‘Justice system data’: a comparative study

Executive summary 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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Overview

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 of, and confidence in, the justice system.

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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.

Background

Contemporary justice systems have evolved from anachronistic structures and rules over time, rather than being purposively designed, and a complex hybrid of policies and laws govern the collection, storage and dissemination of the information generated by the process of justice: 'justice system data'.

This report examines the management of justice system data in three jurisdictions: Australia, Canada and Ireland. Across the three jurisdictions, we found a lacuna in terms of policies for access to justice system data, and a complex web of legal and ethical arrangements between a variety of justice system actors. There is, however, a move to address these issues, and a recognition that better justice system data governance increases access to justice and upholds the rule of law for citizens, helping law and policymakers understand the functioning of the justice system more clearly, and improving its efficiency and fairness for all users.

Brief

This report was commissioned by The Legal Education Foundation (TLEF) as part of its 'Smarter Justice' programme to analyse the ways in which justice system data is managed in three English-speaking common law jurisdictions.

Our brief asked us to consider how other countries define justice system data; their arrangements for access to data, and whether that data is open/shared/closed; and the benefits and drawbacks of their approaches in relation to judicial independence; public understanding of the law and confidence in the justice system; innovation; and the attractiveness of the legal system as a forum for resolving disputes.

The report builds on previous TLEF research on justice data in England and Wales and sets out a comparative review, considering the management of justice system data in Australia, Canada and Ireland, and highlights good practice examples of justice data governance which may be used to inform policy development in England and Wales and beyond.

Methodology

The research was conducted from May – August 2020 via literature review and interviews with key individuals across the jurisdictions, conducted remotely due to the restrictions of the COVID-19 pandemic period. Interviewees came from a range of different professional backgrounds, including academia, court services, legal technology, and access to justice organisations. The literature review included academic and policy materials as well as court service and legal information websites. We considered both higher and lower courts in regional and federal jurisdictions, and examined the principles and practice of existing systems, highlighting good practice examples.

Findings

Australia

Chapter 3 provides an overview of justice system data in Australia at the federal and state level, and examines the state-specific context by looking at the two biggest states: Victoria and New South Wales. Australia has a common law system with a complicated legal system hierarchy comprising the federal division, and the state and territory division. 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.

Access to justice, technology and data

The Australian federal courts services structure is in a process of flux, and both states considered, Victoria and New South Wales, are undergoing a process of considerable technological change and reform. We found a continuum of access to data, from largely unrestricted to limited access subject to court staff discretion, and a lack of consistency between states, jurisdictions, courts, and civil and criminal divisions within those courts.

Overall, the position is one of technological progress, 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.

Justice system data: Good practice examples in Australia

- All Australian courts that we reviewed, across all jurisdictions, had some form of media liaison representative role.
- Victoria Supreme Court judges discuss their judicial work on an innovative podcast series, helping the public access and contextualise the judicial process.
- The High Court of Australia publishes transcripts of all its hearings on their website.
- The Federal Court website has a search function which allows easy access to real-time administrative data.
- In high-profile cases, the Federal Court media liaison officer posts an online file, containing all the publicly available material in the case.
- The pioneering open-access AustLII model has now been adopted around the world.
- All listings are online for all courts in all jurisdictions, and audio/visual streaming initiatives have allowed greater visibility to court proceedings.
- Accountability mechanisms for judiciary allow for public scrutiny and a complaints process.
- The New South Wales Court Information Act 2010 – while yet to be enacted – is pioneering legislation with clear justice data definitions and boundaries for access.

Canada

Chapter 4 provides an overview of justice system data in Canada, at the federal and provincial level. Canada's justice system is both bijural, combining two legal traditions of common law and civil law, and bilingual. The justice system combines regional and national elements, and each region and court is subject to different administrative and funding arrangements.

Access to justice, technology and data

Canada has a notable number of provincial and national access to justice initiatives, and a strong body of academic work on access to justice measures, although interviewees felt that inadequate funding and a deficit of quality, cross-sector data have inhibited progress.

Canada has a wide spectrum of measures for the provision of legal data: from expensive paywalled privately-run services, to free access models and open legal data.

Justice system data: Good practice examples in Canada

- Canada has numerous public legal education resources, and CanLII is an open access pan-Canadian resource.
- Statistics Canada collects, analyses and publishes crime and justice statistics; the Department of Justice is engaged in conducting qualitative legal problems research across the provinces, and has proposed a commitment on open justice for the next Open Government National Action Plan.
- Canada has a strong network of access to justice initiatives, with judicial support at national and provincial/territorial level.
- The publication of a model policy for access to court records was an early initiative to identify types of court records and to design a common policy.
- The Judges Advisory Committee on Technology published a blueprint on the security of judicial information, and almost all jurisdictions have appointed Judicial Information Technology Security Officers.
- The British Columbia Civil Resolution Tribunal has a clear, publicly available access to information policy, and monitors user satisfaction with the proactive and timely collection of user data, publishing regular, anonymised reports.
- The Supreme Court Canada and British Columbia Courts have clear records management policies on the type of data transferred to archives and on which date.

Ireland

Chapter 5 gives an overview of justice system data management in Ireland. Ireland has a common law legal system, and the court service is undergoing a reorganisation and reform programme looking at technological reform and improving the management of and access to court data.

Access to justice, technology and data

Apart from listings, little justice data is available online. The physical 'court file' plays an important role, and this has repercussions for open justice. Other than some basic data on case traffic by jurisdiction, access to court user data is not currently possible.

Justice system data: Good practice examples in Ireland

- All courtrooms in Ireland record proceedings using Digital Audio Recording functionality.
- A new Judicial Council initiative aims to improve judicial accountability, with the jurisdiction to hear complaints.
- The Courts service has a commitment to outreach work which includes internship programmes and mock trials.
- The High Court search tool makes a significant amount of administrative data available for free and without registering.
- A five-year reform programme is focused on optimising the use of technology, including a new Courts service website.

Conclusions

The historical and cultural legacy of the common law justice system has hindered technological development that could improve public access and data innovation; insufficient financial investment and decentralised policy and design mean that mechanisms for providing access to data are still mostly analogue in nature.

Definitions of justice system data

In all three of the countries reviewed, there is an understanding of court user data that has the potential to inform the design and development of the justice system, and a widely-documented deficit of such data. Particularly notable is the absence of court user data, and measures to capture user experience. Privacy concerns were apparent around the shift to digital and the effect on the traditional 'practical obscurity' of court records.

In Canada there are a number of collaborative initiatives working on developing better metrics to monitor the process and experience of justice by court users. 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 is collected by various jurisdictions, the case management systems used make data extraction and analysis difficult. A similar position exists in Ireland, but the technological reforms underway may change this.

Access to justice system data

Typically in Canada and Australia (with some exceptions) 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. Court decisions in all three case study countries are typically open and published online. 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).

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.

Assessing risks and developing safeguards

In many scenarios, it appeared that 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. Organisations responsible for managing justice system data need to develop appropriate modes of governance and regulation where none exists.

Data-sharing practices and judicial independence

We did not identify any robust empirical evidence that showed that greater public availability of data undermined judicial independence.

Data-sharing practices and public understanding of the law, and confidence in the justice system

Access to information about the law is an essential component of access to justice. The Canadian, Australian and Irish courts all showed examples of effective public outreach work, whether through judicial/court visits, or online resources delivered through legal organisations. 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. Where systems are less transparent, public confidence can dip.

Data-sharing practices and innovation

Successful innovation requires top-level support and grassroots consultation and involvement. Funding is key, so governmental support is required if justice data is to be improved.

Data-sharing practices and the attractiveness of the legal system as a forum for disputes

The management of justice system data should not dissuade users from using the proper channels of justice. However, court users do not necessarily have much autonomy or choice of legal forum. It is important to gather data on user experience and needs, so that vulnerabilities can be addressed, and to deliver transparent reporting of the workings of the courts, to improve and encourage use of their services.

Accountability

We identified few robust mechanisms for ensuring and monitoring access to justice data. We did not identify any independent process for challenging lack of access to justice system data, other than via the courts process.

COVID-19

The COVID-19 pandemic was an additional challenge and opportunity for justice system data management. For the most part, systematic and reliable research on the effects and outcomes of remote courts is not yet available, but the pandemic period has highlighted what is possible in terms of the move to a virtual courtroom in all three of the countries under review.

Challenges

We identified that:

- Concerns were held about privacy versus transparency, and the reduction in 'practical obscurity' with the shift to digital data. This was a dominant concern in Canada, and in Australia to a lesser extent: the issue has not yet come to the fore in Ireland, perhaps owing to the lack of digitised records.
- A lack of access to bulk data for research and commercial use was a frustration across all three countries.
- An over-reliance on third-party providers was especially an issue in Canada, but in all three countries, transcript services from private companies could prove costly.
- A lack of financial investment in data systems and court technology and slow innovation was apparent. Coordinated technological development was particularly an issue in Canada and Australia due to de-centralised structure of their justice systems. Ireland has had slow investment in technological development, but reform is now underway.
- Insufficient data collection on user experience and needs was an issue shared across all three countries, as were concerns about data accountability mechanisms and a lack of access to judicial and courts information via Right to Know laws.
- Many of the courts examined had a lack of clarity around provisions for public access to remote hearings during the COVID-19 period.

Recommendations

This report recommends:

- Clearly presented, publicly shared policies on the differing roles for executive, court service, judiciary and 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 judicial independence, public confidence in the legal system, etc.

We propose the following consultative mechanisms:

- Use and 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.
- Engagement with 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 areas of research

Our research identified other areas worthy of 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.

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