

Cameras and live text-based communication in the Scottish courts: a consultation

RESPONDENT INFORMATION FORM

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

If you hold Judicial Office, please specify:	This response is by the Secretary of the Sheriffs' Association on behalf of that Association.
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Confidentiality

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

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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?

We would like to preface our response to this consultation by stating that we agree with the Review Group that “the principles of open justice, public courts and fair and accurate reporting of proceedings are in the public interest”. We agree also that the “disinfectant” of public scrutiny is to be welcomed, so long as the integrity of the legal process can be protected” [paragraphs 16.7 and 16.9]. Our comments below in response to this consultation should be read in the light of these principles.

Question 1 asks whether there might be **any** risk in allowing filming of legal debate. In our view, it would be difficult to assert that filming of legal debate could never produce a risk in any of these proceedings and for any of the following purposes. However, of course, the degree of risk will vary according to the circumstances and some types of filming are unlikely to produce risks which cannot be avoided. By contrast, some types of filming in some circumstances, even of legal debate, may produce risks to the administration of justice which may be difficult or impossible to avoid. Accordingly, strictly speaking, our answer to each of the questions in the table below ought to be “yes”. However, as we explain below, we believe that those risks may be avoided. The adoption of clear and well-defined criteria and conditions for the filming of legal debate would be likely to avoid any appreciable risks to the administration of justice. We note that such criteria and conditions have been adopted in various jurisdictions and that examples of them are given in the appendices to this consultation

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paper. We think that those examples would be helpful in the devising of amended criteria in this jurisdiction.

Proceeding	Purpose		
	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).

We think that the risks associated with the filming for documentary purposes are minimal providing that the documentary is shown after conclusion of proceedings and provided that the presiding judge approves the content of the documentary, so far as that includes film of the court proceedings.

We think that there are greater risks associated with news broadcasts and live broadcasts. Nonetheless, the adoption of suitable protocols and guidance, which among other matters allow restrictions applicable to the manner of filming, the matters to be filmed and the parts of proceedings, may obviate any appreciable risk, as we mention above.

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

See above.

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Filming of first instance proceedings for documentary purposes

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

Yes, on the understanding that this question asks whether the court should have the *power* to permit filming for this purpose. Filming of criminal trials presents obvious potential increased risks to the administration of justice. However, that has been done in this country (such as the Fraser trial) and other countries for documentary purposes successfully. We believe that so long as the protocols and safeguards are carefully maintained, in principle, filming of trials for documentary purposes should continue to be permitted.

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

Yes, these risks are referred to in the consultation paper. A particular risk concerns the possible distortion of the evidence of witnesses knowing that they are being filmed, or perhaps reluctance of witnesses to give evidence if they know they are to be filmed, even only for documentary purposes to be broadcast after the conclusion of proceedings. We believe that vulnerable witnesses (but not other witnesses) should be permitted either to decline to be filmed or to decline to allow any footage made to be broadcast. Jurors should never have their faces filmed or otherwise be identified. However, as we say above, we believe that the risks associated with filming for documentary purposes are minimal in principle.

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

Reluctance of witnesses to give evidence or distortion of evidence; playing to the cameras by participants; inaccurate presentation of proceedings in documentary for commercial reasons. *However*, those risks are likely to be insignificant *provided*

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appropriate steps are taken to ensure the technology used is as unobtrusive as possible.

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

Clear and detailed protocols and application of them by trial judge and the programme makers. On balance, we believe that vulnerable witnesses should have the right to decline to be filmed. Jurors should never be filmed in such a way as they can be identified. The experience of other jurisdictions referred to in the consultation paper suggests that fixed cameras controlled remotely disappear into the background and are not a significant issue for witnesses in general.

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

All will depend on the facts of any particular case. It is difficult to say that in principle certain parts of a trial should never be filmed for documentary purposes, though of course, some parts are likely to carry a greater sensitivity than others, for example the evidence of a complainer in a sex offence case. Where vulnerable witnesses are to give evidence, special considerations arise. We believe on balance that such witnesses should have a veto over the filming and broadcasting of their evidence.

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

No: giving every participant a veto would be likely to reduce substantially the number of trials that could be filmed which would be disproportionate given there are other means of dealing with a lack of consent of one or more participants. We agree that a participant in the trial should be able to refuse consent to be filmed, but we do not agree that any such refusal should prevent filming of the rest of the trial. That would be quite impracticable. Instead, that participant could either not be filmed at all or could have their appearance disguised digitally.

- 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?

No, for similar reasons to question 7, we think that the consent of all should not be required. However, for those not wishing to be filmed, their appearance could be excluded in the final cut or their appearance could be disguised digitally. It may be that on occasion, even though consent has been given by a witness, it may not be appropriate to broadcast such evidence.

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

We have nothing to add to what we have said above.

- 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?

We have nothing to add to what we have said above.

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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?

No, every case will be different. Ultimately, it will be for the trial judge to decide whether in all the circumstances filming should be permitted and if so, under what conditions. We think that the decision should be that of the trial judge taking into account all the circumstances, including the attitude of the participants to filming, and applying the specified protocols once they are drawn up.

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

As with any filming of court proceedings, there is always a potential of risk to the administration of justice, and that applies to first instance civil proceedings. However, the risks in general would be less than in criminal cases and filming of such cases for documentary purposes is unlikely to lead to substantial risk. Nevertheless, we believe that there ought to be protocols in place for this type of filming which would include, for example, obtaining the views of the participants, that any such filming would be subject to the permission of the presiding judge. Furthermore, there could not be broadcasting of information which would be anonymised in the written judgment and of which publication is barred by statute. That would affect all cases involving children for example.

Filming for subsequent news broadcast

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

Yes, subject to safeguards

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

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All parts in principle subject to any restrictions that might be justified in any particular case and subject to the application of the types of safeguards that are applied in other jurisdictions.

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

Proceedings involving offences against or by children may not be suitable.

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

Vulnerable witnesses, at least where special measures have been put in place.

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

No

Please explain the reasons for your opinion.

For similar reasons as we have given above in relation to a similar question.

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

Fixed cameras.

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

We take a similar view in relation to civil proceedings as we have expressed above in relation to criminal proceedings. In particular, we take a similar view as regards the absence of any need to obtain the consent of witnesses, part from vulnerable witnesses.

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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?

EITHER

We think that there would be a real risk of an adverse effect on the proper administration of justice. We think that live transmission of criminal trials would have the potential to inhibit witnesses from giving evidence and to lead to distortion of evidence that is given. It would risk contamination of oral evidence through witnesses learning what evidence had been given earlier. It would be apt to turn trials into entertainment.

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

We take a similar view in relation to civil proceedings as we do in relation to criminal proceedings: see answer 14 above.

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

Please explain the reasons for your opinion.

We agree that a more structured approach to applications for filming would be desirable. The NZ Guidelines have the merit of clearly stating at the outset certain important principles, that all matters relating to filming etc are at the discretion of the court, and provide a clear application process. It is also helpful to have a set of

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standard conditions for filming, photography and recording which can then be amended as circumstances require. While the NZ approach appears to have merit, the detail would of course require careful attention to ensure that it would fit the Scottish context.

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

- 17a. If so what risks do you anticipate?

Disruption in court from the act of using devices; the inherent difficulty in monitoring exactly to what use the device is being put and therefore great difficulty if not impossibility of monitoring use of electronic devices in court; the danger of allowing the passing of information that should be confidential to external sources; contamination of evidence. The practice that seems to operate in England allows summaries of evidence at the end of a day to be broadcast via Twitter; but that is often merely a short tweet attached to a far more detailed lengthy exposition of the evidence which carries with it inherent dangers in an ongoing court case where evidence is still to be heard. Unrestricted LTBC presents more risks than coverage by conventional broadcast media because once the transmission is made, the person transmitting loses control of the use to which that information may be put.

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

Ensuring that any person authorised to use LTBC can be trusted to do so responsibly. Such persons are likely to include those employed by reputable media organisations.

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

No

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Please explain the reasons for your opinion.

The question appears to concern use of LTBC in general, rather than specific types of proceedings, such as criminal proceedings. We think that the use of LTBC may be appropriate in some types of proceedings. The issues involved are not entirely dissimilar to those that concern filming/recording for live broadcast. Therefore, on balance we consider that rather than the establishment a register of those entitled to use LTBC, there should be a procedure for application to be made to the presiding judge in any given case. We suggest that the procedure may be simpler than in the case of filming as it is likely to be much less intrusive and the risks perhaps lower than in the case of filming. If permission is granted, it could be done subject to a standard set of conditions to ensure that the proper administration of justice would not be unduly affected. It is essential that the presiding judge maintains control of what happens in his/her court room.

On balance, we think that the establishment of a central register would require comprehensive and complex regulation which would be time-consuming and expensive. It might well be controversial so far as the established media are concerned. If there were a register and if by virtue of that a person were automatically allowed to use LTBC in any court, the presiding judge would lose a degree of control over his/her court, which is most undesirable. If on the other hand, registration did not provide an automatic right, and application still required to be made to the presiding judge, the utility of such a register would be somewhat diminished. We believe that ultimately, a register would be unworkable.

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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?

n/a

Please explain the reasons for your opinion.

As we note above, on balance, we do not believe there should be a register. Of course, if the court in any given case does allow LTBC, that permission would, we suggest above, be subject to standard conditions which would, we anticipate, include a requirement that the user makes him/herself aware of the relevant law, such as the Contempt of Court Act 1981 and the Children and Young Persons (Scotland) Act 1937, understands the penalties for breach and complies with the law and restrictions on broadcast. We doubt permission would be given by a judge unless s/he was confident that the user was reasonably well acquainted with the law in this area.

Thank you for your response to the consultation.