



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

**A Consultation on the Use of Live, Text-Based Forms of Communications from Court for
the Purposes of Fair and Accurate Reporting**

A Consultation Paper issued by the Judicial Office for England and Wales

1. The Consultation Process

- 1.1 On 20th December 2010, the Lord Chief Justice issued Interim Practice Guidance titled “The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting”. The effect of the Interim Guidance was to clarify the circumstances in which judges may allow use of mobile electronic devices to transmit text-based communications directly from the courtroom for the purpose of reporting the proceedings. The Interim Guidance is attached to this consultation paper. “Live, text-based communications from court” includes the use of internet enabled laptops to make text-based communications, smart phones used for mobile email and other internet services and similar devices.
- 1.2 When issuing the Interim Guidance, the Lord Chief Justice said that he would conduct a full consultation regarding the use of live, text-based communications from court. This paper sets out the considerations taken into account when the Interim Guidance was framed, and outlines issues which need to be considered before a final policy is determined.
- 1.3 The focus of the Interim Guidance, and of this consultation, is the use **by the media** of live, text-based forms of communication for the purposes of fair and accurate reporting. The media are presumed to be familiar with the requirements of the Contempt of Court Act 1981 to engage in “fair and accurate” reporting, in a manner

which respects any applicable reporting restrictions and the relevant Press Complaints Commission Code of Practice.

- 1.4 The consultation invites responses in relation to the courts of England and Wales. It does not relate to the courts in Northern Ireland or Scotland. Nor does it relate to the Supreme Court, which has produced its own policy on the matter¹, in the light of the fact that appeals heard before it do not involve interaction with witnesses or jurors, and that it is rare for evidence to be introduced which may then be heard in other courts.
- 1.5 Following the consultation, consideration will be given as to what, if any, further guidance or rules may be required, and what the nature of those changes will be. For example, in relation to the criminal courts, it may be possible for the Lord Chief Justice to amend the Consolidated Criminal Practice Direction, or request the Criminal Procedure Rule Committee to amend the Criminal Procedure Rules accordingly. In relation to the civil courts, the Civil or Family Procedure Rule Committee may be invited to make rules of court governing the use of live, text-based communications from court, or the Master of the Rolls or President of the Family Division may be invited to consider issuing practice directions on the matter.
- 1.6 It would be very helpful if consultees who practice in family law could bear in mind issues which may arise in proceedings held in private and to which particular reporting restrictions apply and identify any practical points accordingly.
- 1.7 Other than the Interim Guidance, the contents of this paper should not be considered to reflect the final views of the Lord Chief Justice.
- 1.8 The consultation opens on Monday 7 February 2011 and closes on 4 May 2011. Responses may be submitted by email to courtreporting@judiciary.gsi.gov.uk or by post to: Court Reporting Consultation, Royal Courts of Justice, Strand, London WC2A 2LL. For more details see www.judiciary.gov.uk/courtreporting.

2. Introduction

- 2.1 In any society which embraces the rule of law, it is an essential requirement that justice is administered in public and subject to public scrutiny. There is an immense public interest in the public being able to know the details of what takes place in the courts – subject, of course, to well established exceptions in the form of statutory reporting restrictions.
- 2.2 Traditionally, court reporters made notes in the courtroom, and filed the copy outside the courtroom, either by telephone or, lately, using mobile internet access. In more recent times, however, technology has developed which removes the need to leave the courtroom to file copy. Laptops which until relatively recently were large and cumbersome are now less obtrusive. Internet access which previously was only available at a dedicated wireless access point or back in the office is now available not only to the new generation of notebooks and laptops, but also to smartphones and tablet devices, all from within the confines of the courtroom.
- 2.3 As well as technological developments, the identity of those wishing to report court proceedings has also changed; the internet provides a platform for some who are not members of the accredited media to report, comment upon (or, indeed, criticise) court proceedings, and such persons have availed themselves of the opportunity the internet presents to engage in such reporting.
- 2.4 A further and significant factor is the potential for misuse of the internet by jurors. Technological advances in reporting, based upon the ever widening platform of the internet, will inevitably serve to fuel the potential for prejudicial, unfair and inadmissible material to be seen on the internet by jurors. This consideration cannot be ignored.
- 2.5 The central issue to be considered by this consultation, therefore, is how the courts should take account of these technological and cultural developments in reporting, in a way which protects freedom of speech, the right to a fair trial and maintains the

statutory requirement that reports of legal proceedings must be fair, accurate and in good faith.

3. The Interim Guidance

3.1 The Interim Guidance published on 20 December 2010 provides a framework for the issues which must be considered when determining the substantive approach to live, text-based communications from court.

3.2 There is no statutory prohibition on the use of live, text-based communications from court (see paragraph 10 of the Interim Guidance); the power to regulate such activity derives from the Court's jurisdiction to control what takes place in the courtroom to prevent disruption. The purpose of this consultation is to consider the approach the courts should take to live, text-based communications, pursuant to those powers and within the existing legislative framework. Changes to the legislative framework and the policies which underlie it (for example reporting restrictions, the prohibition on photography in the courts) are, therefore, beyond the scope of this consultation, and responses are not invited in relation to those or related issues. The policy and legislation for such matters are the responsibility of the Government, not the judiciary. This consultation paper relates solely to those matters which are the responsibility of the judiciary.

3.3 At the outset of considering what the courts' approach to this issue, it is necessary to identify whether there is a legitimate demand for live, text-based communications from court.

3.4 The paragraphs that follow set out specific questions for consideration.

Consultation Question 1:

Is there a legitimate demand for live, text-based communications to be used from the courtroom?

4. Risks arising from live, text-based communications from Court

Risk of disruption to court proceedings

- 4.1 The circumstances under which live, text-based communications are permitted must be tailored to mitigate the potential risks which may arise from the use of such communications in court. As stated in paragraph 1 of the Interim Guidance, live, text-based communications will only be permitted in relation to those aspects of the proceedings which are not subject to reporting restrictions.
- 4.2 At one level, those risks include the potential for disruption to the proceedings which arises from the use of electronic devices in the courtroom, for example, electronic interference with the court's public address or sound recording system caused by mobile telephone signals, or the increased likelihood of mobile phones ringing in the courtroom. Paragraph 15(b) of the Interim Guidance² recognises this possibility and states that courts may limit the number of attendees engaged in live, text-based reporting for that reason alone.

Risks to the fairness of court proceedings

- 4.3 However, there are more serious consequences which may follow the use of live, text-based communications from court. In his lecture to the Judicial Studies Board of Northern Ireland in November 2010³, the Lord Chief Justice outlined some of the risks to the fairness of trials which may derive from the internet and the use of live, text-based communications from court. The main risk, which is well documented⁴, stems from jurors researching their cases on the internet.
- 4.4 Fundamentally, juries must try cases on the basis of the evidence presented to them in court. They must not discuss the case with anyone other than fellow jurors. The improper use of the internet – both in and out of court – risks breaching these foundational principles of trial by jury. The use of live, text-based communications

from court may increase this risk by fuelling the potential for jurors, whether accidentally or otherwise, to encounter prejudicial or inaccurate material online.

Risk of Coaching Witnesses

4.5 Another potential risk relates to the coaching or briefing of witnesses. Live, text-based communications from court may be used by witnesses to find out what has been said in court before they give evidence themselves. For good reason, in most cases witnesses are not permitted to enter the courtroom until they give evidence. However, if an account of what has been said by one witness can be transmitted electronically, then there may be available to another witness a body of material as to what has taken place in court just moments before he is due to testify. There is a further risk in the use of Twitter specifically as outlined in 5.2, below.

Consequences of Harm

4.6 The consequences of the risks outlined above may be very serious. Trials may have to be stopped and convictions may be found to be unsafe if it emerges that members of a jury were exposed to prejudicial material or commentary on the internet. Those responsible for that conduct (whether the jurors or those placing the material online) may be guilty of contempt of court, punishable by a fine or a sentence of imprisonment. It is, therefore, vitally important that the risks are identified and mitigated not only to ensure that the course of justice is not interfered with in particular proceedings, but also to prevent anyone unwittingly committing contempt of court.

4.7 It follows, therefore, that the circumstances in which live, text-based communications from court are permitted must be tailored to the nature of the proceedings in question in order to mitigate the risks inherent to such communications. Cases before a judge alone and cases in which no witness gives oral evidence in person will attract significantly different considerations from cases before a jury, and those involving oral testimony.

Consultation Question 2:

Under what circumstances should live, text-based communications be permitted from the courtroom?

Consultation Question 3:

Are there any other risks which derive from the use of live, text-based communications from court?

5. Different Platforms for Live, Text-Based Communications from Court

- 5.1 Certain platforms for live, text-based communications may bear a greater potential for prejudice to legal proceedings than others. For example, mobile email – whether from an internet enabled laptop or a smartphone – may be used by journalists to write and file substantive “copy” directly from the courtroom. The “copy” will be received by the newsroom of the relevant publication, and published in much the same way as if the journalist had taken notes on paper on court, and then filed the story out of the courtroom. The story will be written and filed as a substantive piece, possibly with the benefit of consideration by a sub-editor before publication. If published online, reader comments may be permitted, but are not inherent to the presentation of the article, and may be subject to moderation by the publication’s web team. In short, the “traditional” methods of filing copy by the media involve a degree of editorial control.
- 5.2 By contrast, platforms such as Twitter (which allows a maximum of 140 characters per post) by their very nature usually involve less measured remarks, which are presented in a manner which invites commentary and opinion from other users, and are posted in real time with no opportunity for review.
- 5.3 While it may be the case that a journalist sending messages using Twitter from the courtroom ensure that they post only “fair and accurate” material, (adopting the language of the Contempt of Court Act 1981), other users of Twitter may respond to those posts by posting or linking to prejudicial material or commentary which would not be admissible in court or would be in breach of the PCC Code of Practice. Jurors

may be tempted to engage in Twitter discussions on the topic, perhaps by commenting on messages posted from or about their trial.

- 5.4 The internet is assuming an important role in reporting certain events as they unfold. However, very often blog and microblog messages are posted in a trivial manner, even when they relate to a serious subject matter. The fact that compiling such messages can be done in much the same way as hastily writing a private text message may present a false sense of security to the author; the same shorthand can be used, and the same device is used to send the message, yet the consequences arising from a contemptuous internet message can be grave. For example, some Twitter users appear to be willing to commit to writing and publish material which they would have previously only uttered in conversation, or in a private text message. The trivial approach to such postings does not mean, however, that they are any less serious than content written down elsewhere.

6. Instant Publication and Sensitive Matters

- 6.1 The real-time and instant nature of certain platforms may also increase the magnitude of the harm that may be caused by mis-reporting court proceedings; the publication is instant, perhaps to a number of “followers”, and it is very difficult to remove communications once they are circulating on the internet.
- 6.2 Very often, sensitive material emerges in the course of a trial, the sensitivity of which is not immediately apparent; in criminal trials, counsel will discreetly seek to raise the matter with the judge in the absence of the jury, in a way that does not further breach the sensitivity by highlighting it. In such circumstances, the judge may ask the media present in court to omit such material from their reports (usually pending consideration of whether a formal reporting restriction needs to be imposed), and experience has shown that the media are willing to do so. If the relevant material has already been published on the internet, particularly in circumstances where it may have a number of followers or receive a large amount of publicity, it is very difficult to undo the effects of that publication.

Consultation Question 4:

How should the courts approach with the different risks to proceedings posed by different platforms for live, text-based communications from court?

7. Use of Mobile Telephones

- 7.1 Because most live, text-based communications from court are conducted from mobile telephones or similar devices, it is necessary to consider how the normal and almost invariable rule that mobile phones must be switched off in court should apply when permitting live, text-based communications from court. The rule exists because of the potential mobile phones have to interfere with the proceedings, and the fact they may be used with ease to make illegal sound or video recordings, or to take photographs. The blanket prohibition against the use of mobile telephones in court is also easier for court staff and security officers to enforce than if there were some permitted uses and some prohibited uses.
- 7.2 It is necessary to consider, therefore, how the use of mobile telephones to conduct live, text-based communications from court should be reconciled with the long-established and well-founded prohibition against the use of mobile telephones in court. If the use of some devices is to be permitted for some purposes – or by some people – and not others, how should court staff enforce that rule, given it is very difficult to tell the purpose for which an electronic device is being used?
- 7.3 The approach taken by the Interim Guidance (at paragraph 12 and following) provides that judges must grant permission for live, text-based communications to be made from the courtroom on each occasion that such communications are used. One option could be for the judge, when giving permission to engage in live, text-based communications from court, to stipulate that those wishing to do so must demonstrate their legitimate need and must sit in a designated area of the court room (for example accredited members of the media sitting in designated press seating). All those sitting in the particular area may be presumed to be using the equipment for legitimate purposes, and the situation may be kept under review by the Judge. This

approach allows the normal rule in relation to the use of mobile telephones to be maintained, yet allows for it to be applied flexibly in order to permit live, text-based communications from court.

- 7.4 The Interim Guidance states that applications may be informal, and envisages that judges may grant permission of their own motion.

Consultation Question 5:

How should permitting the use of live, text-based communications from court be reconciled with the prohibition against the use of mobile telephones in court?

8. Who should be permitted to engage in live, text-based communications from Court?

- 8.1 The Interim Guidance states, *“The most obvious purpose of permitting the use of live, text-based communications would be to enable the media to produce fair and accurate reports of the proceedings”* (paragraph 13).

- 8.2 This approach presumes that the media will have a legitimate need to engage in live, text-based communications from court, over and above members of the public. It is set out in paragraph 15.b of the Interim Guidance in the following terms:

“it may be necessary for the judge to limit live, text-based communications to representatives of the media for journalistic purposes but to disallow its use by the wider public in court

- 8.3 Inherent in the above approach is a presumption that the media will be familiar with the requirements of fair and accurate reporting, that they will abide by the relevant Press Complaints Commission codes of practice, and that they will understand and abide by any reporting restrictions that may be imposed.

- 8.4 The courts have long recognised the significant role performed by the media. The press are afforded seating areas in most courtrooms, journalists are invited to make representations as to the imposition of reporting restrictions, and the Judicial Communications Office works with journalists and the media, to assist them in the fair and accurate reporting of court proceedings. The media are admitted to certain proceedings in the family courts which are not open to the public. Treating the use of live, text-based communications by the media as the paradigm case for adapting the rules to permit the use of text-based communication is simply a continuation of this approach.
- 8.5 If the media are to be regarded as the paradigm case, it is necessary to consider who is to be classified as the media. Certainly accredited journalists and representatives would be included, though the identity of those wishing to participate in reporting is evolving with the technology by which those events are reported. Student newspapers, bloggers and social commentators may wish to engage in live, text-based communications from court, but would not necessarily have media accreditation. Non-accredited members of the media can not be presumed to have the same appreciation of the legal framework surrounding court reporting, or the industry standards set out by the Press Complaints Commission, as accredited media representatives must be presumed to have.
- 8.6 The platform from which the live, text-based communications are to be conducted may also be relevant to this consideration. As outlined in paragraph 5.1, certain forms of communications from court do not feature an inherent time delay and thus offer no potential for correction before publication. The combination of instant reporting without the self-restraint presumed to be exercised by accredited members of the media might lead to a greater likelihood of prejudicial reporting, and must be considered.

Overall Approach

8.7 There is, therefore, a sound basis for requiring the court to grant permission each time live, text-based communications are to be used, in order for the court to consider and regulate the issues outlined in this paper. In doing so, a court may choose, for example, to say that accredited members of the media may use all methods of internet-based communication, including Twitter, during the proceedings, but not other users of the court. Alternatively, the court may authorise the use of mobile email, but state that other methods are not allowed, for reasons such as those outlined above. A further option would be for judges to consider applications from non-accredited members of the media on a case by case basis. A well-made application received from a non-accredited person in advance of the hearing, may result in the judge being prepared to grant permission to that person, subject to a framework tailored to the case, which the judge would be able to specify.

Consultation Question 6:

Should the use of live, text-based communications from court be principally for the use of the media? How should the media be defined? Should persons other than the accredited media be permitted to engage in live, text-based communications from court?

9. The Parties to the Litigation

9.1 Most, if not all, judicial decisions follow representations from the parties. The decision to permit use of live, text-based communications from court is no different. Indeed, during the operation of the Interim Guidance, it has been the practice of many courts to seek views of the parties before granting permission for the use of live, text-based communications from court. It is proposed that that practice should continue.

Summary of Questions

1. Is there a legitimate demand for live, text-based communications to be used from the courtroom?
2. Under what circumstances should live, text-based communications be permitted from the courtroom?
3. Are there any other risks which derive from the use of live, text-based communications from court?
4. How should the courts approach with the different risks to proceedings posed by different platforms for live, text-based communications from court?
5. How should permitting the use of live, text-based communications from court be reconciled with the prohibition against the use of mobile telephones in court?
6. Should the use of live, text-based communications from court be principally for the use of the media? How should the media be defined? Should persons other than the accredited media be permitted to engage in live, text-based communications from court?

The consultation opens on Monday 7 February 2011 and closes on Wednesday 4 May 2011. Responses may be submitted by email to courtreporting@judiciary.gsi.gov.uk or by post to:

Court Reporting Consultation
Royal Courts of Justice
Strand
London
WC2A 2LL

A summary of responses may be published.

¹ <http://www.supremecourt.gov.uk/docs/live-text-based-comms.pdf>

² Paragraph 15(b) states, “it may be necessary for the judge to limit live, text-based communications to representatives of the media for journalistic purposes but to disallow its use by the wider public in court. That may arise if it is necessary, for example, to limit the number of mobile electronic devices in use at any given time because of the potential for electronic interference with the court’s own sound recording equipment, or because the widespread use of such devices in court may cause a distraction in the proceedings...”

³ <http://www.judiciary.gov.uk/media/speeches/2010/speech-by-lcj-jsb-lecture-jury-trials>

⁴ See, *R v Thakrar* [2008] EWCA Crim 2359, *R v Thompson* [2010] EWCA (Crim) 1623