

Response to the consultation by the Judicial Office for England and Wales on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting

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Background

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 this response has been funded by the Information Technology Think Tank, which is supported by the Arts and Humanities Research Council and led by the SCRIPT/AHRC Centre for Research in Intellectual Property and Technology, University of Edinburgh. This response has been prepared by Michael Bromby. Important contributions to preparing the response were also made by James Chalmers, Burkhard Schafer and Michelle Hynes-McIlroy. In addition, this response is submitted by the following individuals: Dr Abbe Brown, SCRIPT, University of Edinburgh, Professor Philip Leith, Queen's University, Belfast, Karen McCullagh, University of Salford, Dr Dinusha Mendis, University of Bournemouth, Professor Andrew A Adams, Meiji University, Tokyo, Japan, Abhilash Nair, Sheffield Hallam University. This response is broadly in favour of the use of live text-based communications being used from the courtroom, subject to existing safeguards and further guidance given to social media users.

Question 1

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

The question itself rests on a false premise. Given the principle of open justice, reporting on court proceedings should not be restricted without good reason. The question should not be whether there is a 'legitimate demand' for reporting to take place, but whether it is in the interests of justice 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 (notwithstanding the observations about disruption to courtroom equipment in the answer to Question 2 below) and where they do the appropriate answer is to restrict particular instances of their use rather 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 relation to Question 3, 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.

Question 2

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

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.

Question 3

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

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. [3] 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 judgment should they passively or unwittingly become aware 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.

Question 4

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

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* [4] 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.

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?

The prohibition against the use of mobile telephones in court was formulated at a time when such devices were used for voice-based, audio or telephonic (in the technical sense) purposes. Live text-based

communications can be transmitted from other non-telephonic devices such as laptops and hand-held PCs and mobile phones are now part of a wider category of devices that are able to transmit text-based communications. It may, therefore, appear sensible to maintain the current prohibition against the use of mobile devices to prevent the disruption to proceedings that were envisaged at the time of the prohibition, namely conversation, ringtones or recipients leaving the court in a disruptive manner to answer incoming calls. However, on balance, the silent (or near-silent) mode for most devices renders this position invalid.

On a practical level, one or two individuals making use of near-silent mobile devices may not be disruptive to proceedings. However, significant usage of laptops by a large number of persons present in the court may cause disruption. This example is borne out in practice from the experience of academics when faced with increasing usage of laptops by students in lectures: disruption stems largely from the less-silent laptop keyboard rather from the use of a mobile device *per se*. The policing of the number of persons using mobile devices may be difficult to manage as it would be rather arbitrary to allow a small number of users and prevent a larger number of others from conducting the same activity. The UK Supreme Court has a policy on the use of live text-based communications from court, although it is explicitly noted that this court does not interact with witnesses or jurors and it is rare for evidence to be adduced which may then be heard in other courts. [5] Nevertheless, the UKSC does not appear to have significant concerns that proceedings may be disrupted due to the use of wireless communications.

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?

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.

Summary

Overall, the basis on which any decision to allow live text-based communications in the courtroom should be based upon whether there is there a legitimate exception to the publicity principle. The test, modeled on the ECHR balancing model, would be to show that the restriction is proportionate, necessary and efficient. In the opinion of the consultation respondees, it fails all three, most certainly in respect to the first and the latter: it is a serious restriction, and hence disproportionate, and also inefficient for most of the possible problems that arise just as much if someone simply leaves the courtroom and blogs from outside.

Furthermore, it is not just the original blog or tweet entry alone that is the issue, but the ability for others outside the court to immediately comment on it, even if the tweet itself is legally innocuous under the Contempt of Court Act, it may entice others to comment in a way that may makes a third party liable (and also increases the risks should a witness or juror who might then see the comments). However, this concern ultimately fails, as the same situation can arise from someone who blogs immediately after leaving the courtroom and the lack of effective sanctions against third party comments arising from or located outwith the jurisdiction of the court.

What might be desirable, and potentially a more efficient and less disruptive of basic freedom would be:

- a. modified and much more detailed instructions to the jury what they should and should not take into account when deliberating, including a warning that ideally, they should not search for information on the net; and
- b. directions to the audience on contempt of court, that if they blog about the trial then they may want to include a pre-formulated pro forma warning that anyone commenting on the blog may also find themselves in contempt of court (possibly providing a link to a specially created website that defines and describes the nature of contempt of court).

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[2] See <http://www.judiciary.gov.uk/NR/rdonlyres/7C5AE5B0-064C-408D-88B2-4843C4CD69FC/0/cplivetextbasedformsofcomms.pdf>. 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.

[3] 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.

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

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