RESPONDENT INFORMATION FORM

Please Note this form must be returned with your response to ensure that we handle your response appropriately

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Confidentiality

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If you would like your responses to be treated as confidential please indicate this clearly. Responses from those who reply in confidence will only be included in numerical totals and names and text will not appear in the list of respondents.

Please return the completed respondent information form and your response to the consultation by **31 January 2014**

to: mediareview@scotcourts.gov.uk or

Media Review Responses
Judicial Office for Scotland
-3/R11 Parliament House
Edinburgh
EH1 1RQ

BILETA Response to Consultation on Cameras and Live Text-based Communication in the Scottish Courts

(See: http://scotland-judiciary.org.uk/24/1159/Consultation-on-cameras-in-court)

This is a collaborative submission from a group of academics based in the UK with expertise in Information technology law and related areas. The preparation of the response has been funded by the British and Irish Law Education Law and Technology Association.

This response has been prepared by Michael Bromby and Burkhard Schafer. Michael Bromby is a Reader in Law at Glasgow Caledonian University. Burkhard Schafer is Professor of Computational Legal Theory at the University of Edinburgh.

This response has been approved by the Executive of BILETA (the British and Irish Law, Education and Technology Association http://www.bileta.ac.uk/default.aspx) and is therefore submitted on behalf of BILETA.

In addition, this response is submitted by the following individuals:

Dr Abbe Brown, University of Aberdeen

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Ms Fiona Grant, Dundee Business School, University of Abertay Dundee

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Consultation questions

The review group is interested to elicit a broad range of responses to this consultation. It would be appreciated if in giving your response to the consultation you provide answers in the format set out. However, if you have other comments to make, you may provide them in addition.

Appeals and legal debate

1. Do you perceive any risk to the administration of justice in allowing filming of **legal debate** in the following proceedings and for the following purposes?

	purpose		
proceeding	documentary programme	news broadcast	live transmission
civil first instance	Yes ~~No~~	Yes ~~No~~	Yes ~~No~~
civil appeals	~~Yes~~ No	~~Yes~~ No	Yes ~~No~~
criminal appeals	~~Yes~~ No	~~Yes~~ No	Yes ~~No~~

Please answer yes or no by deleting as appropriate (or circling your response if hard copy)

2. If you have answered yes to any combination, what risks do you anticipate? Please specify if the risks you have identified pertain to one or more combination(s).

While most obviously an issue for criminal cases, civil first instance cases may, under any format, feature evidence from a witness and it is presumed that this question only seeks to address legal debate and not instances where witnesses give evidence in civil cases.

The filming of first instance hearings of any type carry a risk should an appeal be granted or a retrial authorised. This is addressed more fully in the answers provided below in Q5(a+b) and Q.

Appeal hearings are less problematic, however, live transmission carries a risk that any disturbances which undermine the dignity of the court would also be broadcast. Additionally, there is a risk that live transmission might open the opportunity for live coaching of counsel from any other person receiving and using a live transmission outside the court room.

3. Are there any steps which could be taken to minimise such risks?

Time embargos could mitigate the risk, especially for first instance cases. Possible solutions are either fixed rules (no release of footage until X months after the trial) or context dependant rules (no release until any appeal is decided, or it is clear that no appeal will occur).

Live transmission could require a shorter delay to allow for editorial control, should disturbances occur that should not be broadcast or to prevent coaching. The New Zealand model discussed below features a delay of 10 minutes which we submit would be the very minimum required.

Filming of first instance proceedings for documentary purposes

4. Should the court allow filming of criminal proceedings at first instance for documentary purposes?

~~**Yes**~~ **No** *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

5. Does filming for documentary purposes carry with it any risk to the administration of justice?

Yes ~~**No**~~ *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

5a. If yes, what risks do you anticipate?

The main risk is the identification of witnesses and jurors. Both could become subject to undue influence, and in addition, the former's behaviour might change if they are aware of the filming.

Any proceeding (criminal or civil) carries the risk of witnesses, jurors, or indeed legal practitioners being recognised, either through personal recognition or computerised recognition software, and a search being made for that person. The use of personal photographs on social media makes this risk greater. Ubiquitous and easy to use facial matching software, and the prevalence of geo-location data on the web, could make it, even for unsophisticated users, possible to not only identify witnesses or jurors, but also their place of abode. Data from social networks may also allow vulnerable associates – children, friends or colleagues – to be identified. There follows the risk of witness intimidation post-trial, stalking for revenge or other such motives. It is our submission that jurors should never be filmed for any transmission, whether documentary, news or live, and that caution should be taken with witnesses.

A possible more abstract risk, not for individual trials, but the fairness of the judicial system as a whole, lies in the selective nature of filming trials. We anticipate that always only a very small number of trials will be thus recorded. For these cases and these cases only, experts in the assessment of witnesses (language, body language, expression etc) or of real and documentary evidence, beyond what is available from transcripts and contemporaneous note-taking, may assist in preparing an appeal. This would not be an inequality of arms between parties in the same case, but would be an unfair advantage to those parties who have been televised, in comparison to the vast majority of first instance trials which will not be recorded. In other walks of life (in particular sporting events), this selective nature of recording is used as an argument to prohibit TV evidence to challenge decisions made on the day. In a trial setting this would be difficult to implement, though legal regulations may be drafted to regulate

the use of the broadcast itself as evidence in appeals or challenges directed to the SCCRC.

5b. If yes, are there any practical steps which could be taken to minimise that risk?

Jurors should not be filmed under any circumstance, including the foreman delivering the verdict whether by video or audio recording only.
Other persons (the accused, witnesses and legal practitioners) should only be filmed with informed consent.
Documentaries should only be broadcast once any possibility of a retrial or appeal has passed. Since the SCCRC can become involved at any time after a verdict, the solution to use time embargos has limits, and a pragmatic solution must be adopted by focussing on the time limits set for appeals as the most appropriate embargo.

Other more abstract dangers for the administration of justice have to do with the reputation and perception of integrity of the justice system. While these concerns are the most likely to be trumped by the demands for open justice and free speech rights, they still need to be taken into account when thinking about the best possible regulatory framework. Issues that may arise are, for instance, inevitable discrepancies between the recording of the oral delivery and the official court transcripts. For appeal purposes in particular, it needs to be clear, in cases of discrepancies, which is the authoritative version.

Online commentators will be able to do a "sentence by sentence" analysis of every statement in court (this course of action is commonly known as "fisking", a point-by-point analysis typically found on blogs). Freely delivered, unprepared speech (and even prepared speeches) often fare badly by this transfer of medium from the oral to the written. Digital films/broadcasts of the trial would allow also subtitling of the oral delivery in court with the transcripts of the proceedings and a running commentary. While criticism of trial performance of legal actors is of course desirable in a democratic and open society, past experience with the medium shows that it

decontexualises the oral delivery to such an extent and opens it up to distortions. This is especially so if the statements of vulnerable or traumatised victims or witnesses were to receive this treatment, and concerns for their wellbeing would arise. Finally, it may be worth considering if lawyers or expert witnesses should be allowed to use parts of the broadcast/film for advertising purposes of their services.

One way in which use and misuse of film material can be influenced is through an appropriate copyright regime. The consultation does not explicit address this question, and it is unclear where ownership will reside, and what type of license will be granted. In principle though, copyright allows to prevent certain types of use that could be seen as particularly problematic. It would in principle be possible to restrict, for example, distribution to locations where Scottish contempt of court laws are enforceable. However, if a digital copy of the film were to be made available through the court's website or elsewhere, this could then result in protruded IP litigation, and in reality, any copyright restrictions may well be unenforceable. If commercial broadcasters or film producers are given permission to film, problems could furthermore arise on competition/state subsidy grounds if they were in turn to restrict use of the recordings to maximise their profits. Competitors who were denied a license may in this case have cause for action.

Copyright would not prevent certain types of derivative work to be created, such as the transformation of material into parodies, or reuse of part of the filming for purposes of commentary and criticism. Indeed, to realise educational benefits, it would be necessary to explicitly permit creation and use of derivative works, in particular videos that are interrupted at key moments to allow expert commentary or questions to be inserted. Questions may however occur if certain derivative and commercial uses (one could think of the judges as a backdrop for a music video on "I shot the sheriff") could not be precluded through judicious drafting of licenses.

In any case, third party editing can create versions of the proceedings for public circulation that can be misleading. We would consider it beneficial if full length

recordings (with the minimal amount of editing required to protects, as discussed above, certain parties) were to be made available as "authoritative" versions of the events. Since the educational benefits are one rationale for permitting cameras into court, showing full length recordings as opposed to "highlights" could play a particularly important role to address popular misconceptions of the judicial system that are created by the depiction of trials in entertainment.

6. Are there any aspects of first instance criminal proceedings for which such permission should not be granted?

Yes.

Any visual recording of the jury, including visual or audio recording of the delivery of their verdict should not be made. No recordings should be made of witnesses who due to their age or mental state cannot give informed consent. It should be presumed that for these groups, consent is not in their interest, so consent cannot be substituted with permission by their legal guardian.

7. If such permission is to be granted, should the consent of all participants to be **filmed** be a prerequisite to permission?

Yes.

When being asked for consent, participants should be fully informed of the nature and extent of the filming prior to the case being heard. In particular, the following points should be made explicit to the participant:

- Risk of recognition (in particular through automated software)
- The possibility of stills or clips of their evidence being made
- Permanence of the recording
- Extent of circulation and control outwith this jurisdiction

Consideration should also be given to the point at which consent may be withdrawn, and this should be intimated at the time of gaining consent. The issue of consent should perhaps be revisited with the participant after they have given their evidence but before final production or transmission as discussed below.

7a. Alternatively, if such permission is to be granted, should assurances that the consent of all participants will be attained to be **broadcast** be a prerequisite to permission?

Yes.

Two important additional questions arise though: When should consent be sought, and under what conditions can consent be withdrawn? A witness for instance may well give consent to be filmed before the trial, but when the line of examination reveals information about his/her past, or impugns their character, the witness may well want to change their mind. If information about third parties is revealed as a result of their testimony, they may feel that they cannot consent on their behalf (generally, a way needs to be found to deal with personal data about third parties that may become part of the recording). One such way would be to keep consent to filming and consent to broadcasting separate, another is to presume consent for broadcasting once permission to film has been given, but with a reminder at the end of the trial that permission can also be withdrawn at this stage. A further question is if consent to broadcast should be "all or nothing", or if it should be possible to "tailor" the consent to different types of use/release: e.g.: limited distribution for educational, non-profit purposes only, or alternately a non-restricted release as podcast on a website visible to the entire world. Since some of the data will be personal data for the purposes of Data Protection legislation, the interaction with the purpose limitation principle must be addressed. On the other hand, there will be a not inconsiderable investment in producing the films, which requires a degree of certainty that consent is not withdrawn at a late stage – it may be practically impossible to remove from broadcast individuals who withdraw their consent at a later stage.

7b. Would either prerequisite be overly restrictive for the educational benefit of allowing filming for documentary purposes?

In particular for educational and documentary purposes, there will routinely be ways available to substitute material for a non-consenting party that are less intrusive, and therefore preferable. Re-enactments by actors, "voice over narratives", anonymisation methods such as pixilation or simply intelligent editing. Whilst anonymisation techniques are available, they could distort the impression given of the trial and thus

undermine any usefulness for educational purposes. Blurring faces and altering the voice could, inadvertently, suggest that the witness requires additional protection or has something to hide. The loss of visual facial expression or audio tone of voice and style of speech reduces the value of edited works to the same level as a transcript.

From looking at the educational literature, there is at least no evidence that this type of solution lowers the educational value significantly. The situation is somewhat different if the education users are not school children, law students or the wider public but the very legal professionals or expert witnesses that are filmed in the trial. For them, the benefit is potentially self-improvement, and their interests are therefore mainly to see their own interaction with others during the trial.

Educational use in formal settings, such as use in schools or university, has from the perspective of the parties filmed the benefit that the circulation is much more limited (and concerns about jury/witness interference are largely irrelevant). The disadvantage is the potentially much longer "shelf life". Participants risk in the worst case scenario becoming an example of "how not to do it" for the next decades of students, just as we still remember David Stevenson as purveyor of snail infected soft drinks, almost a hundred years after *Donoghue v Stevenson* was decided**.** When parties give consent to filming, they need to be aware of this possibility.

7c. If you consider that to require the consent of **all** participants to be filmed would be too restrictive, are there any particular participants whose consent, either to filming or broadcast should nevertheless be obtained?

Consent should be obtained from all participants. It may, however, be practical to imply consent from the judge and legal counsel unless they indicate otherwise.

The consent of witnesses (including the victim) and of the accused should nevertheless be obtained in all circumstances where a case is filmed.

8. Do you think that there are any particular **types of first instance criminal trial** in which the consent of all participants should always be a prerequisite?

Any filming of any type of first instance criminal trials should require consent.

9. Do you consider that there should be any restriction on, or prerequisites for filming of **first instance civil proceedings** for documentary purposes?

Civil proceedings which do not involve witnesses and which do not name individuals or state their addresses may be more suitable for filming. Any civil case with a jury may be subject to our concerns as stated for criminal cases, though this is of course rare.

Filming for subsequent news broadcast

10. Should the court allow filming of any criminal proceedings at first instance for this purpose?

Yes ~~**No**~~ *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

10a. If yes, what type of trial or aspects of the proceedings do you think could be filmed for this purpose?

We think that while the trial as a whole should not be filmed, it might be possible to film individual sections, for example the delivery of a specific type of expert evidence (which could have great educational benefits also for the training of expert witnesses) provided it is either not a jury trial, or that the jury remains invisible. Similarly, parts of the closing speeches may be suitable for filming, provided editorial control rests with the court and problematic passages (identification of witnesses by name or address) is avoided.

10b. If yes, are there any kind of proceedings which you think should **not** be filmed for this purpose?

See our answer to 10a) the default position should be not to allow filming of proceedings of this type, with a possible exception of more technical parts of certain procedures, and under editorial control by the court.

10c. If yes, are there any witnesses who should not be filmed for this purpose?

11. If permission is to be granted, should the consent of all participants be a prerequisite to such permission?

Yes ~~**No**~~ *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

Please explain the reasons for your opinion.

Please see our concerns regarding consent in Q7.

12. Are there practical measures that could allow more contemporaneous broadcasting of criminal proceedings without impacting on the proper administration of justice?

Closing submissions (when a balance is struck and both parties are adequately represented in the film recording) may be suitable for broadcast, as current news reporting practice already includes a requirement to give a fair and balanced view. Sentencing may also be suitable, however we agree with the concerns raised by Judiciary Scotland in relation to public outbursts and comments from the public gallery which may require some editing before subsequent transmission of a recording.

13. What is your view in respect of these matters in relation to the filming of **civil proceedings**?

There is no categorical difference between the issues raised in civil or criminal trials. Delict cases in particular can have the same reputation harm on the accused or the victim as criminal trials. Temptation to interfere with witnesses may be as high in a delict case where considerable damages are at stage as they could be in a criminal trial where punishment may be a fine or another non-custodial sentence. Juries, in criminal or civil procedure, add another layer of complexity, but it is the presence or absence of the jury, not the form of procedure, that is the issue.

Live transmission

14. To what extent do you consider that filming of **criminal trials at first instance** for live transmission is consistent with the proper administration of justice?

Live transmission raises particular concerns in addition to those mentioned above. The danger that search tools allow identification of names and addresses of jurors or witnesses is obviously particularly high. There is also a danger that witnesses scheduled for later parts of the proceedings are influenced by their exposure to seeing other witnesses questioned. This is a known and important error source with eyewitnesses in particular. Granted, this is a problem with any form of live reporting of court procedures. However in traditional media, it is unlikely to get a verbatim report of the statements made by witnesses, if for no other reason than lack of space, which limits the danger of contamination.

15. What are your views in relation to civil proceedings?

See above our answer to Q13.

Structured approach to considering applications to film

16. During the course of the review it has become clear that whilst each application for filming must be considered on its merits, there would be benefit in a more structured approach to applications for filming. The review group was impressed by the New Zealand model. Do you think the New Zealand guidance (Appendix VIII) is a suitable model for Scotland?

Yes ~~**No**~~ *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

Please explain the reasons for your opinion.

The New Zealand model appears comprehensive and appears to be an appropriate model to adopt and adapt where necessary.

Under point 6 (making an application), it is unclear whether the Crown must seek the views of a complainant in non-sexual offence cases under subheadings 4 and 5. It would be advisable to seek the complainers' views, noting whether they will be called as a Crown witness and how a judge may take such views into account in any other way that the manner proposed for sexual offences (i.e. to decline the application in accordance with point 8).

Further information on the experience of using a still photographer under Schedule 3 may be required. It would appear that there is significant potential for disruption by allowing a photographer to be instructed by another individual, in accordance with point 2. Preference should, perhaps, be given to a photographer working alone without verbal instruction during the trial.

Schedule 2, which sets out the standard conditions, appears comprehensive. We note, however, that the filming of the accused for the first 15 minutes of each trial day under point 9 is unwarranted and perhaps gratuitous. The instances described in subsections a), c) and d) relate to specific points within the trial, whereas subsection b) does not. If the accused does not give evidence and does not consent to filming then it may be unfair to allow filming of the accused for an abstract period each day. The same applies for still photography under Schedule 3 in relation to point 8.

Schedule 4 restricts, under point 4, the publishing of broadcasts for at least 10 minutes. As discussed earlier in this response, the possibility of 'fisking' or coaching may well be delayed by 10 minutes, but a longer time period would be recommended to avoid any interference in the administration of justice. Ideally, a delay until a witness had completed all questioning by all parties would be most effective, although this cannot be quantified into a set time period.

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Live text based communications

17. Do you consider that LTBC in **criminal proceedings at first instance** present any risk to the administration of justice?

Yes ~~**No**~~ *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

17a. If so what risks do you anticipate?

We refer to our submission to the Judicial Office for England and Wales (see: http://www2.law.ed.ac.uk/ahrc/ITTT/BILETA_Twitter_Response.pdf).

In particular the following extracts, which are taken from the above response:

Given the principle of open justice, reporting on court proceedings should not be restricted without good reason as it is in the interests of justice not to restrict certain types of reporting. In many instances, such a restriction may be easy to establish - most obviously, anything which will or might disrupt the proceedings themselves, or which might prejudice the outcome of those proceedings, may legitimately be prohibited. Live, text-based communications do not normally give rise to either of those problems and where they do the appropriate answer is to restrict particular instances of their use rather than prohibit than their use entirely. Effective restriction may require that any individual who wants to report "live" from a courtroom identify themselves to court staff at or before the commencement of proceedings so that the judge is aware of their presence and can impose temporary restrictions when necessary (for example, in some cases it might be appropriate to prohibit reporting until a witness has finished giving their evidence).

As court reporting by the media is permitted in the majority of circumstances for a variety of valid reasons, therefore it would seem counter-intuitive to prevent the use of technology to facilitate a valid activity. A note of caution must be sounded in relation to public perception should the general public think that they can undertake similar activities, should this approach to restrict the use of live text-based communications to the accredited media alone be taken. It may therefore be more appropriate to sanction such methods of communication more widely.

The Interim Guidance specifically mentions Twitter within the title, although does in effect take a wider stance on a range of text-based communication tools. The capacity of Twitter to report on proceedings in 140 characters would indicate that any demand for the use of this technology in particular may not be legitimate due to the relatively low word count and the value of the words contained therein. However, the composing of larger, more comprehensive reports in the form of blog posts or the filing of copy for editorial review is indeed a legitimate exercise that will in any event be conducted outwith the courtroom

irrespective of any technological ban within the courtroom.

By and large, the use of Twitter is predominantly for the sharing of short opinions, factual information and the sharing of links; all of which may be annotated and organized with tags or usernames to add value or broaden the scope of circulation. Other forms of text-based communications are typically longer and are less likely to be misconstrued or taken out of context. Guidance on the use of live text-based communications should not single out one communication tool in particular, at the expense of others, neither should guidance be reticent in relation to Twitter due to its current popularity and capacity for the widespread circulation of short updates.

The main concern stemming from this consultation response is whether the content of the live text-based communications would differ should the author of the content be required to wait until a suitable break or until the end of proceedings to transmit the text-based communications, and as such whether this would affect the ability of a reporter (or indeed a non-accredited social media user) to comply with his obligation to undertake fair and accurate reporting in accordance with the Contempt of Court Act 1981.

Technological capability must not be confused with justification for the use of such technologies. Justification may, however, be drawn from the widespread use of the Internet and the difficulty in maintaining bans or implementing sanctions when authors and indeed content may be located outwith the jurisdiction of the court. It is perhaps naïve to assume that witnesses and jurors can be shielded from, or exclude themselves entirely, from a digital world. A more effect approach may be to foster a greater sense of responsibility in jurors and witnesses, and to hold up the existing common law and statutory measures as safeguards which should be rigorously promulgated to enforce due diligence in the users of social media.

18. Can you suggest any practical measures which might allow LTBC whilst preserving the integrity of proceedings?

From a technical perspective, there is a high likelihood that courtroom speaker systems will suffer interference and experience in court by the author can validate this position. Therefore, text-based communications should only take place when such systems are not in use, or from an appropriate distance which may in practice be difficult to calculate.

In relation to the fairness of proceedings, such communications may not be fair and impartial unless they are transmitted after a particular point in the proceedings. For example, it may be stipulated that any reporting of oral evidence must not take place until after a witness has been subjected to examination by all parties and he has undergone examination-in-chief, cross-examination and re-examination, as applicable.

As noted in the consultation documentation, there is a risk that due to the immediate publication and potentially rapid circulation of live text-based communications (in particular with Twitter but also in relation to blog posts) that the content of communications relating to

the evidence of a witness may be read by other witnesses or by the jury. Current media reports (newspaper and television) do report on trials whilst in progress, therefore it would appear anomalous to create greater restrictions on live reporting of a trial in comparison to the existing practice of less frequent media updates or 'daily digests'.

The main significant difference between live reports and less frequent updates is that the media reporter may re-consider what might have been published (if live regular updates were made) when forming a more reflective and thus balanced review at less frequent intervals.

The existing checks and balances for the reporting of court proceedings to be done in a fair and accurate manner appear not to be in need of review, it is the guidance given to those who are reporting which must be updated to reflect the increase in non-traditional media reporting.

There is an additional risk that character, reputation or financial positions may be damaged when real-time reports of witness evidence are transmitted outwith the courtroom before the process of examination and cross examination is complete, as well as before decision of the judge is made. As indicated above, live text-based communications can be widely and rapidly circulated and singular tweets and blog posts may not be fair and accurate whilst evidence is being given.

There is a risk that singular tweets and blog posts can become isolated from the remainder of the reporter's previous and subsequent communications which can result in the same effect of taking a quote out of context.

As an example, evidence given by a witness which is later contradicted by cross-examination or upon re-examination which may have a negative effect on, for example, subsequent witnesses, jurors or potentially company share prices which may suffer significant financial damage within minutes.[1] Whilst factually correct, the transmission of short text-based communications may not be fair or balanced given the relatively low capacity for factual or opinion-based content.

There is an additional risk here that the rules regarding prior presence in court (as a bar to a witness later giving evidence) are undermined and it may be necessary for a judge to have the power to restrict live text reporting temporarily in such cases. Such restrictions would rarely be necessary: at present if a witness is to give evidence on a subsequent day of a high-profile case there will be nothing to stop them reading newspaper reports of previous days' evidence, which does not seem to be regarded as problematic. Should either the reading of newspapers or the engagement with online media be perceived as problematic, there are few solutions beyond instructing the witness to refrain from engaging with the reporting media and to exercise caution or good judgement should they passively or unwittingly become aware

1" As an illustration, the Trafigura case prompted an unprecedented surge in comment on the company on Twitter, with #trafigura and #carterruck becoming the most popular topics on the social media site in October 2009.

of case-related reports.

The clear risk with the use of live text-based communications is that traditional media reports can be considered the complete jigsaw from which others may choose to take singular pieces out of context, whereas live text-based communications would be more akin to the jigsaw pieces themselves which the third party reader must assemble in order to view the complete picture.

Finally, allowing a device to be switched on in a court which is sitting to enable it to be used for text-based communications may pose a further threat. Many people use an interactive device such as a mobile phone which furthermore allows the device to also be used to:

1. Record evidence which can be published immediately or used to be edited later and then published or used in a manipulative way.

2. Take photograph images, either as still photographs or video which could be published BEFORE the verdict has been decided by the jury

Although the consultation paper is specifically focussed on text-based communications and that the prohibition on photographic and audio recording would continue, the risk of these ancillary, yet prohibited, activities being undertaken may be increased should live communication technology be permitted for text-based communications.

For the reasons given above, there are greater risks associated with shorter messages and therefore clearer guidance should be issued in relation to 'microblogging' which encompasses Twitter and any other form of short live updating services.

It should be noted that many platforms, such as iPads, do not 'ring' and therefore pose less of a risk or threat to the disruption of proceedings or the fairness of judicial hearings.

Irrespective of the platform used, instant publication and the potential for immediate circulation of live text-based communications poses a novel risk in comparison to tradition printed or broadcast media where an injunction may be sought to prevent transmission, or to limit further damage caused by secondary or repeated transmission of the content. The decision of the Queen's Bench Division in Mosley v News Group Newspapers[2] illustrates the point that the online materials for which an injunction against subsequent broadcast was sought, were so widely accessible that an order in the terms sought would have made very little practical difference.

2 Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB)

19. Do you consider there would be merit in the implementation of a register of approved people who may use LTBC from court?

~~**Yes**~~ **No** *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

Please explain the reasons for your opinion.

The distinction between the accredited media with a recognised press card and the wider public who may maintain blogs or twitter accounts is marginal.

The sole benefit to restricting the use of text-based communications to the accredited media is that the accreditation itself may suggest that a professional maintenance of standards in reporting is being met.

In defining, or deciding who counts as 'the media', the principle must be one of publicity of the trial, and that the state (or indeed any other body) should be at arms length in regulating who counts as journalist. Restriction to accredited journalists is a prima facie violation of both, and needs very good justification. At the very least, the court would need discretion to classify people as journalists for the purpose of a specific trial. There are some benefits to this approach: it keeps numbers manageable (if this were a problem) and it allows a "low level sanction" for misbehaviour where contempt of court prosecution would be disproportionate. A professional journalist would have real concerns in losing his official card, and a "one off card" would not be issued again to "known offenders" (although this would require a form of registration or record keeping).

Against this weights the general policy issues above, and one could argue that social media has made the distinction between "professional" and "citizen" journalists irrelevant and moot - which for the reasons stated above is a good thing, and one would not impede it unnecessarily. On balance our view would therefore be that it does not, but it could be used if we were to find out that it is too disruptive once implemented.

19a. Should those seeking entry on that register be required to complete a statement confirming awareness and understanding of the Contempt of Court Act 1981?

Yes ~~**No**~~ *Please answer yes or no by deleting as appropriate (or circling your response if hard copy)*

Please explain the reasons for your opinion.

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If a register were to be established, then it would appear to be sensible to include some guidance. A statement relating to the 1981 Act detailing possible offences and how to avoid contempt of court would be more useful than a mere statement confirming awareness and understanding. Whilst guidance cannot be comprehensive or include all possible forms of contempt, there should be some basic guidance to avoid those who seek entry on to the register subsequently falling foul of the law.

Thank you for your response to the consultation.