Transparency and Open Justice Board

Response to Public Engagement on the TOJ Board's Key Objectives

Background

1. On 6 December 2024 the Transparency and Open Justice Board launched a public engagement on the Board's proposed Key Objectives. It closed on 28 February 2025.

2. The public engagement sought views on the Board's proposed Key Objectives and asked the following questions:

    1. Do you agree that these are the correct objectives?

    2. Do you think there is something that has been missed from the objectives? If yes, what else do you think should be included?

    3. Do you think there is something that has been included within the objectives that shouldn't be? If yes, what?

Summary of responses

3. In total, 48 responses were received. The respondents include a mix of individuals and representatives from various organisations, including legal professionals, academics, judges, press and members of the public. Responses were also received from the Tribunals Procedure Committee and the Civil Procedure Rules Committee.

4. The full list of respondents (excluding those who submitted responses anonymously) can be found under Annex B.

Question 1 – Do you agree that these are the correct objectives?

5. 83% of Respondents agreed with the overall objectives of promoting transparency and open justice. Respondents recognised the importance of these principles in maintaining public trust and accountability in the justice system. However, some responses suggested that the objectives could be enhanced to ensure they are comprehensive and effectively implemented.

6. The remaining 17% of respondents provided constructive feedback and suggestions for improving the objectives, rather than outright disagreement. These responses highlight areas where it was suggested that the objectives could be refined and expanded so as better to address the principles of transparency and open justice. Further details of their feedback and suggestions are included within the responses to questions 2 and 3 below.

7. The Board believes that it is important, at the outset, to be clear about what the Key Objectives seek to achieve. They are high level principles which should inform the practice and procedure of all Courts and Tribunals. It would be wrong, however, to adopt a 'one-size-fits-all'. The level of openness and transparency that can be achieved will always depend upon the nature of the work of the relevant Court or Tribunal. There is no doubt that doing justice must always come first.

8. Whilst most Courts and Tribunals routinely sit in public, due to the nature of their work, some are required to conduct some or all of their work in private. Examples would include the Youth Court, family proceedings, the Mental Health Tribunal and the Investigatory Powers Tribunal. Some Respondents have rightly drawn attention to Courts and Tribunals the nature of whose work means that they would be unable to achieve in full the Key Objectives. The Board recognises this. For Courts and Tribunals that are unable to sit in public for some or all of their work, this does not obviate the need to consider open justice and the Key Objectives. The challenge is for the relevant Court or Tribunal to enable the public to know as much about the cases as is consistent with doing justice in each case. The Board expects that in the next phase of the work each Court and Tribunal will assess whether they are achieving (or can achieve) the Key Objectives and, if not, what derogations are strictly necessary arising from the nature of the cases with which it deals. As the transparency project in family proceedings has demonstrated, the question is not what cannot be exposed to public scrutiny, but rather what can be without putting the administration of justice at risk.

Question 2 - Do you think there is something that has been missed from the objectives? If yes, what else do you think should be included?

Open justice and public understanding of the administration of justice

9. The Law Society was one of several Respondents who raised the issue of the wider context of open justice and is practical importance in promoting understanding of the constitutional role of Courts and Tribunals in the administration of justice and the rule of law.

10. In its response, the Law Society said:

> "… it is important that the public at large understand and support the workings of the justice system and feel a sense of connection to it and ability to participate. If the aim of open justice policy is to build understanding and trust in the justice system, then the means of engagement must be designed in a way that encourages this… While open justice policy and powers have an important role to play in demystifying the legal process, these alone will not be comprehensive enough to address the deficit in understanding among the general public. We would strongly recommend that efforts to improve open justice are underpinned by the development of a wider programme of civic and constitutional education. The Law Society has called for such a programme several times in the context of the proposed Constitution, Democracy and Rights Commission and reform of the Human Rights Act."

11. JUSTICE, in its response, highlighted the conclusion, from its 2023 review of open justice, that the overarching purposes of open justice in a modern justice system were: (a) to preserve the legitimacy of the justice system in the eyes of the public; (b) to facilitate scrutiny of the justice system and the actors involved in it; and (c) to increase the accessibility of the law itself. JUSTICE suggested that these should be reflected in the Key Objectives.

12. *Response from the Transparency and Open Justice Board*

12.1. The Board accepts that open justice has a wider significance than simply ensuring adherence to the open justice principles by Courts and Tribunals. Whilst specific initiatives to promote wider public education and understanding of the constitutional role discharged by Courts and Tribunals in the administration of justice and the rule of law probably goes beyond the remit of the Board (and would involve other key stakeholders), the Board agrees that, where they can, Courts and Tribunals should, play an active role in promoting open justice, not simply a passive role of simply operating in accordance with the open justice principles. Reflecting this, and drawing upon the Supreme Court's articulation of the key purposes of open justice in *Dring -v- Cape Intermediate Holdings Ltd* **[2019] UKSC 38 [2020] AC 629** (see below), the Board has therefore included a new Key Objective:

> "Courts and Tribunals should promote open justice to enable the public to understand and scrutinise the administration of justice by Courts and Tribunals; and thereby seek to (a) uphold public confidence in the administration of justice; and (b) support improved public understanding of the constitutional role discharged by Courts and Tribunals in the administration of justice and the rule of law."

12.2. The Board recognises that an obligation to "promote" involves Courts and Tribunals being active not passive, but this does not necessarily have to be onerous, and it will always be constrained by what the Court or Tribunal is able to do with the resources that are available to it. The Board wants to foster a culture in Courts and Tribunals that sees openness and transparency as a core part of the administration of justice, not an adjunct to it. It can be as simple as a Judge/Tribunal Member/Magistrate making an adjustment to the way in which proceedings are conducted so as to promote open justice. One example of promotion of open justice is the provision of summaries of judgments that are likely to be of public interest. A summary, prepared by the Court, can provide much assistance making a judgment more comprehensible to the public. Such summaries are often prepared for judgments in the Court of Appeal and High Court and are now routinely provided by the Supreme Court, which also provides other explanatory material to the public about current cases on its website. Other measures that would promote open justice would be the provision more public information about cases (for example in published court lists) and ensuring that copies of skeleton arguments or other written submissions are available to non-parties who are observing the proceedings. A pilot of scheme that provides such enhanced public access to information and documentation is underway in the Court of Appeal (Civil Division). At a prosaic level, merely ensuring that people observing the proceedings can hear and follow what is going on would promote open justice and the aims it hopes to secure.

Recording of proceedings

13. Several respondents suggest that the objectives need to be strengthened to ensure true transparency. Key suggestions include recording hearings, specifically removing the criminalisation of recording hearings and mandating the official recording of all hearings. Respondents claim that this would ensure better judicial conduct and accountability, especially towards unrepresented litigants who may be vulnerable to poor treatment.

14. *Response from the Transparency and Open Justice Board*

14.1. The Board agrees that the objective should be that proceedings in all Courts and Tribunals should be routinely recorded. Doing so promotes transparency and openness because it facilitates the provision of transcripts of the proceedings. In turn, that has other benefits for the administration of justice, for example removing disputes about what was during the proceedings, particularly evidence given by witnesses. For various First Tier Tribunals, the recording of proceedings would obviate the need for separate written reasons to be provided after an oral judgment has been given.

14.2. The routine recording of proceedings in Courts and Tribunals would also promote that part of open justice which ensures that all those involved in Court proceedings, including Judges, Tribunal Members and Magistrates, are properly accountable to the public and subject to scrutiny. It also protects the integrity of the proceedings. The Board considers that recording of proceedings is captured by the Key Objective that there should be "*effective access to hearings of Courts and Tribunals held in public, including… enabling transcripts to be obtained of proceedings in public (subject to any applicable fees)*". The availability of transcripts pre-supposes that, and is dependent upon, the proceedings being recorded to enable a transcript to be produced.

14.3. The Board recognises that, at present, obtaining official transcripts of proceedings of a Court or Tribunal can be expensive and there can be a delay before they are provided. The Board is aware that advances in technology mean that it may well be possible for reasonably accurate transcripts could be generated automatically from the recording of the proceedings. Whilst there would remain a need for accurate transcripts for certain purposes (e.g. for the purposes of an appeal), the Board considers that there is scope to investigate whether these more 'rough and ready' transcripts might be made available.

14.4. Legislation currently restricts other recordings being made of the proceedings – see s.9 Contempt of Court Act 1981 (and s.85B Courts Act 2003 for remote hearings) and s.41 Criminal Justice Act 1925. s.9(1)(a) Contempt of Cout Act 1981 enables the Court to grant permission to make audio recordings. This is sometimes granted to litigants who would otherwise struggle to make a note of the proceedings and would otherwise be disadvantaged. Permission in such circumstances is usually granted subject to conditions, for example that the recording is to be used only for the purposes of the proceedings.

14.5. The Board considers that a matter to be considered, in the context of facilitating greater broadcasting of suitable proceedings in Courts and Tribunals, is whether these statutory restrictions should be relaxed to place the decision whether proceedings should be broadcast with the relevant Court or Tribunal. Presently, the broadcasting of proceedings in the Court of Appeal and sentencing in certain Crown Courts has been achieved by Statutory Instruments, the effect of which is to disapply the statutory prohibition on recording and broadcasting in relation to specific categories of proceedings. The Board recognises that this is a matter for

Parliament, but the Board would welcome active consideration of whether this piecemeal approach should be replaced with legislation that permits Courts and Tribunals to decide whether its proceedings (or parts thereof) can be recorded and broadcast.

Availability of evidence and other material submitted to the Court/Tribunal

15. Some Respondents suggested that the Key Objectives should specifically include a requirement that evidence used in litigation should be public by default, with only genuinely private information being restricted. Respondents emphasised the importance of the availability of skeleton arguments as an essential part of open justice. Other Respondents suggested that there is a need to protect certain categories of information from disclosure to the public (for example confidential/private medical information used in Mental Health Tribunals). Some Respondents suggested that aspects of open justice could have a "chilling effect and discourage people from bringing claims". Another questioned whether, in respect of expert reports and evidence, whether all of the expert's report would be publicly available and the stage at which it would be available.

16. *Response from the Transparency and Open Justice Board*

16.1. It is already the position in all Courts and Tribunals in England & Wales that, save where the administration of justice means that it is necessary strictly to derogate from the principle and for part or all of the evidence to be withheld from the public, evidence that is given, or deployed, in proceedings in open court is required to be available to the public (both in the sense that it should be communicated in public proceedings and/or available to those attending the proceedings – whether by access to witness statements, documents or other evidence or transcripts of such evidence if given orally). This response is not the place to restate the circumstances in which a Court or Tribunal can derogate from this principle. The Board is not proposing any change to the substantive legal principles, which are well-established, and some of which are identified below. As noted above, there cannot be a 'one-size-fits-all' approach to how the open justice principles find their expression in Courts and Tribunals.

16.2. Leaving to one side those Courts and Tribunals where, because of the nature of their work, restrictions on public access are necessary, in relation to access to documents or other material relating to the proceedings held by the Court or Tribunal, the law is stated in the Supreme Court's decision in ***Dring -v- Cape Intermediate Holdings Ltd*** **[2019] UKSC 38 [2020] AC 629** [41]-[46], from which the Board draws the following:

16.2.1. The constitutional principle of open justice applies to all Courts and Tribunals exercising the judicial power of the state. Unless limited by legislation, all Courts and Tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the Court or Tribunal. It is not correct to talk in terms of limits to this jurisdiction; it is how that jurisdiction should be exercised in any particular case.

16.2.2. The Supreme Court identified the principal purposes of the open justice principle as two-fold (recognising that there may well be others).

16.2.3. The first is to enable public scrutiny of the way in which Courts and Tribunals decide cases: to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly – see also Lord Woolf MR's observations in ***R -v- Legal Aid Board, ex parte Kaim Todner (A Firm)*** **[1999] QB 966, 977e-g** and the recent decision of the Court of Appeal in ***X and Y -v- BBC*** **[2025] EWCA Civ 824**.

16.2.4. The second goes beyond the policing of individual Courts/Tribunals. It is to enable the public to understand how the justice system works and why decisions are taken. For this they must be able to understand the issues, the evidence and the arguments adduced in support of the parties' cases. Before more modern innovations in the way that Courts and Tribunals work, the general practice was that the evidence and arguments were placed before the Court or Tribunal orally and documents would be read out. That is still largely the practice in the criminal jurisdiction. It provided observers of the proceedings with all the information, evidence and submissions that were being relied upon by the parties and considered by the Court. The modern practice in many jurisdictions is now quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Whilst this benefits efficiency of proceedings, it has the potential to reduce their transparency. Even in criminal proceedings, in which most of the oral tradition is retained, increased use is now made of written submissions (e.g. sentencing notes) which conveniently summaries the argument advanced by a party. Without access to these written materials, the observer's ability to follow what is taking place is seriously impaired; the process risks becoming closed and opaque rather than open and transparent.

16.2.5. The default position, which the Board intends to adopt, is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents (especially witness statements where these have been allowed to stand in place of oral testimony) that have been placed before the Court/Tribunal. Where oral evidence is given before the Court/Tribunal, the corollary is that the default position should be that a non-party ought to be able to obtain a transcript of the evidence that has been given by the witness. So far as possible, the observer should have access to the material to enable him/her to relate what the Judge has done or decided with the material and evidence that was before him/her. Doing so ensures that all proceedings remain open and transparent.

16.2.6. Largely, at present, it is for the person seeking access to Court documents to explain why s/he seeks it and how granting access will advance the open justice principle. In this respect, those wishing to provide contemporaneous reports of the proceedings are currently better placed than others to demonstrate a good reason for seeking access.

16.2.7. The Board considers that the objective is clear. In respect of the contemporaneous understanding and reporting of proceedings in open Court,

no burden should be placed upon someone wanting access to the Core Documents to explain why s/he wants such access. This simply reflects the position as it was many years ago. No one who wanted to sit in the public gallery of proceedings in a Court or Tribunal was expected to give a reason why they wanted to watch the proceedings in open court. The Court or Tribunal has always had powers to withhold information or evidence from the public in those proceedings, and in certain circumstances to impose reporting restrictions protecting that information from publication, but subject to that any citizen was entitled to observe the proceedings in public and subsequently to report upon them. It is in the public interest to promote, not restrict, such access and reporting (a public interest that is reflected in the important privilege that attaches to fair and accurate reports of such proceedings).

16.2.8. As noted, in some cases the Court or Tribunal may be strictly satisfied that parts of the evidence (including documents) should be withheld from the public in proceedings in open court. Typically, that will be because the Court or Tribunal is satisfied that disclosure of the material will cause harm to the administration of justice or to legitimate and sufficiently weighty interests of others. In such cases, the Court or Tribunal may make consequent orders including limiting non-party access to the withheld material. The most obvious justifications for withholding material include national security, the protection of the interests of children or adults who lack capacity, the protection of legitimate and sufficiently weighty privacy interests, and the protection of trade secrets and commercial confidentiality.

16.2.9. Confidentiality is, however, not usually sufficient on its own to justify derogations from open justice. It is usually only where the proceedings are brought to vindicate that confidentiality that derogations are justified. That is so because otherwise the Court by its process would destroy that which the party was seeking by the proceedings to protect. In civil cases, parties are frequently compelled to disclose documents which contain private and/or confidential information. Until trial, use and wider disclosure of that information is limited to that which is necessary for the proceedings. At a trial or other hearing in public, some of those disclosed documents may be deployed or relied upon. Ordinarily, in consequence, the documents or evidence will then become available to non-parties. The public disclosure of the information may well destroy any confidentiality.

16.3. Some Respondents invited the Board to reflect upon issues of privacy and confidentiality and how they impact on open justice, and one Respondent ask whether the Board had carried out an impact assessment of the "negative impacts" of open justice. One Respondent suggested that in civil litigation – aside from inspection of witness statements during trial - witness statements and expert reports should only be available upon application; that litigating parties should have the opportunity to challenge the request where appropriate and should be able to redact the documents appropriately without prior resort to the Court or Tribunal.

16.4. The Board's position is, however, clear. The principles of open justice are well-established. The Board has no power to change or recalibrate these principles, even if it wished to do so.

16.5. Those principles make clear that the process of litigation in Courts and Tribunals may well lead to information that a party or witness would rather have kept private or confidential is exposed to public glare. In ***Scott -v- Scott*** **[1913] AC 417, 463**, Lord Atkinson explained: "*The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or [a] deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect*". To the extent that private or confidential information is, by the Court's process, made public, then "the *collateral impact… on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*": ***Khuja -v- Times Newspapers Ltd*** **[2019] AC 161** [34(2)] *per* Lord Sumption. Similarly, in ***ex parte Kaim Todner***, Lord Woolf MR observed: "*In general… parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation."* Consequently, any interference with the public nature of court proceedings is to be avoided unless justice requires it.

16.6. The Board considers that it neither appropriate nor necessary for it to carry out any assessment of the "*negative impacts*" of the principles of open justice. To the extent that negative factors are relevant and admissible in the application of the principles of open justice, the law already allows them to be taken into account by the Court of Tribunal making the decision on any derogations from open justice. However, as the authorities referred to above recognise, there will be some negative impacts that are simply "*the price to be paid for open justice*". As stated above, the Board is not recalibrating the principles of open justice; it has neither the power nor jurisdiction to do so. The Board's role is to lead and coordinate the promotion of transparency and open justice across the Courts and Tribunals in England & Wales. That is about ensuring that the principles of open justice are being embraced, promoted and protected by those Courts and Tribunals. If the relevant committees with responsibility for the procedural rules that apply in Courts and Tribunals consider that changes should be made to those rules to reflect the requirements of open justice, then it will be for each committee to consider the identified benefits of the proposed rule change and its likely impact. The rules committees may also consult on proposed rule changes.

16.7. The Board will be guided by and intends to apply the following summary of the law in Master of the Rolls' ***Practice Guidance*** **[2012] 1 WLR 1003** (with internal citation omitted)

> [9] Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public...

[10] Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.

[11] The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test.

[12] There is no general exception to open justice where privacy or confidentiality is in issue…

[13] The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence.

16.8. It will be a key focus of the Board to look closely at the categories of document that a non-party has a right to obtain (subject to the Court/Tribunal making an order in a specific case withholding one or more documents). Drawn from the principles in ***Dring***, the Board's position is that the default position for each Court or Tribunal (subject only to derogations or restrictions which are strictly necessary) that non-parties should have a right to obtain from the records of the Court or Tribunal the core documents in proceedings held in open court: i.e. those documents that would enable a non-party to understand the issues, the evidence and the arguments adduced in support of the parties' cases and, ultimately, the decision of the Court or Tribunal ("the Core Documents"). This is reflected in Paragraph (2) of the Key Objectives. It would include, for example, skeleton arguments and other written submissions that are provided to the Court or Tribunal.

16.9. In civil proceedings, for example, CPR 5.4C(1) identifies those documents to which a non-party has a right to obtain from the records of the Court. A non-party is required to make an application to the Court to obtain any other documents from the records of the Court. The documents to which a non-party can obtain 'as of right' under CPR 5.4C(1) is very restricted; limited to orders and judgments of the Court and Statements of Case. The Board considers that this fails to include all the Core Documents. The clearest omission from CPR 5.4C(1) is skeleton arguments (or similar written submission) that are deployed in place of what would otherwise have been oral submissions to the Court or Tribunal, but also witness statements and expert reports upon which reliance has been placed by a party at a hearing or trial held in public.

16.10. Some Respondents pointed to confusion and uncertainty as to the documents non-parties can obtain from a Court or Tribunal, such as witness statements used in the proceedings. The Board considers that, on an issue that has such importance for transparency and open justice, such confusion and uncertainty must be avoided.

16.11. To support the provision to non-parties of Core Documents, it is axiomatic that the Court or Tribunal must *have* these documents to be able to provide them. This has two main implications:

16.11.1. First, Courts and Tribunals will need to ensure that their procedural rules generally require Core Documents to be filed with the Court or Tribunal. As already noted, in civil proceedings, the Civil Procedure Rules do not presently require witness statements relied upon at trials or skeleton arguments to be filed. It will be for each Court and Tribunal to consider the changes that may be needed in practice/procedure/rules to enable that Core Documents can be provided to non-parties, but this is an area that upon which the Board will want to focus attention to ensure that this is consistency in approach, so far as possible.

16.11.2. Second, Courts and Tribunals do not hold records indefinitely. HMCTS is responsible for the administration of Courts and Tribunals, and it is an executive agency of the MoJ. The MoJ uses publicly-available 'Record Retention and Disposition Schedules' to manage its compliance with legislation including the Public Records Act 1958. To this end, MoJ/HMCTS will destroy paper copies of files (and delete their digital equivalents) after a defined period. That period varies from jurisdiction to jurisdiction. Self-evidently, if the Core Documents sought by a non-party have been destroyed or deleted, the Court or Tribunal will be unable to provide copies.

16.12. Some Respondents raised the resource implications of greater provision of documents relating to cases. The Board acknowledges this, but believes that increases in digitisation will mean that the burden of providing documents would not be as onerous as it might have been in the days when the Court or Tribunal maintained paper records. The Board believes that the responsibility for providing documents relating to proceedings in Courts and Tribunals should rest principally, as it does now, with the Court or Tribunal; not the parties. In general terms, it is impractical and undesirable for the provision of Core Documents to non-parties to depend upon the cooperation of the parties, many of whom will not be legally represented. Ultimately, the Court must retain control of third-party access to Core Documents. That said, the Board recognises that few of the digital case management systems currently used by Courts and Tribunals presently offer an online portal by which non-parties can access or download Core Documents, even on a limited basis. And, as a matter of practicality, it may sometimes be necessary for a Court or Tribunal to rely on the parties – perhaps the legally represented party – to facilitate access to the Core Documents during a hearing.

16.13. One Respondent raised a concern that documents made available by the Court or Tribunal might inadvertently disclose confidential/private information another suggested that there would be resource implications in redaction of witness statements. The Board considers that it is the responsibility of the person who asserts that a derogation from open justice is required to raise the issue with the Court/Tribunal and to seek an order that the relevant information be withheld from

the public. The Court/Tribunal will determine such applications applying the well-established principles. Courts and Tribunals already use various methods to withhold such information where a claim for confidentiality is made out (for example redacting information from publicly available documents or utilising confidential exhibits to statements of case or witness statements which are ordered to be withheld from the public).

16.14. The principle, however, is clear: it is for the Court/Tribunal – not the parties – to decide whether the information is to be withheld from the public and if so, the manner in which that is to be achieved. In the absence an application to impose restrictions, the Court/Tribunal will proceed on the basis that documents/evidence submitted to the Court during proceedings will be liable to be made public in the usual course. This is the embodiment of open justice. The burden is always on the person seeking the derogation from open justice to persuade the Court or Tribunal by sufficiently cogent evidence that the restriction sought is necessary and proportionate.

16.15. As to the potential resource implications, the Board has always recognised that delivery of open justice may be constrained by available resources. However, the Board is not presently convinced that the impact is likely to be as significant as some Respondents fear. In civil proceedings, the position now is that a party would find it very difficult to assert a right to withhold parts of a witness statement that had been relied upon (without redaction) at a public hearing or trial. One of the benefits of increased digitisation is that provision of documents becomes much easier and less costly.

16.16. The Board notes the concern, expressed by some Respondents, that aspects of open justice (for example increased access to documents and expansion of broadcasting) might have a chilling effect by discouraging people from bringing claims. This is a potentially complicated area, and the answer may vary jurisdiction by jurisdiction and even case to case. Assessment of the Key Objectives and what they require in each Court or Tribunal jurisdiction is for each jurisdiction to assess. However, some principles are clear.

16.16.1. Doing justice will always come first. For example, in the criminal jurisdiction, the identities of some witnesses are protected (for example, complainants in sexual offence cases and alleged victims of blackmail). Where a witness has been granted anonymity in the proceedings, there could be no question of his/her evidence being broadcast. Indeed, the extent to which the evidence of any witness could be broadcast, and any deterrent effect it might have on the witness being willing to give evidence, would need very careful consideration.

16.16.2. More generally, however, the administration of justice in England & Wales is firmly based on the principles of open justice. They are not negotiable. Recognising that the administration of justice in Courts and Tribunals is a matter of public interest, litigants cannot, for example, decide that a claim brought in a Court or Tribunal in England & Wales should be heard and

determined in private or that they should be anonymised.[1] Whether it is necessary for a particular claim (or part of a claim) to be heard and determined in private, or for the names or parties or other information to be withheld from the public, is a matter for the Court or Tribunal to determine (in accordance with the established principles of open justice). There are some Courts and Tribunals where, to do justice, it is strictly necessary for the proceedings to be heard in private and/or for other derogations from open justice to be adopted. Nevertheless, even in these jurisdictions, the principles of open justice challenge the Court or Tribunal to ensure that the public receives as much as possible about the proceedings and the decision that has been made.

16.16.3. For litigants who wish to have their disputes resolved completely in private, there may be other dispute resolution options available. Any recalibration of the principles of open justice on the grounds that people were being "chilled" from pursuing claims or complaints because of the openness and transparency of proceedings in Courts and Tribunals would be a matter for Parliament, not the Board.

16.17. Finally, in relation to expert evidence, it will be a matter for each Court and Tribunal jurisdiction to decide whether and, if so, at what point non-parties should be provide with copies or have access to expert evidence. However, the starting point is that expert evidence is evidence. If it has been relied upon by a party as part of its evidence before a Court or Tribunal at a hearing in public then, unless there is a convincing justification for departing from the usual principle, that evidence should be publicly available along with all the other evidence in the case. The Board recognises that, as with other witness evidence, there will be an important issue as to *when* this evidence becomes publicly available.

16.18. One Respondent suggested that the Board ought to decide the timing of when evidence becomes available at the level of the Key Objectives. The Board disagrees and maintains the position, expressed in the Explanatory Notes, that the timing of when such documents would become available would be matters to be considered by each Court and Tribunal to resolve. Nevertheless, the Board accepts that there may be good reasons why evidence (including expert evidence) should only be publicly available once it has been relied upon by a party at a hearing in public. The law of defamation provides certain statutory reporting privileges for evidence given in Court. Whilst there are ancillary reporting privileges for documents that are required by law to be open for public inspection (and these might be engaged in respect of cases that are determined without a hearing), the Board considers that the policy underpinning the key reporting privilege is one rooted in the public interest that attaches to fair and accurate reports of proceedings in public before a Court or Tribunal. The Board recognises that the administration of justice could be

---

[1] "… orders which contain derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the Article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public": ***Practice Guidance*** [16]; ***JIH -v- News Group Newspapers Ltd*** **[2011] 1 WLR 1645** [12]

harmed if witness statements of the parties could be reported, under privilege, divorced from any cross-examination and in advance of a trial or other hearing. Finally, the Board would note that the need to protect the integrity of criminal proceedings (particularly those tried by jury) is likely to justify more significant restrictions as to non-party access to witness statements and expert's reports in that jurisdiction. This fortifies the Board in the view that it is for the relevant jurisdictions to determine when evidence and other documents should be made publicly available pursuant to the open justice principles.

Reporting Restrictions

17. In their responses, the BBC, ITN and Guardian News and Media Limited ("GNM") suggested that the Key Objectives should include specific reference to the desirability that notice of applications for reporting restriction orders should be given to the media and that reporting restrictions require a statutory basis and that the terms of any restriction should be necessary, proportionate and established by clear and cogent evidence.

18. *Response from the Transparency and Open Justice Board: X*

18.1. In determining the Key Objectives, the Board has sought to provide high level objectives which do not descend into matters of detail which will be matters to be resolved in each Court and Tribunal jurisdiction. Although it might be possible to give general high-level principles that relate to reporting restrictions, this would simply be to attempt to summarise the substantive law in what is already a complicated area. Indeed, since the Board published the Key Objectives (and Explanatory Notes) in December 2024, the Supreme Court has recently given judgment in ***Abassi -v- Newcastle upon Tyne Hospitals NHS Foundation Trust*** **[2025] UKSC 15**, which will now have to be considered in cases where restrictions are sought in relation to what can be published about proceedings. The Key Objectives cannot be and are not a substitute for the substantive law that applies to open justice (including reporting restrictions), which will continue to apply.

18.2. As a matter of practicality, the Board has always recognised that it is very important that information is provided about any reporting restrictions that apply to any relevant proceedings, and this is reflected in the Key Objectives. Reflecting the points made by the BBC, ITN and GNM, some amendments have been made to the section dealing with reporting restrictions.

Coroners, Magistrates and other proposed members of the Board

19. Some responses highlighted the omission or Coroners and Magistrates from the membership of the Board. Other Respondents have suggested that the Board would benefit from members from stakeholders outside the Judiciary/HMCTS/MoJ.

20. *Response from the Transparency and Open Justice Board:*

20.1. The Board accepts that it would benefit from the experience of those who sit in the Magistrates' Court. Given the breadth of the work of the Magistrates' Court and that its jurisdiction embraces, criminal, family and civil proceedings, requests have been sent to the Chief Magistrate to nominate a District Judge (Magistrates' Court) and to

the National Lead Magistrate to nominate a Magistrate who sits in the family/civil jurisdiction to join the Transparency and Open Justice Board.

20.2. The Board intends to keep its membership under review. The formation of the Stakeholder Group, which meets regularly, is designed to ensure that the stakeholder voice is heard at key stages of the Board's work. It is also anticipated that, when work moves to the phase of implementing the Key Objectives, there will be a need for jurisdiction specific sub-groups to assist and work closely with the various Courts and Tribunals jurisdictions.

Suggested amendments to the wording of the Key Objectives

21. Substantial issues that emerged from the responses and which the Board has accepted are detailed above and reflected in the reworked Key Objectives. Further detailed feedback and suggestions for amendments to the wording of some paragraphs of the Key Objectives was also provided.

22. *Response from the Transparency and Open Justice Board:*

22.1. The Board has carefully considered and reflected on these suggestions and proposed amendments. This has led to amendments being made. Where the Board has not accepted suggested changes, this is usually because the suggestion seeks to incorporate a reference to the existing substantive law of open justice, because the suggestion is too prescriptive for overarching principles, or because the Board anticipates that the point is more appropriately a matter for consideration by the Courts and Tribunals jurisdictions in the next phase of the Board's work.

22.2. The Board repeats what was said in the Explanatory Notes that were published with the Proposed Key Objectives in December 2024. The finalisation of the Key Objectives are the first stage of reform. The next phase of the Board's work will be to engage with all Courts and Tribunals and to ask them to carry out an evaluation of the extent to which their current practice and procedure achieve the Key Objectives. Where they do not do so, the relevant Courts and Tribunals will be asked to formulate a change programme that would see the Key Objectives being realised. As part of that reflective exercise, the Courts and Tribunals will be asked to identify any obstacles to achieving the necessary changes. It is likely that any changes in procedural rules will be subject to public consultation. Stakeholders will therefore have a further opportunity to engage with and comment upon these proposals.

Resource implications and risks to delivery

23. 31% of the responses expressed concerns about implementation. There are concerns about the practical implementation of the objectives. Concern was raised about the potential burden on court staff in implementing these objectives, particularly in terms of time and expense. Respondents raised that the Board would need to ensure that there are enough resources to support transparency initiatives such as sufficient staffing, training, and technological infrastructure. Additionally, 17% of the responses raised the role of technology claiming that it is crucial for facilitating transparency. Specific suggestions include, enabling

remote access to hearings through video links and other digital tools and using digital tools for recording and reporting court proceedings to ensure accuracy and accessibility.

24. *Response from the Transparency and Open Justice Board:*

    24.1. The Board fully recognises and understands that changes may need time and sufficient resources to be achieved fully. The Board also recognises the crucial role that technology will play in realising the Board's objectives. There can be no doubt that open justice is greatly supported and much easier to deliver in Courts and Tribunals that have been digitised. Courts and Tribunals that are still using paper files will pose challenges to delivery and the cost of is likely to be more.

    24.2. Whilst resourcing and technology are for the Ministry of Justice (MoJ) and HMCTS to provide, the Board is committed to working with both HMCTS and MoJ to support the objectives and representatives from both organisations attend Board meetings.

Transparency of data relating to Courts and Tribunals

25. Several responses, principally those on behalf of the Law Society and JUSTICE, suggested that the Board's remit should be widened to include data relating to Courts and Tribunals and that the Key Objective should reflect this additional area.

26. *Response from the Transparency and Open Justice Board:*

    26.1. The Board agrees, in principle, that transparency in data sharing is very important. However, disclosure of data is its own specialist area with many complex considerations, such as data protection regulations, data ownership which can be shared across multiple bodies, and how disclosure of data interacts with the protection of important constitutional principles. It is a significant area on its own.

    26.2. Whilst the terms of reference of the Board are arguably broad enough to encompass the area of transparency of data relating to Courts and Tribunals, this is a very significant further area that is separate from open justice. The Board therefore considers that this area does not presently fall within the Board's remit.

Question 3 - Do you think there is something that has been included within the objectives that shouldn't be? If yes, what?

27. Most respondents are content with the objectives and only four responses suggest that something should be removed. Several responses suggested that objectives number 2 and 3 in the proposal were presently expressed as caveats rather than objectives. They provided context and sought to manage expectations, but they were not in themselves objectives.

28. *Response from the Transparency and Open Justice Board:*

    28.1. The Board accepts the substance of these points. It has reformulated the final objective in the revised Key Objective to focus on an achievable objective, rather than simply stating a constraint or caveat.

28.2. The Board has converted the original final "objective" to a "Note" recognising that the original paragraph was not an objective and could not be converted into one. The Note is nevertheless important and will be retained in the finalised document. It would be unrealistic for the Board not to acknowledge clearly the role that resources and partnership with HMCTS and MoJ play in delivery of the Key Objectives.

Conclusion

29. The Board feels that the responses reflect strong support for the principles of transparency and open justice, with numerous suggestions for enhancing the objectives to ensure they are comprehensive, practical, and effectively implemented.

30. The Board would like to express its gratitude for the time and dedication shown by all respondents in your responses. The detailed responses received have ensured that the objectives are both well-informed and comprehensive.

31. The responses received have been considered in finalising the Board's Key Objectives which have been agreed by the Board and are now published here.

32. The Board looks forward to the continued support and interest of key stakeholders and the further opportunities that there will be for engagement with the Board on its future work.