head of Legal Research and Library Services, Courts Service of Ireland (15 July 2020).

5.2 The courts of Ireland

The Courts Service is part of the Department of Justice but also a separate body corporate established by the Courts Service Act 1998, with a statutory mandate to assist the courts with the collection, processing and publication of justice data. Ireland therefore operates a partnership model of governance with the board consisting of a mix of the judiciary (the chief justice and the heads of all jurisdictions of courts), and representatives of the Department of Justice.⁴⁹⁰ The specific functions of the Courts Service are set out in section 5 of the Act and are to manage the courts, provide support services for judges, maintain court buildings and provide facilities to court users and to ‘provide information on the courts system to the public’.

The Courts Service has a media relations office with a nominated media relations officer. The media relations office deals with approximately 10,000 press queries each year, on matters ranging from policy, information on court cases, research for journalists’ pieces, and the context for practice directions and rules.

Supreme Court

The Supreme Court website is in essence a landing page which directs users to the Courts Service website. With the exception of this Supreme Court landing page, the different court jurisdictions in Ireland do not have their own websites: their online presence is limited to a section of the Courts Service website. Listings for all the courts (bar the lowest court, the District Court) are published by the Courts Service on the ‘Legal Diary’ section of the Courts Service website and posted at 5pm the day before. The website has good search functionality and it is possible to search by date, or by case name.

Access to the court file

There is little information on the Courts Service website about access to administrative or case level data in the Supreme Court. There is a paragraph (confusingly in the section on data protection) which states:

Court records are under the control of the judiciary. Access to certain court records may be given to the parties concerned or their legal representatives. Persons seeking access to court records should contact the court office where the case was heard. The court office staff will explain the procedures which apply.⁴⁹¹

It is therefore not clear how you apply for access, if and why access might be denied, or how some groups may be favoured over others. As indicated by the text above, access to court records is, in general, limited to the parties and their legal representatives.⁴⁹² Any copies of documents required can be applied for through the Office of the Supreme Court, and contact information for the Office of the Supreme Court email account is provided on the website.⁴⁹³ One important exception to this is that in the Supreme Court, thanks to an initiative introduced by the former Chief Justice Susan Denham, it is possible to apply for copies of ‘written submissions lodged in or transmitted to the Supreme Court Office or handed in on or after 7 October 2013’ on payment of a fee.⁴⁹⁴

Further restrictions have been imposed since evidence of file tampering took place in a matter before Mr Justice Kelly in 2018. Mr Justice Kelly, having concluded that it was likely that a court file had been interfered with and that two different versions of one order could not or should not be present on the one file, ruled that ‘the procedure by which High Court files may be inspected in an unsupervised fashion and where they are open to being interfered with is completely unsatisfactory’.⁴⁹⁵ Supreme Court practice direction SC20 was issued as a result. It says:

490 Part III, Section 11 Courts Service Act 1998.

491 Courts Service of Ireland (n 471).

492 Interview with James Finn, Courts Service of Ireland (9 June 2020); Interview with Butler, Head of Legal Research and Library Services, Courts Service of Ireland (n 489).

493 Interview with Finn, Courts Service of Ireland (n 492).

494 Courts Service, ‘Practice Directions/Supreme Court:SC15 – Written Submissions’ <https://www.courts.ie/content/written-submissions-0> accessed 24 June 2020.

495 Michael and Thomas Butler Ltd & ors v BOSOD Ltd & ors [2018] IEHC 702 [67].

The purpose of this practice direction is to safeguard the integrity of court files maintained in the offices of the Supreme Court and the Court of Appeal and the Central Office of the High Court. This practice direction arises in the context of the judgment delivered in the High Court (Kelly P.) in *Michael and Thomas Butler Ltd & ors v Bosod Ltd & ors*. The files maintained in the aforementioned offices of the Superior Courts shall not be made available to any person attending at any of those offices. For the avoidance of doubt this includes the parties to the proceedings and the solicitors on record. Nothing in paragraph 2 of this practice direction shall preclude the provision of a copy of a document of a file to a solicitor on record or a part of the proceedings where not legally represented upon payment of the relevant fee.⁴⁹⁶

In some ways these developments – the suspected ‘file tampering’ and the ensuing protective and ‘closed’ practice direction SC20 – illustrate how much of the higher courts’ business in Ireland is still conducted on paper. The Courts Service of Ireland told us that ‘most of our information and our data is paper based, very little of it is online or soft copy’.⁴⁹⁷ The physical ‘court file’, in other words, plays a more important role, possibly more than in other jurisdictions we have looked at, and this has repercussions for open justice. The introduction of consistent electronic document management systems across the jurisdictions that is being considered as part of the five-year reform programme referred to above will go some way to addressing this. COVID-19 has impacted on this process and there is now a facility for online filing in many circumstances.⁴⁹⁸

Judgments

All Supreme Court judgments are handed down (not *ex tempore*). Judgments of the Supreme Court are public documents that are available online. Once written reasons are released, there is a good working relationship between the Courts Service and the judiciary. The Courts Service manages the process through which the judgments are, post-delivery, made available. The Courts Service works with judges, for example, to make their written reasons consistent from a style perspective. Once the judge has signed his or her written reasons (which usually happens the day the judgment is delivered), the Office of the Supreme Court checks the details and then posts it on the website, either the same day or within a few days.

Judgments also get published on the BAILII website, and, as explained above, from there onto the IRLII website. Commercial publishers, like elsewhere in the world, do not play a role in this process, but they are free to use and re-use decisions that have been published on BAILII. Reproduction of court decisions and published judgments by BAILII/IRLII is allowed free of charge on licence, as long as the Courts Service are acknowledged as the source and owner of copyright.⁴⁹⁹ As stated above automated and/or bulk downloads are blocked.

A recent decision by the Courts Service to revert to using PDF files for publication of judgments (rather than HTML) has met with criticism, because this affects the ease with which the information contained within the decision can be accessed. One interviewee pointed out that this was probably a mistake, and that such mistakes are usually a result of misunderstandings about accessible formats rather than any proprietary intent on the part of the Courts Service. The identifying metadata used by the Courts Service was also found by our interviewees to be a problem – they told us, for example, that (unlike with BAILII) the architecture of the database means that it is difficult to get a stable URL for a specific High Court record.⁵⁰⁰ A process is underway to improve this.⁵⁰¹

496 Supreme Court Practice Direction SC20 Access to Court Files in the Superior Courts.

497 Interview with Butler, Head of Legal Research and Library Services, Courts Service of Ireland (n 489).

498 *ibid.*

499 The Courts Service of Ireland, ‘Re-Use of Information’ <https://www.courts.ie/re-use-of-information> accessed 13 December 2020.

500 Interview with O’Dell, Trinity College, Dublin (n 470).

501 *ibid.*; Interview with Sheridan, Founder and CEO, Vizlegal (n 488).

Recordings

As with all Irish courts, the hearings in the Supreme Court are recorded. The Digital Audio Recording (DAR) system was introduced in 2000. The Courts Service explained to us that courts do not sit until the DAR (which is operated by the registrars for each courtroom) has been started, and that there is functionality for recording who is speaking. DAR are stored by (and are the property of) the Courts Service.

The Supreme Court also makes some audio-visual recordings, and is pioneering a new 'live streaming' approach; the first live delivery of decisions took place last year and was streamed live on television. This has happened a few times since: as one researcher told us 'we don't get to see the legal arguments, we just get to see the judges delivering the judgment, but this is an important step'.⁵⁰²

Court of Appeal

Access to the court file

Listings are managed by the Courts Service as set out above. There is no access to administrative or case level data online; it is necessary to apply to the Court of Appeal registry for access. Access to administrative level data should be given by the registry on application, but practice direction SC20 referred to above applies, so while requesting a specific document is possible, unsupervised access to a court file is not.

For case level data the situation is less clear cut. In the judgment quoted in the introductory section to this chapter, Mr Justice Hogan said that 'the public are entitled to have access to documents which were accordingly opened without restriction in open court'.⁵⁰³ In theory, then, any member of the public should be able to go in person to the Office of the Court of Appeal and request a copy. In practice, however, we have been told that, apart from the initiative by former Chief Justice Susan Denham in the Supreme Court, as described above, this often does not happen.

Accredited journalists can get permission to inspect case level data that has been referred to in open court (but not copy documents or take them away), and only if they apply in person to the registrar. The registrar has to be satisfied that the document in question was indeed referred to in open court. For researchers wanting access to case level data, the registrar also needs to obtain the authorisation of the President of the relevant court jurisdiction before it can be granted. Documents that are not referred to in open court are treated as 'closed', that is, available to the parties only. Documents that are closed are not available even to Courts Service employees, who do not have access to court files. As the Courts Service explained to us, 'Only officers of a court office are entitled to have access to that court's documents for the purposes of the administration and processing of papers on behalf of the court. Therefore, a Courts Service employee from a different court office or an administrative office would not have access to the records of a court or court office they did not work in'.⁵⁰⁴

Judgments

As with the Supreme Court, all written judgments are made available on the website, but the timing in the Court of Appeal is less certain. Researchers told us that there is no way of knowing when a judgment that has been delivered orally will be released. Some judgments are released the following day, some can take weeks, or even months. It is up to each individual presiding judge as to when he or she releases their written judgment. Some judgments do not get released at all.⁵⁰⁵

502 Interview with Noonan, IRLII, UCC School of Law (n 487).

503 Allied Irish Bank Plc -v- Treacy (No. 2) [2013] IEHC 242 (21 March 2013) [22] <https://www.bailii.org/ie/cases/IEHC/2013/H242.html> accessed 24 June 2020.

504 Interview with Finn, Courts Service of Ireland (n 492).

505 Interview with Noonan, IRLII, UCC School of Law (n 487).

High Court

Access to the court file

The High Court stands out from the other jurisdictions in Ireland because of its case tracking system known as 'High Court Search'. This makes a significant amount of administrative data accessible to all groups, free of charge and with no need to register. The High Court database goes back to around 1990 and contains about 520,000 cases. Searchable data include the names of parties, the names of solicitors of parties, documents filed (although not the contents of the documents) the outline details of the orders made, and whether a judgment relates to the case or not. The data are available in real time in so much as there is a 'big bulk update' at 11 pm each evening, which updates the system with all data entered by the registrars on that day. The position with regards to case level data is as with the Court of Appeal, above: it is necessary to apply to the registrar in person, who has to make sure that the document has been referred to in open court. Practice direction SC20 applies.

Judgments

All written judgments are published on the Courts Service website. Not all High Court cases, however, conclude with a written judgment.

Lower courts

Listings are displayed on the Courts Service website for the Circuit Court. Otherwise it is necessary to apply in person to the registrar of the relevant courthouse. For District Courts listings it is still necessary to go to the courthouse where the listings are displayed in the entrance to the courthouse on the day (and only on the day). Access to administrative data will usually be given in both Circuit and District Courts, but access to case level data will only be given if the document has been referred to in open court. This is decided on a case-by-case basis. No judgments for the Circuit Court or the District Court are made available because judgments in these courts are usually *ex tempore*. Recordings of judgments are rarely transcribed or published in the lower courts. Just as with the higher courts, only the parties to the case can request a transcript, and they have to make that request formally by a motion to the court: it is then up to the presiding judge whether or not to grant access. Charges for transcripts are the same as in the higher courts.

Court hearings and transcripts

As stated above, all hearings are routinely recorded using the DAR service. The Courts Service conducts procurement exercises from time to time and has an officially appointed transcription service (currently Gwen Malone Stenography Services). Access to the DAR is restricted to parties; technically the media could apply to the presiding judge for permission, but the Courts Service explained to us that this would, in all likelihood be refused as it would be seen to be interfering with the work of the court reporter. Permission to access is generally only sought (and granted) if parties are seeking clarification of an order, or if they are looking for grounds to appeal the judgment. In any event there is an onus on the applicant to give a legitimate reason for the request. The applicant must pay the cost of the transcription which is approximately €200 per hour of audio recording.

5.3 COVID-19

Use of remote technology was rare pre-COVID-19: it was used to allow overseas witnesses or experts to appear in court via video link, but that is all. Innovation as a result of the COVID-19 pandemic was dramatic. As elsewhere in the world, the courts have struggled because the time frame has been so short, and they have had to accomplish more within a tight time frame than they had planned for.⁵⁰⁶ The courts used a video conferencing-based system which worked with the Courts Service system, and at the time of writing nearly 700 judicial hearings have taken place successfully in this way.⁵⁰⁷ In theory, the official COVID-19 position was that hearings remained open, and some hearings continued to be held physically in open courtrooms, right through lockdown. Open access was possible in all courts who ‘are doing a really great job of keeping things going’.⁵⁰⁸ Access was provided by emailing the registrar, or by going to the courtroom where the hearing was displayed on screens. We heard from the Courts Service that in June 2020, 40 summer interns completed an internship programme at the Court of Appeal and Supreme Court, and all 40 (20 from around the world, 20 based in Dublin) successfully logged into Court of Appeal and Supreme Court cases. It seems, then, that the Higher Courts in Ireland provided more reliable access to remote proceedings than many of the other courts discussed in this report.

Other jurisdictions in Ireland that have moved online, however, have not necessarily been as open to members of the public – some have been effectively closed. Exceptions were made for accredited journalists. The Courts Service explained to us that:

Remote access was designed primarily for the parties and their representatives; also, in order that court proceedings might be reported to the public, members of the media are provided access to remote courts on request. Request for remote access from non-participant observers are considered and may be granted. Any such application will include an undertaking not to record or broadcast the proceedings.⁵⁰⁹

One concern was that the technology did not allow for ‘one-to-many’ system control, so there would be no way to ‘mute’ a member of the public who intervened inappropriately, for example. We certainly heard anecdotal accounts of practitioners being told not to share access links with members of the public due to technology limitations.⁵¹⁰ One interviewee explained to us that the courts use Pexip (which uses Zoom) and whatever implementation they used did not initially allow for passive non-participant observers. We were told that this has been a teething problem in many places thus far but that it will hopefully be resolved in due course.⁵¹¹ Concerns have been raised that hearings that are effectively closed in this way are unconstitutional: as one interviewee said to us, ‘you can’t be having secret trials’.

Some courts allowed open access to remote hearings for members of the public to the extent that it was ‘feasible’. People wanting access emailed the court office, and the request then needed to be approved by the presiding judge. The Courts Service explained to us that, mostly, this has been feasible as most of the requests that came through have been from researchers. The ability to accommodate members of the public was limited from a technical perspective.

506 Interview with Gavin Sheridan, Founder and CEO, Vizlegal (n 488).

507 A&L Goodbody, ‘Covid-19 Prompts Welcome Litigation Reforms’ (2020) https://www.algoodbody.com/files/uploads/news_insights_pub/COVID-19_prompts_welcome_litigation_reforms.pdf accessed 12 December 2020.

508 Interview with Butler, Head of Legal Research and Library Services, Courts Service of Ireland (n 489).

509 Interview with Finn, Courts Service of Ireland (n 492).

510 Interview with Sheridan, Founder and CEO, Vizlegal (n 488).

511 *ibid.*

Court user information

Some basic data on case traffic by jurisdiction is recorded in the Courts Service Annual Report.⁵¹² Other than that, access to court user data is not currently possible. While there is a recognition at a high level that ‘there is so much information that we could use and leverage’ there is simultaneous recognition that ‘even accessing very simple information can be very difficult’.⁵¹³ As with the other jurisdictions under review, the data collected is limited, and does not include any information relating to protected characteristics, for example. Data is stored on the court’s data management system but collection is patchy: different courts use different systems, most of which were not designed with the collection of court user information in mind. Some systems are still paper based which means that the data cannot be extracted at all.

One researcher told us of a FOI request that he made to the Courts Service with regard to a piece of new legislation that he was tracking. He wanted to know how many times orders had been made under a particular section. The Courts Service could not comply with the request because the records were all on paper – the researcher was told that the only way he could find the data he wanted was by going through all the case files held by the Courts Service for the period in which he was interested by hand.⁵¹⁴ The Courts Service confirmed that, explaining that firstly, they don’t make use of court user data, and secondly ‘most of our information and our data is paper based, very little of it is online, soft-copy based so to actually collate information and develop statistics is very difficult’.⁵¹⁵ Furthermore there is no consistency between jurisdictions – or indeed circuits within jurisdictions – so ‘it just depends on which office you are in as to the methodology that you use, even as to the IT systems that you have: different systems are in different places, so because of that you can’t just run a statistical analysis programme or anything like that.’⁵¹⁶

Accountability mechanisms

Ireland has a central Customer Comments Coordination Office which manages complaints received about court staff or services. The Courts Service Annual Report 2019 makes a brief reference to complaints received during the year: ‘there were 76 valid customer complaints received during 2019 all of which were processed and completed in accordance with the complaints procedure’.⁵¹⁷ This brief reference to complaints process raises more questions than it answers (What is the validity filter? What is the complaints process?) but still compares favourably with the annual reporting in Victoria, Australia, for example, where complaints are not mentioned in the annual report at all.

As far as complaints about the judiciary (rather than Courts Service staff or process) are concerned, a Judicial Council has recently been established ‘to promote judicial excellence and independence to ensure public confidence in the administration of justice’.⁵¹⁸ Established by the Judicial Council Act 2019, a key part of its mission is to ‘achieve public confidence in the administration of justice’. It is very early days for the Council which has only met once, but the Judicial Council Act allows for the registrar of a court to refer complaints to the Judicial Council Conduct Committee for review. Allowing for judicial conduct to be scrutinised in a more public way is likely to build confidence in the public perception of the independence of the judiciary. It may also provide a mechanism for holding the judiciary to account on open justice principles; as one academic said of the development: ‘It will now be possible to complain that a judge has overstepped his or her function. Not respecting their constitutional obligations or their obligation to uphold justice in public will be an example of the kind of complaint that is likely to be made.’⁵¹⁹

512 Courts Service of Ireland (n 462).

513 Interview with Butler, Head of Legal Research and Library Services, Courts Service of Ireland (n 489).

514 Interview with Noonan, IRLII, UCC School of Law (n 487).

515 Interview with Butler, Head of Legal Research and Library Services, Courts Service of Ireland (n 489).

516 *ibid.*

517 Courts Service of Ireland (n 462).

518 Judicial Council website available at <https://judicialcouncil.ie> accessed 2 July 2020.

519 Interview with O’Dell, Trinity College, Dublin (n 470).

5.4 Critical appraisal

As with our other case studies, in this final section we review the main themes relating to comparative factors discussed in Chapter 6, including judicial independence, public understanding and confidence and innovation.

Public understanding and confidence

Overall, the view from our interviewees is that the Courts Service do a good job with limited resources but also that there is room for further progress.⁵²⁰ Generally, and across jurisdictions, access to justice data is limited. Apart from listings, little is available online, so the ‘practical obscurity’ mechanism⁵²¹ operates to make access to any data, even administrative data, relatively time consuming and difficult. The lack of online guidelines (and the new ‘non-inspection’ regime in the superior courts further to practice direction SC20) adds to the impression of secrecy. Attendance at the registry office is necessary. Even with attendance at the registry, if a document has not been referred to in open court it is considered ‘closed’, and further to PD SC20, files cannot be inspected. Journalists note that their ability to report on cases is, due to the above restrictions, ‘severely limited’.⁵²² As one leading academic said to us, ‘if justice is administered in public then the infrastructure of publicity is definitely lacking at the moment. They are working on it but slowly.’⁵²³

It has been noted by the OECD that the level of citizen trust in public institutions has been a key policy concern in recent years.⁵²⁴ As has been pointed out, ‘trust in the justice system is important because it shapes the perceived legitimacy of the system’.⁵²⁵ Trust in the justice system has been defined as ‘the belief among members of the public that the justice system has the appropriate intentions towards them and is competent in the tasks assigned to it’.⁵²⁶ Gavin Sheridan, who runs a commercial legal technology organisation Vizlegal and spends much of his professional life extracting data from courts systems in Ireland for his clients, thinks that much of the difficulty arises from the fact that ‘court systems are not necessarily designed with members of the public in mind – they are designed for practitioners, and that is understandable – the court system is mainly used by practitioners. And there are traditional or historical reasons for why certain things work certain ways, but often these are not centred on how members of the public will use the system’.⁵²⁷ The public’s faith that the justice system has the appropriate intentions will be likely weakened when court systems are hard to navigate.

Certainly, the rules on access to court data right across the Irish jurisdictions are, at the moment, confused and confusing: difficult to find and contradictory when located. Procedural barriers of this type, in a digital age, compromise some of the key themes under review in this project. These obstacles have an impact on public perception of the accessibility of the legal system; and public understanding of, and confidence in, the law is affected detrimentally as a result.

Public engagement

Although outside the direct remit of this project, the Courts Service lists outreach work as one of its strategic priorities and its Annual Report lists an impressive array of outreach activity for 2019. The Criminal Courts of Justice in Dublin hosted over 6,000 students who had the opportunity to witness the courts in operation and participate in mock trials in real courtrooms. As mentioned briefly in our COVID-19 section above, the Superior Courts run an internship programme, which in 2019 hosted 23 law students from around the world. Courts Service Media Relations office also does outreach work, organising workshops, seminars and news days for trainee and student journalists, for example. This commitment to outreach work could help build citizen trust in the justice system. Maintaining good relationships with (and education sessions for) the media facilitates the fair and accurate reporting of cases, which in turn improves public understanding of and confidence in the law.

520 Interview with Sheridan, Founder and CEO, Vizlegal (n 488).

521 Discussed in Chapter 2 (page 13) and Chapter 6 (page 115).

522 Conn Corrigan, ‘Full Disclosure? Court Records and Data Journalism in Ireland’ (UCD Data Journalism Studio, 3 May 2018) <http://newslab.ie/ddjucd/full-disclosure-court-records-and-data-journalism-in-ireland/> accessed 5 August 2020.

523 Interview with O’Dell, Trinity College, Dublin (n 470).

524 Yvon Dandurand and Jessica Jahn, ‘Access to Justice Measurement Framework’ (International Centre for Criminal Law Reform and Criminal Justice Policy 2017) 17 <https://acesstojusticebc.ca/a2j-resources/> accessed 12 December 2020.

525 Mike Hough and others, ‘Attitudes to Sentencing and Trust in Justice Exploring Trends from the Crime Survey for England’ Ministry of Justice Analytical Series, 8.

526 *ibid* 11.

527 Interview with Sheridan, Founder and CEO, Vizlegal (n 488).

Innovation

Change is difficult, because ‘things have always been done that way’.⁵²⁸ What is interesting is that change is both difficult and happening – as is evidenced by the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 which formally acknowledges the jurisdiction to hold remote hearings, and suggests that it is expected that they will continue. The Act gives the chief justice and the presidents of the different jurisdictions the ability to direct that certain categories of proceedings can be heard remotely in their respective courts. Further, it allows parties to proceedings to apply for their matter to be heard remotely. Formal recognition of the recent changes in some courts’ practices to allow for electronic filing of documents demonstrates the willingness of the Irish judiciary to embrace technological reform.⁵²⁹

That further substantial, structural change is on the horizon was evident from our conversations with the Courts Service, whose five-year reform programme sounds innovative and potentially transformational.⁵³⁰ Initiatives that are under review include: making changes to the allocations of metadata at the beginning of a case to make it significantly easier to track cases right the way through the system; introducing a new virtual courtroom that would make document sharing possible in real time (so that documents could be viewed online as they were ‘opened’ in court); updating the High Court search tool to improve data consistency; introducing the High Court search tool right across the jurisdictions (higher and lower courts), so that the court user is met with a ‘singular system where you go in and you know what to expect, it doesn’t matter what jurisdiction you are in’.⁵³¹

The Courts Service Annual Report 2019 lists ‘optimising the use of technology’ as a strategic priority, with 70 IT infrastructure projects completed in 2019.⁵³² Finally, the Courts Service is in the process of moving across to a brand new website ‘to provide a platform to help transform the Courts Service’s digital presence’ and which will constitute one website for all jurisdictions in Ireland. We noted in our Australia case study how locating information across disparate websites can be time consuming and frustrating for the user. It could be that the Irish approach, which is being designed to be ‘mobile friendly and responsive on all the latest devices’⁵³³ resolves this.

5.5 Summary

In many ways it is a difficult time to draw any conclusions about the state of justice data in Ireland. Certainly, as things stand, the anachronistic (and, with the exception of the High Court, more ‘closed’) approach to access is in need of reform and improvement. Some areas of good practice stand out and Ireland’s centralised courts service has enabled Courts Service to locate all its listings across jurisdictions on one online platform. The establishment of a Judicial Council allowing for a degree of judicial scrutiny is likely to improve public perceptions of judicial accountability and independence. But even though reform and improvement are very much on the agenda, with one reform initiative underway, and a new courts website, it is not clear whether or not there has been a consistent and holistic consideration of justice system data management, including the privacy implications of digitisation and technological reform, a topic we return to in our final comparative chapter.

528 *ibid.*

529 A&L Goodbody (n 507).

530 Interview with Butler, Head of Legal Research and Library Services, Courts Service of Ireland (n 489).

531 *ibid.*

532 Courts Service of Ireland (n 462).

533 *ibid.*

6 Comparative analysis and conclusions

This chapter compares our findings in each national jurisdiction, identifying common themes and considering data approaches in each justice system against the research brief criteria. It identifies strengths and weaknesses in the case studies and makes concluding recommendations for future research and policy work.

6.1 Approaches to justice system data

How do other countries define ‘justice system data’? What are the categories they use to describe the different types of data generated by the justice system?

On embarking on this project, we did not know if ‘justice system data’ would be understood or interpreted similarly in each of the countries we were looking at. Even in the English context, there is variety in the way information relating to the justice system is described and understood. For the purposes of the study, we adopted the approach taken by Dr Byrom in her earlier ‘Digital Justice’ report,⁵³⁴ which had some similarity to the categories used by Townend for a working paper in 2019.⁵³⁵ This approach uses ‘justice system data’ to describe the information generated, collected, stored and disseminated in the course of the formal justice process. In Chapter 2 we described the categories of justice system data in some detail, but broadly speaking, they are: case level data (e.g. documents contained in the court file); administrative/management information data (e.g. listings, outcomes); primary legal data (e.g. written judgments); hearings data (e.g. transcripts and recordings); and court user data (e.g. court user and case characteristics).

We also identified that types of access to this data can be split into two main categories: (a) data collected for internal use by the relevant authorities (e.g. judiciary, court service, government justice department); and (b) data that may be released publicly, whether openly online or to a more restricted category, such as members of the media. However, data in the first and more restricted category may be shared more widely, with appropriate de-identification/anonymisation and security measures.

The initial literature search revealed that this approach to justice system data would prove useful for our three primary case studies of Australia, Canada and Ireland, where – probably as a result of the shared common law system – there are similar conceptualisations of data types. Though further research and our interviews revealed some variation in terminology (for example, some Canadian courts’ reference to ‘dockets’),⁵³⁶ it seemed relevant to continue to use our framework for the presentation and analysis of our findings. The category about which we discovered the least is ‘court user data’. Partly this was because it became apparent that many court services do not systematically capture such data, but also because we researched this question as outsiders to the systems. Though we talked to a number of court officials, we cannot say we have captured a complete picture of internal data management systems within the scope of this project. With the development of ‘justice data commons’ projects, under discussion in British Columbia and Saskatchewan, for example, more about court internal datasets may be learned and shared in the public domain in coming years.⁵³⁷

In Canada, many courts have a public access to court records policy, based on a model policy developed by the Canadian Judicial Council (CJC) in 2005.⁵³⁸ Court records described in such policies corresponded to several of the categories described above: the information in the court file including exhibits or evidence; administrative information such as listings; hearing recordings and transcripts. While Australia and Ireland do not have a model policy as such, their approach (as demonstrated by practice directions and instructions on court websites, and as articulated by our interviewees) is much the same.

534 Dr Natalie Byrom, ‘Digital Justice: HMCTS Data Strategy and Delivering Access to Justice’ (The Legal Education Foundation 2019) <https://research.thelegaleducationfoundation.org/blog/digital-justice-hmcts-data-strategy-and-delivering-access-to-justice> accessed 23 July 2020.

535 Judith Townend, ‘Towards a National Commitment to Open Justice Data in the United Kingdom’ (Spotlight on Corruption / Open Government Network 2019) <https://www.opengovernment.org.uk/wp-content/uploads/2019/10/Open-courts-final-October-2019-latest.pdf> accessed 23 July 2020.

536 See Glossary (page 123).

537 As we are seeing with the ADR UK project in the UK: ADR UK, ‘Data First: Harnessing the Potential of Linked Administrative Data for the Justice System’ (ADR UK) <https://www.adruk.org/our-work/browse-all-projects/data-first-harnessing-the-potential-of-linked-administrative-data-for-the-justice-system-169/> accessed 25 July 2020.

538 Judges Technology Advisory Committee, ‘Model Policy for Access to Court Records in Canada’ https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_AccessPolicy_2005_en.pdf accessed 14 July 2020.

Many courts in Canada have adopted security policies derived from the CJC’s Blueprint on the Security of Judicial Information, and almost all jurisdictions within Canada have appointed Judicial Information Technology Security Officers, as recommended in the blueprint.⁵³⁹ This blueprint delineates a more specific category of ‘Judicial Information’ – that is information ‘stored, received, produced or used by or for a Judicial Officer; or ‘information stored, received, produced or used by staff or contractors working directly for or on behalf of judges such as executive officers, law clerks, law students, judicial clerks or assistants’, further split into three categories: Individual, General and Personal. As discussed in Chapter 4, ongoing work by the CJC is considering a broader understanding of such information to reflect current practice and storage arrangements for judicial and court data.

In New South Wales, Australia, the Court Information Act 2010 (which has received Assent but which is not in force) divides justice data along the lines suggested in the introduction to this chapter – into two categories. The first category, ‘open access information’ is information that all groups have access to as of right, and the second category, ‘restricted access information’ where access is permitted, for example with the leave of the court. The justice data identified in the Act is consistent with the court records described in the Canadian public access to court records policy, namely court records (case level data) that are included in the court file, such as witness statements, exhibits and so on; administrative data such as the records that are filed by the parties (for example the originating process); and primary legal data/hearings data such as judgments and transcripts.

Separately, in all three of the common law countries under review, there is an understanding of court user data that has the potential to inform the design and development of the justice system. There is a widely-documented deficit in such data in Canada, Australia and Ireland. In Canada there are a number of emerging collaborative initiatives working on developing better metrics to monitor the process and experience of justice by court users. This data would typically be de-identified or anonymous; while the rationale for collecting and releasing such court user data may be different from the broader rationales for releasing public court records, public records could be used to help build court user experience datasets. Canada seems to be further ahead with these initiatives than either Australia or Ireland. In Australia there is a recognition that while court user data are collected by various jurisdictions, this is usually as part of the business of the court, and the case management systems used by courts often do not make extraction or analysis of this data a straightforward task. A similar position exists in Ireland, but the technological reforms underway might change this.

What arrangements are in place for making this data available to different stakeholders (public/press/researchers/private sector) and how are they financed? To what extent have other countries delegated the function of data dissemination to the private sector?

In Canada, each court is subject to a specific arrangement with federal or provincial level government, as to who has responsibility for data management. We identified the Supreme Court Canada as having the most independence and control for its data management, with an accord between judiciary and government in place for its financing arrangements.⁵⁴⁰ In the provinces, the government had more involvement in the handling of court data – for example, the role of Court Services Branch in British Columbia. Financing by government emerged as a major issue in several contexts (see below). User fees apply for some access to courts documents and data to cover administrative costs, though some resources are made freely available (e.g. electronic documents in the Supreme Court Canada). Justice statistics tend to be published by provincial or federal government. In New South Wales, Australia, funding has proved an obstacle to developing case level data services provided for by the inactive Court Information Act; with disagreement between the Attorney General’s Office and the courts as to who will pay for the measures it requires.

539 Martin Felsky, ‘Canadian Judicial Council Blueprint for the Security of Judicial Information - Fifth Edition’ (Canadian Judicial Council 2018) <https://cjc-ccm.ca/sites/default/files/documents/2019/Canadian%20Judicial%20Council%20Blueprint%20for%20the%20Security%20of%20Judicial%20Information%20-%20Fifth%20Edition%2C%202018.pdf> accessed 14 July 2020.

540 Supreme Court of Canada, ‘Accord to Strengthen the Independence of the Supreme Court of Canada’ (scc.csc.ca, 22 July 2019) <https://www.scc-csc.ca/court-cour/accord-justice-eng.aspx> accessed 28 July 2020.

Other financing initiatives included legal professionals, through the Law Societies in Canada, supporting the creation and continued sustainability of CanLII which publishes open access case law, legislation and legal commentary (using services and software provided by Lexum, a company which CanLII acquired in 2018). Lexum also provides software and services to many court services in Canada. In Québec, SOQUIJ, a self-funding organisation operating under the authority of the Québec Minister of Justice, publishes decisions from the judicial and administrative tribunals and provides other informational services (e.g. databases and newsletters) to its customers. Likewise, judgment data in Australia and Canada is provided via third-party services, including AustLII and IRLII/BAILII, which are reliant on hybrid funding.

In British Columbia, Canada, the British Columbia Courthouse Library Society (known as Courthouse Libraries BC) is funded by the Law Foundation BC (whose revenue derives from the interest on funds held in lawyers' pooled trust accounts) to provide public legal education (PLE) resources. Similar PLE initiatives are offered by not-for-profit organisations in other parts of the country. In Canada, private initiatives included a law firm's creation of an open access information resource for the Commercial List in Toronto, as well as commercial and (predominantly subscription-only) legal information services such as vLex, LexisNexis and Thomson Reuters. Such private legal information services also operate in Australia and Ireland. A system of private transcription by authorised providers exists for purchasing transcripts in many courts across Canada, Ireland and Australia.

Where have other countries placed different types of data on the open/shared/closed spectrum? Are these arrangements time limited e.g. closed until x date?

Typically in Canada and Australia (subject to exceptions described in Chapter 4 and 5), individual court records are accessible by members of the public and media, with access permissions for different types of data set out in court policies. This is not the case in Ireland, where in the Supreme Court, for example, it is necessary to apply to the registry office to understand access permissions and processes. Some courts in Canada have made more court documents available online, but many courts, including the Federal Court, still use paper-based registry systems as the main means of access. This has meant that the records are technically open, but difficult to access in practice, as a physical visit to a court is required. The same is true for the jurisdictions we looked at in Australia, with some courts (the High Court, for example) making court documents available online, and some (NSW) requiring visits to the court. Most courts in Australia use electronic court management registry systems, but this does not negate the necessity of a physical visit to a court to get access to documents. Ireland is in the process of moving to a more electronic court management system but at the moment only the High Court allows access to court documents online. Court decisions in all three of our case study countries are typically open and published online via court websites, CanLII/BAILII/AustLII or other providers.

However, the majority of court or justice system data is not open in any of our three countries, in the sense of open data (data that can be freely used, re-used and redistributed by anyone subject, at most, to the requirement to attribute and sharealike).⁵⁴¹ Court data in Canada, Australia and Ireland though open to public access may be subject to both privacy and copyright restrictions if re-used. In general, bulk data requests – for commercial or public purposes – are difficult to negotiate and would be subject to judicial permission, depending on the particular jurisdiction's policy and process. Even though CanLII/AustLII and BAILII, which all gather judgment data according to agreements with each court, offer access to judgments for free, they are not open datasets that can be used by third parties (for online search or analytic services, for example). Individual judgments may be reproduced, according to its terms, but not in bulk.

541 'What Is Open Data?' (Open Data Handbook) <http://opendatahandbook.org/guide/en/what-is-open-data/> accessed 20 July 2020.

Plans for ‘justice data commons’ in British Columbia and Saskatchewan (Canada) would allow increased research access to de-identified datasets originating in the justice system. The Department of Justice Canada has plans to increase public access to justice data through an open justice commitment in the next Open Government National Action Plan.

Time-limited contemporaneous data

For Canada, we also observed a number of ‘temporal’ controls, either limiting the time that contemporaneous data was publicly available, or by providing an embargo period for release via public archives.

For instance, many court lists are supplied on a daily or weekly basis, before the PDF document is removed from the court website. Another example of where time limits have been applied in an attempt to balance transparency and privacy is found in the Provincial Court of British Columbia, where – following a consultation on what extent to expand access to criminal case records online – the court decided to prevent electronic access to criminal case information regarding acquittals, dismissals and withdrawals after 30 days from the entry of the acquittal, dismissal or withdrawal; adult criminal case information regarding stays of proceedings after one year; and to information regarding peace bonds issued once the peace bond has expired on its terms.⁵⁴²

Archival arrangements

The Canadian Judicial Council’s Model Access to Court Records Policy⁵⁴³ briefly discusses the destruction of files, but not in detail; and the technological and data issues have developed significantly since its publication in 2005. In British Columbia (BC), court registries generally destroy files after 15 years, however court records categorised for permanent retention are transferred to the BC Archives at the end of their retention period.⁵⁴⁴ Policies can be found in the approved records schedule for Court Services. Prior to the 1980s, there were no record schedules, and there was variation in practice between each court, meaning there is inconsistency in what is available from the Archives.⁵⁴⁵

The Supreme Court Canada provides a recent example of where archival arrangements are set out clearly. As of 2016, the Court has an agreement in place to transfer ownership to Library and Archives Canada (LAC) of its case files older than 50 years; this includes Collegial files of the judges of the Supreme Court of Canada which will – after 50 years – provide the public with ‘insights into the inner deliberations of the Court’. The SCC ‘will continue to control its active case files and closed files until 50 years after a judgment has been rendered’, however.⁵⁴⁶

Good practice examples

In this next section, we identify selected examples of ‘good practice’ identified by interviewees and from the literature; i.e. those that were described by or in sources as commendable and positive initiatives. It should be noted that these assessments are not based on the application of any empirical measurement criteria. It should also be noted that some aspects could be improved and updated, and not all interviewees shared the same view on their usefulness. For example, some interviewees identified that data access policies were too restrictive in allowing third-party data use for research and analytical purposes. Nonetheless, we flag them here as efforts to produce a consistent and clear approach to justice system data, upon which future initiatives can be developed.

542 Office of the Chief Judge, ‘Provincial Court Post-Consultation Memorandum: Provincial Court Policy Regarding Criminal Court Record Information Available through Court Services Online’ <https://www.provincialcourt.bc.ca/downloads/Archive/Provincial%20Court%20Post-Consultation%20Memorandum%20-%20CSO%20Criminal%20Information.pdf> accessed 9 August 2020.

543 Judges Technology Advisory Committee (n 538).

544 ‘Court Documents at the Provincial Archives’ (Courthouse Libraries BC, 6 January 2020) <https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/court-documents-provincial-archives> accessed 11 August 2020.

545 Royal BC Museum, ‘Court Records Guide’ <https://royalbcmuseum.bc.ca/sites/default/files/sites/default/files/images/Work/Court-Records-guide.pdf> accessed 11 August 2020.

546 Library and Archives Canada, ‘Supreme Court of Canada and Library and Archives Canada Sign Agreement on Transfer, Preservation and Access to Case Files’ (bac-lac.gc.ca, 9 June 2017) <https://www.bac-lac.gc.ca/eng/news/Pages/2017/supreme-court-agreement.aspx> accessed 11 August 2020.

Australia

Table 3 Good practice examples – Australia

Initiative	Details	Link
Victoria Supreme Court 'Gertie's Law' podcast series	Innovative, engaging podcast series with high level buy-in from the most senior judiciary in Victoria. Helping the public access the judicial perspective by contextualising judicial work.	https://www.supremecourt.vic.gov.au/podcast
High Court of Australia transcript publication policy	The High Court of Australia publishes transcripts of all its hearings on its website.	https://www.hcourt.gov.au/publications/judgments/transcripts
Search tool 'Federal Law Search'	Allows for easy access to administrative data, providing a list of all court events, a list of documents filed by the parties, and so on.	https://www.fedcourt.gov.au/court-calaendar/check-progress-of-a-case
Introduction of 'Online File' in the Federal Court of Australia	In high profile cases the media liaison officer for the Federal Court posts an 'Online File' containing all publicly-available material for that case.	https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files
AustLII	The original LII – pioneering pan-Australian resource publishing judgments, legislation and commentary across Australian jurisdictions; open access; model now adopted around the world.	http://www.austlii.edu.au
Good listings functionality	All listings online for all courts in all jurisdictions.	
Audio/visual initiatives allowing greater visibility to court proceedings	Live streaming of selected cases from the Federal Court, audio/visual streaming of some hearings from the High Court, live streaming of judges handing down judgments in civil proceedings and sentencing remarks in criminal proceedings in Supreme and District Court in NSW.	
Judicial accountability	Good accountability mechanisms for judiciary, allowing for public scrutiny and a complaints process.	https://www.judicialcommission.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/04/5c/eb615db98/Judicial%20Commission%20of%20Victoria%20Annual%20Report%202018-19_Final.pdf
New South Wales Court Information Act 2010	Pioneering legislation with clear justice data definitions and boundaries as to access process. However, not yet in force.	https://www.legislation.nsw.gov.au/acts/2010-24.pdf
Media liaison officers	Existence of a media team in every court improves relationships between the court and the media, remit tends to be broad so improved access for general public, as well as media.	

Canada

Table 4 Good practice examples – Canada		
Initiative	Details	Link
CanLII	Pan-Canadian resource publishing judgments, legislation and commentary across Canadian jurisdictions; open access and primarily funded by the Canadian Law Societies. CanLII and Lexum (the software company that provides services to CanLII and was acquired by CanLII in 2018) have been involved in the development of judicial policies and guidance on legal information since the early 2000s.	https://canlii.org
National-level access to justice work on metrics - e.g. Canadian Forum on Access to Justice	Canada has a strong and extensive network of Access to Justice initiatives, with judicial support, at national and provincial/territorial level. While identifying many problems with 'metrics' for access to justice, there is work underway to remedy this, and network members' work is influencing and contributing to research by the Canadian government.	https://cfcj-fcjc.org/
Model Policy for Access to Court Records in Canada (Canadian Judicial Council, 2005)	An early initiative to identify types of court records and design a common policy that could be adopted by different courts. It involved external stakeholders, as well those internal to the justice system. It is still referenced today, though technology and data methods have moved on substantially since 2005. Many courts now have such policies in place.	https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_AccessPolicy_2005_en.pdf
Work by the Canadian Judicial Council on issues around privacy and court records; initially through Judges Advisory Committee on Technology and now through the ad hoc Technology Committee (since 2018)	The model policy built on an earlier report, and public/stakeholder consultation. In the mid-2000s the CJC published several resources discussing and advising on the issue of privacy and transparency in court records, including the use of personal information in judgments. Although the Judges Advisory Committee on Technology (JTAC) no longer exists in that form, a new committee on technology was formed in 2018, and is an ad hoc sub-committee of the Executive Committee, and is now working on new guidance for the handling of justice system data.	https://cjc-ccm.ca/en/resources-center/publications?date_sort=&page=1&category=6
Blueprint on the Security of Judicial Information (Canadian Judicial Council, 2018)	The blueprint is another initiative developed from work by the Judges Advisory Committee on Technology (JTAC) and is now in its 5th edition in 2018. As a result, many courts have adopted security policies derived from the CJC's Blueprint on the Security of Judicial Information, and almost all jurisdictions within Canada have appointed Judicial Information Technology Security Officers (JITSOs).	https://cjc-ccm.ca/sites/default/files/documents/2019/Canadian Judicial Council Blueprint for the Security of Judicial Information - Fifth edition%2C 2018.pdf
Department of Justice Canada research	Among other initiatives, legal problems qualitative research across the provinces.	https://www.justice.gc.ca/eng/rp-pr/jr/index.html
Statistics Canada, crime and justice statistics	Collection, analysis and publication of statistics relating to crime and justice. Engaged in quantitative survey on legal problems, aiming to reach a sample size of 30,000 people.	https://www.statcan.gc.ca/eng/subjects-start/crime_and_justice
Open Justice proposal for next Open Government National Action Plan	A Department of Justice proposal for a commitment on open justice for the next Open Government National Action Plan, with the aims of increasing access to justice, ensuring fairness in application by promoting the rule of law, and enhancing public trust in government institutions. Canada is a member of the Open Government Partnership Coalition on Justice.	https://justice.gc.ca/eng/trans/open-ouvert.html

Canada *continued*

Table 4 Good practice examples – Canada

Initiative	Details	Link
Provincial Court of British Columbia: consultation on availability of criminal case details online	Public consultation in BC asked members of the public and relevant stakeholders to comment on the options for expanding access to criminal case data online. Respondents' views were summarised and reported in a post-evaluation report, with the final decision.	https://www.provincialcourt.bc.ca/downloads/Archive/Provincial%20Court%20Post-Consultation%20Memorandum%20-%20CSO%20Criminal%20Information.pdf
British Columbia Access to Justice collaborative initiatives on justice metrics and data commons	The University of Victoria Access to Justice Centre for Excellence has hosted several colloquiums on 'justice metrics' and its most recent event considered how to move forward with plans for a justice data commons, involving government and other stakeholders.	http://www.uvicace.com/research
British Columbia Court Services Online portal	An online portal allows members of the public to request and purchase certain electronic court documents. Some data is made freely available.	https://justice.gov.bc.ca/cso/index.do
Québec distribution of judgments via SOQUIJ	SOQUIJ, a self-funding organisation operating under the authority of the Québec Minister of Justice, publishes decisions from the judicial and administrative tribunals and provides other informational services (e.g., databases and newsletters) to its customers. It also supplies the judgments to other services.	https://soquij.qc.ca/fr/english
BC Civil Resolution Tribunal Access to Information and Privacy Policy	An example of a clear and publicly-available policy on what types of data the BC Civil Resolution holds, and levels/means of access to each.	https://civilresolutionbc.ca/wp-content/uploads/2019/02/Access-to-Info-in-CRT-Case-Records-20190220.pdf
Supreme Court Canada/ Federal Court of Appeal/ Federal Court reproduction terms	Reproduction of court materials is permitted, under stipulated conditions, for non-commercial purposes – as permitted by the Reproduction of Federal Law Order, P.C. 1996-1995, December 19, 1996, SI/97-5, and court terms and conditions.	https://www.scc-csc.ca/terms-avis/notice-enonce-eng.aspx#cr-d
Digital Audio Recording Systems (DAR/DARS) used by many courts	DAR/DARS allows for a digital audio file to be created of court hearings. Depending on court policy, a public user/member of the media can access the recording at court or, in some cases, electronically.	
Public legal education resources	Numerous independent or government-supported public legal education initiatives: e.g., Public Legal Education Associations; BC Clicklaw resources and wikis.	https://www.pleac-aceij.ca/en/pleac-member-agencies https://www.clicklaw.bc.ca/
BC Civil Resolution Tribunal collection of user data	Proactive, timely collection of user data which will monitor users' satisfaction and experience of the process, with publication of anonymised reports.	https://civilresolutionbc.ca/tag/statistics/ https://civilresolutionbc.ca/about-the-crt/presentations/
Supreme Court Canada and BC Courts archival policies	Clear records management policies on what types of data will be transferred to authorised archives, at what date.	https://www.bac-lac.gc.ca/eng/news/Pages/2017/supreme-court-agreement.aspx https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/court-documents-provincial-archives

Ireland

Table 5 Good practice examples – Ireland		
Initiative	Details	Link
New Courts service website	Improved functionality including listings for all jurisdictions (coming soon) in one place.	https://www.courts.ie
Outreach	Superior Courts' internship programme hosts law students from around the world; Criminal Courts host thousands of students annually to witness the courts in operation and take part in mock trials in real courtrooms.	https://www.courts.ie/school-visits
Courts service reform programme	Five-year reform programme introducing sweeping changes across jurisdictions, with exciting initiatives under review such as document sharing in real time in virtual courtrooms.	
New Judicial Council initiative	A council to improve judicial accountability, with the jurisdiction to hear complaints.	https://judicialcouncil.ie
High Court search tool	This makes a significant amount of administrative data accessible to all groups, free of charge and with no need to register. Searchable data include the names of parties, the names of solicitors of parties, documents filed (although not the contents of the documents) the outline details of the orders made, and whether a judgment relates to the case or not.	http://www.highcourtsearch.courts.ie/hcslive/cslogin
Digital Audio Recording functionality	The DAR is used in all courtrooms in Ireland.	

Challenges

In this section, we summarise some of the main challenges identified in the literature and interviews.

Challenge	Description	Comparison
Privacy v transparency	Concerns about shift to digital availability of personal data, and reduction in 'practical obscurity' which may affect individuals' willingness to use court system; others are worried about lack of access to digital records in interests of 'open justice' and freedom of expression.	This was a particularly dominant discussion point in Canada, based on interviewees' perceptions of the key issues, and perhaps a lesser concern in Australia, where interviewees were more worried about the invisibility of certain data (e.g. suppression orders). In Ireland, owing to the lack of digitised records, the issue has perhaps not yet come to the fore.
Lack of access to bulk data	Frustrations with lack of access to bulk data for research and commercial purposes alongside concerns (e.g. judicial) about analytical uses.	The literature and interviews in all three countries indicated frustrations with access to bulk data, and the way in which this inhibited third party re-use, particularly by researchers and technologists.
Over-reliance on third-party providers	Though there are excellent services provided by third-party providers, some of the underlying issues (e.g. inclusion of personal information in court records) need to be resolved at source, and the additional legal protections for external providers need to be put in place. Additionally, third-party providers or funders may not always be able to see the holistic picture, in terms of the technological development that is needed.	This was a particular issue in Canada, where it was felt that the courts services needed to resolve issues at source before onward distribution of the data; and where traditional actors in the system may overlook opportunities to develop better justice data services. In all three countries (though not all courts), access to transcripts provided by private services could prove costly.
Lack of funding	Lack of financial investment in data systems and court technology, and a lack of coordinated technological development.	This emerged as a particular issue in Canada and Australia, partly owing to the disparate/ decentralised structure of the Canadian and Australian justice systems. Investment in technological development in Ireland has been slow, but reforms are now underway.

Challenge	Description	Comparison
Slow innovation	A lack of technological and data development.	In each country we found examples where positive innovation had occurred, with Ireland currently the least technologically developed (but this is changing). However, there were widespread complaints in all three countries in relation to different parts of the system. In Canada, initial innovation in the 2000s may have led to complacency in the current day.
Insufficient user data	Concern about insufficient data collection on user experience and needs; even where it is now being collected (in Canada's Civil Resolution Tribunal in BC for example), there is a lack of baseline data with which to compare it.	This was a common complaint in all three jurisdictions, with researchers and NGOs concerned that insufficient data was made available with which to understand the justice system and improve its efficiency and efficacy, and therefore access to justice.
Insufficient data accountability mechanisms	Lack of access to judicial and courts information via Right to Know laws.	In all three countries, there were extensive exemptions from Right to Know laws. Though there were often annual reporting practices, and complaint channels available, no country provided an independent means of challenging lack of data access (other than via the courts process, which may be impractical and costly).
Provisions for public access to remote hearings	Court policies were not always clear about how the public could access remote hearings during the COVID-19 period.	Although live streaming was available in some higher courts, in many courts featured in this study, it has not been clear how members of the public (not just the media) could access remote hearings, and whether systems of access have been effective and appropriate.

6.2 Comparative discussion

Emerging themes

Here, we briefly discuss some of the dominant themes that emerged from both the literature review and interviews.

Historical/cultural legacy

Many of the challenges faced can be understood as a product of the historical and cultural legacy of each justice system, and the countries studied shared many of the same characteristics, as predominantly common law systems.⁵⁴⁷ The rationales and objectives for the provision of justice system data (principles of open justice, judicial independence, and access to justice including rights to a fair trial) can be found in the deep roots of each justice system, and the common law justice system originating in England and Wales. Historical legacy, however, is also a factor in hindering the development of technology that could deliver these objectives more effectively. For instance, as in England and Wales, legal representatives or third-party services have often taken the responsibility for certain justice system data, where they may claim ownership rights, or resist public access to certain materials; this can prove problematic in the overall development of a fair system of access to data that operates in the public interest. The systems – with the possible exception of Australia – are also very paper-based: even in 2020, a scenario described as ‘unacceptable’ in the Federal Court Canada’s latest strategic plan.⁵⁴⁸ This inhibits public access and data innovation; for example, the collation and analysis of justice data in order to improve the functioning of the justice system.

Mechanisms for transparency and access

Across our case studies, we observed insufficient financial investment and decentralised policy and design, partly owing to the historical legacies described above and also the structure of the justice systems: the division and independence of state/provincial courts in Australia and Canada, and the involvement of different organisations and actors across all the justice systems we examined. Inevitably, systems for the processing and dissemination of data have evolved rather than being proactively designed. In many courts, it was not clear what records were held by the court, or what levels/routes of access applied (Canadian court record policies provided an exception here, though these could still be improved with more comprehensive data catalogues and clearer information).

The benefits from largely starting from scratch in the design of a court or tribunal (subject to legislative provisions) is that more coherent approaches to the collection and provision of data can be made, as in the case of the Civil Resolution Tribunal in British Columbia. As a result, access mechanisms are still very analogue in nature: requiring physical visits to the court in many cases. It may be that COVID-19 will provide a stimulus for further digitalisation of records and processes, with the recent increased use of remote hearings, but that is likely to require higher levels of funding and resourcing than have previously been available and the problem of co-ordination across complex court systems, with jurisdictional particularities, remains.

547 We did not examine in detail the civil law elements of the Québec justice system.

548 Federal Court Canada, ‘Federal Court Strategic Plan 2020-2025’ (2020) 14 <https://www.fct-cf.gc.ca/content/assets/pdf/base/2020-07-15%20Strategic%20Plan%202020-2025.pdf> accessed 5 August 2020.

Data deficit

A data deficit, across all court data types, was perceived in all our country case studies. This has been particularly well documented in the access to justice literature in Canada (which is being drawn on at a global level, e.g. by the OECD⁵⁴⁹) and in legal academic materials in Australia, where there are pronounced concerns about the prevalence and use of suppression orders on court proceedings. In Ireland, we identified a less-developed literature on justice data issues; this may reflect that Irish courts service data collection is under-developed compared to many other national jurisdictions and international standards. The lack of data being collected can be explained by the factors mentioned above: historically, judgments have often been delivered *ex tempore*, so if a system isn't in place for affordable access to recordings and transcripts, the data is often unrecorded. A concern that is being addressed at global level through UN SDG 16 initiatives and the Open Government Partnership is the absence of court user data, and measures to capture user experience and views are now being developed in some pockets of the Canadian Justice System but there is still much work ahead. In Ireland and Australia, there is recognition of the work to be done (and the potential benefits of that work) but little yet by way of concrete initiatives on this front.

Privacy

As discussed in Chapter 2, and in the Canadian case study in particular, there is a concern about the implications for court users and those whose personal data is contained in court records. Traditional 'practical obscurity' which meant that data that was technically available was difficult to access, no longer provides a safeguard to personal privacy, with implications for individuals' rehabilitation into society (in the criminal context) and for the way in which their data may be used to inform employment or insurance policy decisions (for example). As Darin Thompson explains, 'courts have continued to defend the openness principle, even as other public institutions have recognized the need to protect personal information and modified their practices accordingly. Ironically, many common law courts permit a much broader right to inspect court records than they have allowed inspection of government records.'⁵⁵⁰ Canadian interviewees were concerned about both the privacy implications, and the access to justice implications, if – in the civil justice arena – litigants were dissuaded from pursuing legitimate rights because of the possibility of publicity.⁵⁵¹

The issue remains unresolved; some Canadian academics propose re-introducing 'friction' of the old systems into new digital portals (making it difficult to access data); others think it would be better to increasingly remove personal data from records that is not essential for the administration of justice, and to use technology to introduce 'restricted view' techniques such as such as blanking text, for example, or to 'set constraints on consultation periods, to block aggregation tools, or to simply limit research functions within certain types of documents'.⁵⁵²

549 OECD, 'Access to Justice' (www.oecd.org) <http://www.oecd.org/gov/access-to-justice.htm> accessed 18 July 2020.

550 Darin Thompson, 'Working Paper: Rationalizing Openness: Access to British Columbia Court and Tribunal Records in a New Era of Technology and Privacy' 6.

551 See, for example: Karen Eltis, 'The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context' (2011) 56 *McGill Law Journal/Revue de droit de McGill* 289; Karen Eltis, *Courts, Litigants, and the Digital Age: Law, Ethics, and Practice* (Second edition, Irwin Law 2016).

552 Nicolas Vermeys, 'Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-Examine Our Fundamental Values' in Karim Benyekhlef and others (eds), *eAccess to Justice* (University of Ottawa Press 2016) 138.

Accountability

In our research we identified few robust mechanisms for ensuring and monitoring access to justice data. Annual reports by court services (generally available via court or judiciary websites) provide one means of accountability to the public but the type of data reported varies significantly, with few requirements for proactively reporting statistical or user experience data. In our research we did not identify any independent process for challenging lack of access to justice system data, other than bringing a challenge in the court, which may prove costly and outside the ability of members of the public.⁵⁵³ Additionally, in all three countries (as well as England and Wales), ‘right to know’ or ‘freedom of information’ laws generally exempted or largely excluded justice system data, especially court records (administrative or statistical information is available via this route in some jurisdictions).

The design of better accountability systems is something that could be done through the Open Government process: as well as improving access to justice-sector information, some countries are developing commitments that deal with ‘legal empowerment, strengthening judicial institutions, and improving legal system accountability’.⁵⁵⁴

Relationship to criteria

In this final section of analysis, we consider how the example initiatives, challenges, and unresolved issues, relate to the criteria we were given in the brief, which asked us to identify the links between the types of sharing practices and the following criteria: (a) Judicial independence; (b) Public understanding of the law; (c) Public confidence in the justice system; (d) Innovation; and (e) The attractiveness of the legal system as a forum for resolving disputes.

Before we proceed, a methodological note. Owing to the nature of our methodology – primarily interviews and literature review – we were reliant on the evidence and views presented to us. We were not made aware of any substantial research in each jurisdiction that measured the way in which justice data practices impacted the five criteria described above. As with many aspects of the legal system, views on data practices often seemed to be based on anecdote or experience, rather than robust empirical evidence. Follow-up research could design an assessment methodology – using, for example public surveying or by analysing behaviours and decision making – that could be applied to these and other justice systems but this was beyond the scope and capability of this project.

a Judicial independence

This factor is interpreted variously in policy and academic literature, and by our interviewees. On the one hand, we identified widespread concerns (or reported concerns) that use of bulk data and data analytics could undermine judicial independence by providing governments with a means of ‘performance management’ of the judicial role, or by unduly changing the behaviour of judges because they were concerned about what the data would show. However, on the flip-side, we identified counter-arguments that suggested that better and more systematic access to justice system data could in fact bolster independence by illustrating how the system functions (with the use of judicial dissent and successful appeal outcomes, for example) and helping improve aspects that don’t work so well (by exposing inefficiencies, a case could be made for better funding and investment in technology, for example). As noted above, we did not identify any robust empirical evidence that showed that greater public availability of data undermined judicial independence.

553 See, for further discussion: Jason Bosland and Judith Townend, ‘Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom’ (2018) 23 *Communications Law* 183.

554 Department of Justice, ‘An Open Justice Commitment for Canada - Discussion Paper’ (justice.gc.ca, 1 June 2020) <https://www.justice.gc.ca/eng/tp-pr/other-autre/trans/open-ouvert/ojcdp-eejodt.html> accessed 28 July 2020; Open Government Partnership, ‘OGP Policy Area: Justice’ (Open Government Partnership) <https://www.opengovpartnership.org/policy-area/justice/> accessed 19 July 2020.

Some of the initiatives we have described show how the latter points could be achieved, in the interests of protecting fair and independent justice systems. For example, clearly written court record and data policies can delineate the separated roles of executive and judiciary; and include safeguards to protect the way in which data is used by third parties. Too often, current approaches are muddled in policy and practice, and do not provide adequate safeguards for judicial independence and third-party use of data. This is something that could be addressed by building on the Canadian model for Canadian Judicial Council guidance: best-practice guidance could be designed, following public consultation, to be adopted by courts within a country's various jurisdictions.

b *Public understanding of the law*

As one of our interviewees observed, for law to be effective and not ignored by a country's citizens, the law has to be made available to them; 'details have to be made accessible, in both the physical and intellectual sense of the word'.⁵⁵⁵ As is explained in core materials on access to justice, access to information about the law is an essential component of access to justice, and vital to providing the 'irreducible minimum standard' of access to justice under English law, outlined by Dr Byrom in 'Digital Justice'⁵⁵⁶ and described in Chapter 2 (page 14). In this way initiatives to provide both access to court records, and access to de-identified court data and statistical information about the functioning of the court system are important, as well as providing access to legislation and judgments. The Canadian, Australian and Irish courts all showed examples of effective public outreach work, whether through judicial/court visits, or online resources delivered through various legal organisations. As well as delivering a public benefit in general, such resources and initiatives are particularly crucial to assist those individuals of lower resource, who may be self-represented; and support organisations of limited means, who may not otherwise be able to access paid-for advice or information services.

c *Public confidence in the justice system*

This point relates closely to the discussion above. If the public have a means of understanding the justice system – through access to materials, data and educational tools – they are able to have more confidence in the justice system and observe for themselves if justice is being done fairly (as is the rationale for the principle that justice must be seen to be done). Where systems are less transparent, public confidence can dip.⁵⁵⁷ The side-effect of this is that litigants may be dissuaded from pursuing legitimate complaints in the justice system, or pursue remedies outside the formal justice system, which could lead to unfair and risky outcomes. Here, we identified efforts to enhance Canadian public legal education (PLE) through court outreach activities and resources, such as BC's Clicklaw Wikibooks⁵⁵⁸ and other activities provided by a range of PLE organisations across the country.⁵⁵⁹ Across Australia we found that the media liaison officers allocated to each jurisdiction are often active in outreach work (aimed at the media and the general public rather than specifically just the media). In Ireland we were inspired by the recent success of the Supreme Court's internship programme, engaging with students from around the world despite the limitations of lockdown and the COVID-19 pandemic.

555 Interview with Nicolas Vermeys (26 June 2020).

556 Dr Natalie Byrom (n 534).

557 For example, there is evidence of a lack of public trust and confidence in the English family justice system, partly owing to incomplete or misleading information and advice published online and via social media; without transparent processes and (appropriately anonymised) data it is difficult to counter such misinformation. For a detailed discussion see: The Transparency Project, 'President of the Family Division's Transparency Review: Response by the Transparency Project' 12–21 <http://www.transparencyproject.org.uk/press/wp-content/uploads/transparency-consultation-response-29-April-2020.pdf> accessed 13 August 2020.

558 'Clicklaw Wikibooks' https://wiki.clicklaw.bc.ca/index.php?title=Clicklaw_Wikibooks accessed 2 August 2020.

559 'PLEAC Member Agencies' (PLEAC-ACEIJ) <https://www.pleac-aceij.ca/en/PLEAC-member-agencies> accessed 11 August 2020.

d *Innovation*

Thus far we have discussed at length some of the factors inhibiting technological development. In terms of how innovation has been achieved, successful projects have required top-level support and grassroots consultation and involvement. Funding is key, so governmental support is required if justice data is to be improved, and for the projects to meet the needs of communities, it is essential that innovation takes place with the involvement of court users and their representatives.

Better user data can help inform the development of services. For example, Darin Thompson, has described how the design team for the BC Civil Resolution Tribunal ‘placed a high priority on the needs, interests and preferences of the public and tribunal users rather than on more traditional justice stakeholders’ and that user testing was a factor in the success of the Civil Resolution Tribunal at an early stage.⁵⁶⁰ As already noted, the collection and analysis of user data remains an important part of the tribunal’s development. Other emerging projects in Canada, around the development of better justice metrics and ‘data commons’ are also involving a range of stakeholders, with judicial and governmental support (e.g. via the Department of Justice Canada, the Canadian Forum for Civil Justice, Accès au droit et à la justice (ADAJ), the Access to Justice BC consortium, and the University of Victoria Access to Justice Centre for Excellence).

Projects to improve the extraction and use of user data are more advanced in Canada than in Australia or Ireland. Plenty of evidence exists, however, of innovative projects in both of these jurisdictions in other areas, as we highlighted in the table of good practice examples above. The Irish High Court’s search tool functionality ‘High Court Search’; the research AustLII is doing around into future possibilities for the computerisation of law; and the live streaming of some parts of judicial process in both Australia and Ireland are all examples of innovative practice. The COVID-19 pandemic has highlighted what is possible in terms of the move to a virtual courtroom in all three of the countries under review.

e *The attractiveness of the legal system as a forum for resolving disputes*

This aspect proved the most difficult to explore as it was not necessarily a predominant concern in the academic or policy literature. To some extent, it relates to the point above, that users should not be unduly deterred from using the proper channels of justice because of the way in which data is managed. However, court users do not necessarily have much autonomy or choice of legal forum (the legal path may be imposed on them, or there are jurisdictional constraints). It is perhaps most relevant to consider as a factor in the context of civil justice, where claimants may be deciding whether to pursue a claim or not. We have already mentioned the Civil Resolution Tribunal in British Columbia (Canada) which has a mandate to provide accessible and efficient dispute resolution services for a limited type of complaints; though it cannot accept cases from outside its jurisdiction, it is worth noting the emphasis it places on user satisfaction and transparent reporting of its workings, in order to improve and encourage use of its services. Of particular importance here is the gathering of data on user experience and needs, so that vulnerabilities can be addressed, in terms of lack of online literacy or technological tools.

560 Darin Thompson, ‘The Online Justice Experience in British Columbia’ (Society of Computers and Law, 22 November 2016) <https://www.scl.org/articles/3784-the-online-justice-experience-in-british-columbia> accessed 22 June 2020.

6.3 Conclusion

Definition of justice system data

This research established that ‘justice system data’ – at least in these common law countries – can be understood as the information collected, stored and disseminated in the process of justice.⁵⁶¹ All case studies indicated a similar understanding of court records (court files, case administrative information, judgments and hearing recordings/transcripts) and case/court user information compiled for statistical and analytical purposes. We discovered more detail about public access to court records, and less on the nature of case/court user data practices for analytical purposes. It seems likely that court user and case data is not being collected or organised systematically in many instances, though we must acknowledge our ‘outsider’ role in conducting this research, and that we may not have been privy to some developments internal to the court systems we studied.

Key issues

The main issues for the development and improvement of justice system data identified in the three case studies (Australia, Canada, Ireland) included: the impact of cultural and historical legacy practices; the under-investment and decentralised approach to technological reform; a data deficit for user and case experience; a tension between privacy and transparency in the provision of court records containing personal data; and a lack of accountability measures for the management of justice system data.

However, we identified numerous examples of effective practice, where justice system data initiatives were broadening access to justice, enhancing judicial independence, public understanding and confidence in the law, innovation and new mechanisms for dispute resolution. While challenges remain, and our informants did not always agree about the aspects of mechanisms or access, or priorities for justice data collection, there was unanimous interest in improving the way in which court services manage their data, in the interests of the delivery of effective and fair justice. In that vein, we offer the following suggestions for further policy work and research, while – as advised by one of our research participants – steering clear of proposing any universal principles at this point.

561 Courts and tribunals were the natural focus though, as observed by Professor Trevor Farrow, courts and tribunals are only a small part of the way in which people deal with justice issues. Interview with Trevor Farrow (15 July 2020).

Suggestions for further development of justice system data policy and practice

A two-pronged approach

In developing future approaches to justice data governance and standards, we propose a two-pronged approach to designing processes for more effective management of contemporaneous justice system data (as defined above); this understands justice system data sharing and access arrangements in two main ways:

- Public court records that contain some degree of personal information and should be made available contemporaneously, primarily in the interests of open justice and freedom of expression.
- Datasets concerning court user and case information to be used for analytical and monitoring purposes, which may be released in certain restricted and de-identified or anonymised formats, in the interests of transparency and accountability and improving public understanding of law, the administration of justice and access to justice.

Though the categories overlap to an extent (court records may form the basis of de-identified datasets), procedures for collection, maintenance and dissemination should be considered separately, for their distinct, if related, purposes. A third aspect that may be considered is the archival arrangements for court records and user/case data, but that falls outside the remit of this work.

Pooled resources

In developing this approach, it would be helpful to pool resources with other jurisdictions and organisations, in order to share best practice and develop common or model templates for standards and guidance. Although the justice systems, and jurisdictions within them, are subject to particular practices and protocols, reflecting an important division between executive and judicial power, there is much that could be drawn from other areas of work on open data (in addressing tensions around privacy of personal information, for example).

Data standards and governance

We do not repeat here all of Dr Byrom's detailed recommendations for England and Wales in Digital Justice, but re-emphasise the need for:

- Collecting data about court users' vulnerabilities, including age, mental and physical disabilities, literacy levels, and gender (paras 4.13 and 4.33)
- Monitoring outcomes in the digital courts, both to compare with outcomes under pre-digital processes, but also to evaluate how different groups fare compared with each other under the new system (for example, represented and unrepresented court users; claimants and defendants; individuals and organisations). (paras 4.33-4.38)
- Monitoring which types of users and which types of cases are decided by a judge (rather than being determined earlier in the process) (para 4.37).
- Considering the benefits and drawbacks of introducing unique identifiers for each court user to allow researchers and evaluators to have a complete picture of what an individual's experience of the court process has been – for example, if they have been bringing and responding to multiple cases at the same time (para 4.32).
- Ensuring strict, clear and ethical controls over how accumulated information is used, to avoid misuse and ensure privacy is protected (paras 4.32; 4.60).

Additionally, our research indicates a need for:

- Clearly-presented policies, shared publicly, on the differing roles for executive, court service, judiciary and any third-party providers in the management of justice system data.
- Accountability mechanisms for access to justice data: i.e. appropriate routes of application and appeal for accessing justice data that is not readily available in the public domain.
- Consideration of public and court user views and experiences in the design of justice system data processes (especially with regard to the use of personal data).
- Measurement of the impact of data-sharing practices on outcomes of the justice system (such as the criteria discussed in this report: judicial independence, public confidence etc.).

To develop these suggestions, the following consultative mechanisms are proposed:

- Use or development by court services of academic/technologist/NGO networks on justice system data, to gather views on how data could be improved and gather evidence to feed into digital and data reform processes.
- Use the Open Government National Action Plan commitment process and projects to meet UN Sustainable Development Goal 16.3 on access to justice, to strengthen justice system data management and accountability mechanisms.

Further research

Our research also identified various areas worthy of further investigation, in these and other jurisdictions:

- Comparison between uses of personal data in common law and civil law jurisdictions; and the implications/purpose.
- Data protection and rehabilitation of offender protections.
- Justice data categories beyond court service data, and the formal justice system.
- Archival arrangements for the preservation of court records and case data.

Summary

In sum, this research has identified a common understanding and definition of ‘justice system’ data types and access in our three case studies of Australia, Canada and Ireland. It has described examples that are perceived to help deliver access to justice, and protect important principles of open justice, judicial independence and public understanding of the law. In doing so, various challenges and tensions across the jurisdictions were also exposed, and to help address these we offer various suggestions that could be adopted by policy and lawmakers, whether in England and Wales, or other jurisdictions grappling with similar issues.

Glossary of terms

Here we explain our use of the following terms, though we acknowledge that there is variety in how they are used in different contexts, and will no doubt evolve as justice data systems are further developed. For further open data terminology see: <http://opendatahandbook.org/glossary/en/>

Justice system data

By this we mean the data that is generated/collected, stored or disseminated as part of the administration of justice (see Chapter 2, page 17). Includes the following categories of data:

Administrative/management court data: The administrative or management information about a case. Including, for example: hearing listings information; record of charge or claim; filing records; application for order for a private hearing/anonymisation of parties; outcome information.

Case level data (the court file): Case documents and information held by the court. Including, for example: party name and contact details; procedural mechanisms initiated by parties or court; outcome by stage; value of settlement/judgment; order/variation of order; statements of case/pleading, witness statements, directions, affidavits, skeleton arguments; exhibits/evidence.

Court user data: Data collected by the court service about users. Could include: geo-demographic and equalities characteristics of parties; party type e.g. claimant, defendant; represented vs unrepresented; perceptions of fairness/user satisfaction/customer effort.

Hearings data: Transcripts, audio recordings, or video recordings of a case hearing.

Primary legal data (rulings): Judgments (written or ex tempore), sentencing remarks (written or ex tempore).

Other terms

Bulk data: Where an entire dataset can be downloaded easily and efficiently by a user.

Data commons: A common pool of resources; 'help organisations or people collaborate to create and maintain shared data assets'.⁵⁶²

Data trusts: 'Enable people or organisations to share data with others, with data governance decisions made by "trustees" with fiduciary responsibilities'.⁵⁶³

Docket: Official record of the proceedings. It could include documents filed by the parties, orders, judgments, and 'event' listings in the case (usage may vary between jurisdictions). In many Canadian courts, it typically refers to the schedule of upcoming hearings, with information such as the name of the case, file number, type of hearing, courtroom, and hearing date/time.⁵⁶⁴

Open access (OA): Material that can be accessed by any internet user (but not necessarily freely re-used by third parties).

Open data: 'Data that can be freely used, re-used and redistributed by anyone – subject only, at most, to the requirement to attribute and sharealike'.⁵⁶⁵

Open Government Partnership (OGP) and OGP Action Plans: In the OGP process, governments and civil society co-create two-year action plans, with specific commitments.

Online dispute resolution (ODR): Dispute resolution process that uses technology and the internet to facilitate the resolution of disputes between parties (usage varies).

Publication ban/Reporting restriction order/Suppression order: Terms to describe an order prohibiting the publication or further dissemination of specified information in a case.

Remote/virtual court hearings: Audio hearings, video hearings, and paper hearings (decisions delivered on the basis of paper submissions).⁵⁶⁶

United Nations Sustainable Development Goals (SDGs): Address global challenges, including those related to poverty, inequality, climate change, environmental degradation, peace and justice.

562 Jack Hardinges, 'What Do We Mean by Data Institutions?' (The ODI, 10 February 2020) <https://theodi.org/article/what-do-we-mean-by-data-institutions/> accessed 30 August 2020.

563 *ibid.*

564 Dean Jobb, *Media Law for Canadian Journalists* (3rd edn, Emond Montgomery Publications, 2018) 265.

565 'What Is Open Data?' (Open Data Handbook) <http://opendatahandbook.org/guide/en/what-is-open-data/> accessed 20 July 2020.

566 'Remote Courts' (Remote Courts Worldwide) <https://remotecourts.org/> accessed 25 July 2020.

Appendix A: list of interviewees

Please note: Attributed views were given in a personal capacity and should not necessarily be taken as the views of the institutions to which they are affiliated.

Australia

Name	Title	Institution	Date of interview
Richard Ackland	Legal Editor at Large	Guardian Australia	21 July 2020 (by email)
Nigel Balmer	Research Director	Victoria Law Foundation	18 June 2020
Vanessa Blackmore	Supreme Court Manager, Law Courts Library Services	Supreme Court of New South Wales	30 June 2020
Jason Bosland	Associate Professor of Media and Communications Law, Director of the Centre for Media and Communications Law	University of Melbourne	19 May 2020
Philip Chung	Executive Director	AustLII	28 May 2020
Amanda Davies	Senior Business Intelligence Analyst	County Court Victoria	
Sarah Dolan	Communications Director	Supreme Court of Victoria	15 June 2020 (by email)
Jennifer Farrell	Head of Legal Research and Administration	Federal Court of Australia	16 July 2020
Kate Gibson	Compliance Manager	County Court, Australia	22 July 2020
Graham Greenleaf	Professor of Law and Information Systems/ Founding Co-Director and Senior Researcher	University of New South Wales/AustLII	20 May 2020
Jenny Lee	Manager, Performance and Planning	Court Services Victoria	22 June 2020
Hugh McDonald	Principal Researcher	Victoria Legal Aid	18 June 2020
Kylie Nicholls	Director, Data and Analytics, Courts, Tribunals and Service Delivery, Department of Communities and Justice	New South Wales Government	6 July 2020 (by email)
Peter O'Donnell	Digital Architect	Victoria Legal Aid	3 June 2020
Bruce Phillips	Director of Public Information	Federal Court of Australia	7 July 2020
David Rolph	Professor of Media Law	University of Sydney Faculty of Law	2 June 2020
Paul Sutherland	Manager, Magistrates' Court Data Analysis and Reporting	Magistrates' Court, Victoria	7 July 2020
Kerry Wilson	Supreme Court Library Manager	Supreme Court of Queensland	1 July 2020

Canada

Xavier Beauchamp-Tremblay	President and CEO	CanLII	29 June 2020
Johanne Blenkin	Director	Access to Justice Centre for Excellence, University of Victoria	13 July 2020
Dan Chiddell	Executive Director, Corporate Support	Court Services Branch, Ministry of Attorney General (British Columbia)	9 July 2020
Trevor Farrow	Professor	Osgoode Hall Law School, York University	15 July 2020
	Chair	Canadian Forum on Civil Justice	
Karen Eltis	Professor	Faculty of Law, Civil Law Section, University of Ottawa	20 July 2020

Canada *continued*

Name	Title	Institution	Date of interview
Cindy Eng	Manager, Performance Measurement and Business Intelligence	Court Services Branch, Ministry of Attorney General (British Columbia)	9 July 2020
Martin Felsky	Senior counsel	Heuristica	14 July 2020
Heather Heavin	Professor/Associate Dean	CREATE Justice, University of Saskatchewan	5 August 2020
Jon Khan	PhD researcher	Osgoode Hall Law School, York University	7 July 2020
	(On academic leave) Counsel	Department of Justice Canada	
Barbara Kincaid	General Counsel	Court Operations Sector, Supreme Court of Canada	10 July 2020
Colin Lachance	Co-founder/CEO Founder and Executive Director	Compass Legal Innovation Data Institute (LIDI)	16 July 2020
Alicia Loo	Director	Library Branch, Supreme Court of Canada	10 July 2020
Brea Lowenberger	Director	CREATE Justice, University of Saskatchewan	5 August 2020
Frédéric Pelletier	VP Legal Information	Lexum	29 July 2020 (by email)
Katie Sykes	Associate Professor	Thompson Rivers University	23 July 2020 (by email)
Darin Thompson	Legal Counsel	British Columbia Ministry of Attorney General	22 June 2020
Nicolas Vermeys	Dean of Programs	Université de Montréal, Faculté de droit	26 June 2020
	Associate director	Cyberjustice Laboratory	
Representative		Department of Justice Canada	16 July 2020
Ireland			
Laura Butler	Head of Legal Research and Library Services	Courts Service, Ireland	15 July 2020
James Finn	Legislation and Rules Unit	Courts Service, Ireland	9 June 2020
Renate Ní Uigín	President of the British and Irish Association of Law Librarians	King's Inns	19 June 2020
Luke Noonan	Doctoral Researcher	UCC School of Law	11 June 2020
Eoin O'Dell	Professor of Law	Trinity College, Dublin	12 June 2020
Abigail Rieley	Journalist		29 June 2020
Gavin Sheridan	Founder and Chief Executive Officer	Vizlegal	20 May 2020

Appendix B: Project information sheet supplied to interviewees

What is the purpose of the study?

As part of its research programme on “Smarter Justice”, The Legal Education Foundation has commissioned researchers at the University of Sussex to undertake a review of the way in which different international jurisdictions collect, process and share “justice system data”. By this, we mean the information that is generated by the justice system. As part of this research we are approaching key stakeholders in different countries in order to gather information and views.

The study will explore:

- 1 How other countries define “justice system data”. What are the categories they use to describe the different types of data generated by the justice system? This includes information like case files, judgments, management information, tribunal decisions etc.
- 2 What arrangements are in place for making this data available to different stakeholders (public/press/researchers/private sector) and how are they financed?
- 3 Where have other countries placed different types of data on the open/shared/closed spectrum?
- 4 Are these arrangements time limited e.g. closed until x date? To what extent have other countries delegated the function of data dissemination to the private sector?
- 5 What have been the benefits and drawbacks of the approaches developed in these countries? We are particularly interested in identifying robust research that is capable of demonstrating a link between the types of sharing practices adopted and:
 - a. Judicial independence
 - b. Public understanding of the law
 - c. Public confidence in the justice system
 - d. Innovation
 - e. The attractiveness of the legal system as a forum for resolving international disputes.

The project will focus on English speaking, democratic common law jurisdictions but also explore some examples from European Union countries.

The next page explains what is required of participants and how your contribution will be used.

What is required of participants?

We are asking you, in your professional capacity, to answer questions about the way that justice data is collected, stored and shared in your national or state justice system.

We will conduct interviews via telephone or an online remote meeting on a platform approved by the University of Sussex (we will provide instructions how to join a meeting) and will audio record using a Dictaphone or in-built recording facility. In the consent form, you will be able to indicate whether you wish to remain anonymous in the report, or permit your name/organisation to be attributed in any publications arising from the research.

You may withdraw your participation in the study before the report is finalised. If you wish to withdraw, you are asked to state this decision by 30 July 2020. By participating you consent to the processing of your personal information for the purposes of this research study, in accordance with the University's data protection policy and the Data Protection Act 2018.

Who is organising and funding the research?

The research team – Dr Judith Townend and Ms Cassandra Wiener – are conducting this research as employees of the University of Sussex, in the School of Law, Politics and Sociology. The research is being funded by The Legal Education Foundation (registered charity no. 271297).

Who has approved this study?

The research has been approved by the Social Sciences & Arts Cross-Schools Research Ethics Committee (C-REC) at the University of Sussex (reference: ER/JT367/8).

What will happen to the results of the research?

The research project's findings will be published in a report published on The Legal Education Foundation and/or University of Sussex websites, along with accompanying public datasets. The findings may also be reported in subsequent academic articles and conferences and relevant policy events, and in relevant professional media.

Contact for further information

You can contact the Principal Investigator for the project, Dr Judith Townend (Judith.Townend@sussex.ac.uk) if you have any concerns about the way in which the study is being/has been conducted. You can also contact the Chair of the Social Sciences & Arts C-REC at c-recss@sussex.ac.uk if you have further concerns. The University of Sussex has insurance in place to cover its legal liabilities in respect of this study.

Thank you for taking the time to read this information



Comparative Study on Shared
Access to Justice Data

Appendix C: Key resources

This is not intended to be a comprehensive list and more detailed references can be found in the report. Please send additional suggestions to judith.townend@sussex.ac.uk.

Open access case law and commentary repositories

AustLII, <http://www.austlii.edu.au/>

BAILII, <https://www.bailii.org/>

CanLII, <https://www.canlii.org>

IRLII, <http://irlii.org/>

WorldLII, <http://www.worldlii.org/>

Access to law organisations

Free Access to Law Movement (FALM), <http://falm.info/>

Free Law Project, <https://free.law/>

Access to Justice initiatives

OECD Access to Justice,
<http://www.oecd.org/gov/access-to-justice.htm>

Open Government Partnership Justice Coalition,
<https://www.opengovpartnership.org/policy-area/justice/>

Open Knowledge Justice Programme, <https://okfn.org/what-we-do/case-studies/open-knowledge-justice-programme/>

Open Society Justice Initiative, <https://www.justiceinitiative.org/>

United Nations SDG 16, <https://sdgs.un.org/goals/goal16>

World Justice Project, <https://worldjusticeproject.org/>

Academic/policy journals

International Journal of Legal Information, <https://www.cambridge.org/core/journals/international-journal-of-legal-information>

Internet Newsletter for Lawyers,
<https://www.infolaw.co.uk/newsletter/>

Journal of Open Access to Law,
<https://ojs.law.cornell.edu/index.php/joal>

Legal Information Management, <https://www.cambridge.org/core/journals/legal-information-management>

Remote court/technology resources

HMCTS/Society for Computers and Law International Forum on Online Courts, December 2018, <https://www.gov.uk/guidance/international-forum-on-online-courts-3-and-4-december-2018>

Remotecourts.org, <https://remotecourts.org/>

Open Data

Global Data Barometer, <https://globaldatabarometer.org>

Open Knowledge Foundation Global Open Data Index,
<https://index.okfn.org/>

Open Data Barometer, <https://opendatabarometer.org/>

Open Data Institute, <https://theodi.org/>

Open Knowledge Foundation, <https://okfn.org>



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