



**Report of the Review of Policy on Recording and Broadcasting of
Proceedings in Court, and the Use of Live Text Based
Communications from Court**

**Presented to the Lord President
by Lady Dorrian
January 2015**

Contents

1.	Introduction.....	Page 3
2.	Composition of the Media Review Group.....	Page 4
3.	How the review was carried out.....	Page 4
4.	The Results of the Consultation.....	Page 5
5.	Discussion and Recommendations.....	Page 12
6.	Summary.....	Page 28

1. Introduction

- 1.1 On 18 October 2012, the Lord President appointed a judicially led media review group, whose remit was to review policy on the recording and broadcasting of proceedings in court. This was later extended to include consideration of the use of live, text-based communications from court.
- 1.2 Guidance on the conditions under which cameras could be allowed in court was previously contained in a practice note issued by Lord President Hope in 1992. These conditions were revised by Lord President Hamilton in 2012. The revised conditions allowed filming to take place without the consent of all parties involved. The production company and broadcaster had to provide an undertaking to the presiding judge that the final broadcast would not identify those who had not consented to the filming.
- 1.3 The passage of time since guidance was issued, together with the development of social media, the use of instant text-based communication and the broadcasting of proceedings before the UK Supreme Court have all contributed towards a need to review this matter. Shortly after the appointment of the review group, filming was allowed for the first time in the Appeal Court of England and Wales, under a protocol with statutory underpinning. When filming for documentary purposes has taken place in Scotland, the guidelines have had to be complemented by detailed negotiations as to the precise terms in each case. In appointing this review group, the Lord President considered that a more structured approach was desirable, not least in the interests of consistency.

- 1.4 The review was carried out in the context of a complete acceptance of the importance of the principle of open justice, recognising however that any steps taken in support of this principle must not pose any risk to the administration of justice. As was observed in *Scott v Scott* ([1913] AC 417(HL)) at p437,

“...the chief object of the courts of justice must be to secure that justice is done”

and that

“As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield” (*ibid*)

2. Composition of the Media Review Group

The review was chaired by Lady Dorrian. The other members were: Lord Bracadale, Lord Woolman, Sheriff Principal Stephen, and Sheriff Drummond. The group was supported by: Christopher Nicholson, Deputy Legal Secretary to the Lord President; Elizabeth Cutting, Head of Judicial Communications; Ryan Gare, Judicial Office for Scotland.

3. How the Review was carried out

- 3.1 The review group examined information and guidance on practice and experience in recording and broadcasting of court proceedings in Scotland and other jurisdictions. The review group acknowledged that the issues arising could affect a wide range of interested parties. As a result an open consultation process was followed, with the issuing of a consultation paper which outlined the main issues and sought responses from as wide a group of respondents as possible.

3.2 In the event, only seventeen were received. The majority of the responses (76%) were submitted by organisations. We are very grateful to all those who responded.

3.3 Several of the media organisations who submitted responses did not explicitly answer the questions as set out in the consultation response form. The BBC, Sky News, STV and the group responsible for filming the Appeal Court of England and Wales responded in narrative form to the consultation and the points made within it. Other respondents answered the questions posed, or provided a combination of answers and narrative comment. Some respondents sought only to comment on limited aspects of the consultation paper. This, together with the small number of responses, and the variety of different perspectives offered, makes the responses difficult to aggregate. On behalf of the review group, independent external research was undertaken by Linda Nicholson of the Research Shop, who prepared an analysis of the consultation responses. What follows is a summary of the responses: we do not repeat all the risks identified in the responses or in the original consultation document, nor do we repeat in detail all the safeguards which were said to exist, but it is important to emphasise that the review considered all the individual responses individually and in detail.

4. The Results of the Consultation

4.1 Appeals and Legal Debates

4.1.1 In relation to either documentary programmes or subsequent news broadcast, the majority view was that filming of legal debate in civil

cases at first instance or on appeal, and in criminal cases on appeal, posed no risk. The majority view was also that live transmission of debate at the appeal stage of either civil or criminal proceedings did not create a risk. Views on the risks associated with live transmission were more cautious overall in relation to civil debates at first instance, with respondents evenly split on whether or not live transmission posed a risk to the administration of justice.

4.1.2 From the responses of those who identified a risk, it appears that some may have been referring more generally to the risks which they thought might arise from filming and Live Text Based Communication (LTBC) at other stages of the criminal or civil process, rather than addressing any risk which might arise specifically in relation to filming of legal appeals or debate. Risks which were relevant included the risk that filming might provide a stage for those seeking attention or to disrupt proceedings; risks associated with identification of Scottish Court Service staff; and risks which might arise from editing of footage. Suggestions for overcoming these risks included the use of a time-delay or a veto on transmission, the use of consents and a set protocol for the procedure to be followed.

4.2 *First Instance Proceedings – Documentaries -Criminal Proceedings*

4.2.1. Most of the respondents who provided a view considered that the court should allow filming of criminal proceedings at first instance for documentary purposes, although the majority also acknowledged that there were potential risks to the administration of justice in so doing. Only two respondents, both media companies, thought that there were no risks to the administration of justice associated with such filming.

The risk identified most frequently was that witnesses might become less inclined to engage with the criminal process, might be reluctant to give evidence in the knowledge that they were being filmed, or that the quality of their evidence might be adversely affected, with one respondent remarking that for some witnesses:

“the possibility of being filmed....could add strain and anxiety to an already difficult situation”.

4.2.2 Other concerns related to the possibility of disruption of proceedings, the effect of editing, the potential effect on jurors in a subsequent retrial following appeal, the effect of the possible recognition of jurors and witnesses, and the time involved in making practical arrangements. The majority of respondents thought that, in relation to filming for documentary purposes, the risks could be attenuated by adoption of certain practical steps, such as establishing a clear process for obtaining the consent of witnesses prior to filming and/or broadcasting of proceedings. Other key suggestions included the use of fixed and unobtrusive, remotely controlled cameras and microphones, the establishment of robust guidelines, the control by the presiding judge of a time delay or veto on filming relating to any aspect of the case which it was felt should not be filmed, together with a prohibition on filming of jurors. Several respondents pointed out the safeguard that the law on contempt of court would continue to apply, and another raised the possibility that transmission might not take place until after any appeal, and where applicable, any retrial.

4.2.3 A prominent view was that permission to film first instance criminal proceedings, for any purpose, should be withheld in cases involving vulnerable witnesses, including children. Respondents also highlighted concerns over filming complainers in sexual offences,

filming of jurors and filming in cases where national security was at risk.

4.2.4 Asked whether the consent of all participants should be a prerequisite for granting permission to film, opinion was evenly split amongst the respondents who provided a clear view. Those in favour of a requirement of consent raised concerns that otherwise witnesses might be reluctant to give evidence. Other views were that to obtain consents from all involved would be impracticable and expensive, and that there were ways in which an individual's identity could be masked prior to broadcast if an objection were made at that stage.

4.2.5 As an alternative to obtaining consent for filming, the majority of those who addressed the issue considered that it would be appropriate to gain the consent of all participants prior to transmission. In the absence of consent an individual's identity could be protected by pixilation and voice substitution. A prevailing view was that final decision should remain with the judge, having regard to all the circumstances of each case.

4.3 *First Instance Proceedings – Documentaries - Civil Proceedings*

4.3.1 It was broadly accepted that whilst some civil proceedings could be filmed for documentary purposes with little concern, others, particularly those involving family law and asylum cases, may pose more risks to participants. Several of the concerns relating to witnesses were felt to apply equally to civil as to criminal proceedings.

4.4 *First instance proceedings - Live Transmission -Criminal Proceedings*

4.4.1 Amongst those who expressed a view, a slight majority opposed live transmission of criminal trials at first instance. Their most significant concerns related to perceptions of the potential detrimental impact of live transmission on witnesses and jurors. Some considered that knowing that they would be instantaneously on show to a wider audience might make witnesses more reluctant to give evidence, impact on the quality of their evidence, and enable those scheduled for later in proceedings to be influenced by witness presentations earlier on. There was also concern that witnesses could be recognised in live transmissions and potentially suffer intimidation. Others made the point that family and friends of jurors may watch proceedings and offer their own views to jurors. One respondent commented:

“It would be very difficult to police this and directions may not suffice, as unsolicited but persuasive views may be offered.”

Two respondents were concerned that live transmission could be demeaning to the process, risking turning trials into a form of “reality TV” entertainment.

4.4.2 Media companies were prominent amongst the minority who supported live transmission of criminal trials, arguing that this would promote transparency and openness in the justice system, in turn enhancing public confidence that justice is being carried out. Two media respondents pointed out that a robust framework of safeguards already exists, including the Contempt of Court Act 1981, and broadcasting guidelines. BBC Scotland observed that:

“...broadcasters are extensively regulated, self-regulated, and in the case of the BBC, sometimes both....it is very much in the legal interests of a broadcaster such as the BBC to abide by its own Guidelines”

4.5 *First instance proceedings - Live Transmission - Civil Proceedings*

4.5.1 Most respondents who commented considered that many of the concerns relating to criminal proceedings would apply also to civil proceedings (other than legal debates), although the concerns relating to jurors would apply only in a few cases.

4.6 *First instance proceedings – Filming for subsequent news broadcast-
Criminal proceedings*

4.6.1 The majority of those who provided a view considered that filming of certain aspects of criminal proceedings at the first instance for subsequent news broadcast should be permitted, subject to safeguards to ensure that the administration of justice was not compromised. Three respondents supported filming of all aspects of a trial. Others expressed the view that only certain aspects of proceedings might be filmed for this purpose. Examples cited were:

- expert evidence
- closing speeches/verdict
- Crown narrative
- mitigation
- sentencing
- pre-trial hearings, but only where there was a subsequent conviction

Aspects of a trial which should not be filmed for this purpose included:

- proceedings involving children or vulnerable witnesses
- sexual offence cases
- jury empanelment
- preliminary evidential hearings

4.7 *Live Text Based Communication (LTBC)*

4.7.1 Of the respondents who provided a view, most considered that LTBC in criminal proceedings, at first instance, posed some risk to the

administration of justice. A general concern emerged over what was perceived to be a lack of control over the use and content of LTBC. A key risk identified was that the content of LTBC early in a trial could contaminate the evidence of witnesses called later in proceedings.

4.7.2 Other risks identified were:

- that tweets and blog posts can become isolated from the full report of proceedings and the balance and context which this provides
- the risks of communication of matters heard by the judge outwith the presence of the jury
- disruption in court caused by the use of devices for transmitting LTBC, either generally or by devices causing interference on speaker systems and recording equipment

4.7.3 The majority recognised the benefit of a register of those approved to use LTBC from court, although certain practical difficulties in such an approach were raised, namely that there might be difficulty in identifying exactly those who might be accredited, and that the maintenance of such a register could become overly bureaucratic and time-consuming. The consensus was that should there be a register, then those seeking entry should be required to complete a statement confirming awareness and understanding of the Contempt of Court Act 1981.

4.8 Guidance

4.8.1 There was clear support for the provision of a comprehensive framework of principles, which would set out the role of media organisations, the circumstances in which filming would be likely to be approved, the restrictions which might apply, and the mechanism for

applying, yet which nevertheless permitted some flexibility in decision-making.

5. Discussion and recommendations

5.1 Appeals and Legal Debates

5.1.1 In our view the risks associated with the filming of legal debates in civil cases at first instance and on appeal, and in criminal cases on appeal, are in general sufficiently minimal to allow filming of these proceedings for the purpose of documentary making, live transmission or news broadcast, subject to the introduction of clear and comprehensive guidelines. We return later to the form such guidelines might take.

5.1.2 There will be certain cases where filming would not be appropriate. Criminal appeals where a retrial remains a possibility might require to be excluded, or broadcasting deferred. Cases involving children, or national security, those in which reporting restrictions apply, or proceedings *in camera*, would have to be excluded. There may be risks to those involved in asylum cases which render such proceedings unsuitable for filming. Cases in which evidence required to be heard on appeal would be excluded in any event. Provisions restricting certain reporting, for example section 46 of the Children & Young Persons (Scotland) Act 1937, or section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926, require to be borne in mind. Contempt of Court rules would continue to apply. The issue of whether a case should be filmed must remain under judicial control, and the court would be entitled to rule that in any given case recording

would not be in the interests of justice, but the principle under which that control operates should recognise that recording of proceedings is in the interests of open justice and for the information and education of the public. Your Lordship might think it appropriate that this should be recognised in any protocol as the guiding principle, as in New Zealand, England & Wales and elsewhere.

5.2 *First Instance Proceedings - Documentaries*

5.2.1 As we have noted at para 4.2.1, the majority of respondents considered that there was some risk to the administration of justice associated with the recording of first instance proceedings, in particular criminal trials, even for documentary purposes. The primary concerns were in relation to the potential effect on witnesses and jurors. Several of the risks identified were risks which applied also in relation to the filming of proceedings for live transmission or news broadcast. Those of most concern included the possibility that witnesses, and even jurors, might be less inclined to engage with the criminal justice system if the proceedings in which they were involved were to be filmed. Considerable concern was expressed in relation to the position of victims, children and vulnerable witnesses, notwithstanding that such individuals would already have the benefit of certain protections. Concern was also expressed at the risk of intimidation. We recognise that there is force in some of these concerns, and we deal with them more fully as they arise in relation to filming for live transmission or news broadcast. We do so largely because we are persuaded that the risks which exist in relation to filming of certain criminal or civil

proceedings at first instance for documentary purposes can be minimised by a combination of several factors.

5.2.2 These factors include the protections already available to certain types of witness and the availability of reporting restrictions. In addition we would suggest the imposition of a restriction on filming in cases of sexual offences and cases involving children, certain limitations in respect of filming of an accused, and a prohibition on filming of jurors or any part of the proceedings conducted *in camera*. If an appeal is envisaged, broadcasting of the documentary could be delayed pending resolution of the appeal. As several respondents have pointed out, broadcasters are extensively regulated, and self regulated, with obligations placed upon them to be fair and accurate and to have regard to the interests of victims and relatives. Guidelines which included provisions of the type referred to above, together with the application of careful editorial procedures and responsible editing are safeguards which should ensure that the filming for documentary purposes of first instance proceedings, even criminal trials, can be carried out without risk to the administration of justice. In any other case, if it appears to the presiding judge that to film a witness would affect the giving of their evidence in way which would adversely impact upon the interests of justice, then the judge should retain the power to order that the evidence of that witness should not be filmed. It should be clear that any such decision should be based only on consideration of where the interests of justice lie.

5.2.3 On the question of consents, we understand that in the agreement with Windfall Films referred to in the consultation document an initial stipulation requiring consent became unworkable and required to be

dispensed with. We have reached the view that it would be impracticable to obtain consent for filming from all involved. In specific instances, it may be that the judge would be satisfied that it would not be in the best interests of a witness to be filmed, if the quality of the evidence which they might give could thereby be adversely affected. It is perhaps difficult to think of examples where this might occur other than in cases of witnesses who fall into a protected category, but the power should be available as a longstop. However, we consider that it is not unreasonable to expect that consent to broadcast generally be obtained, without which the witnesses contribution may require to be anonymised in some way. Channel 4 noted that:

“If individuals do not consent to broadcast, a full record of their participation would allow a director to use other means, for example, disguise, commentary, reconstruction text etc to relate the history of the case without identifying them.”

Several respondents suggested that the issue of whether any individual contribution should be broadcast should not be determined solely on the views or even whim of the individual participant. Channel 4 made the submission that:

“...it may be appropriate to broadcast an individual without their consent if that was warranted in the public interest.we appreciate that with filming in the courts it may be necessary to agree to some mechanism which means that any wish to broadcast without consent can be argued before the trial judge.”

adding that whilst consent to broadcast should generally be a prerequisite,

“Any issue about broadcasting without consent should be determined by the trial judge. We appreciate that particular steps may have to be taken to protect the identities of victims of sexual crime, and in cases involving children and adults with incapacity, if filming was to take place. It is

probable that statutory protections, court reporting restrictions or conventions would be in place in such cases in any event.”

5.2.4 We consider that there is some force in these submissions. In our view the general rule should be that an individual’s contribution should only be broadcast in an identifiable way with their consent to broadcasting, but that there should be an overriding public interest exception which would entitle the judge to allow broadcasting without consent. Two exceptions arise. We agree that expert witnesses should be assumed to consent to broadcasting of their evidence. However, the opposite should apply in the case of court staff. Concerns have been expressed that if staff can be identified in any film they may be at risk of identification, intimidation or retribution. We consider that court staff should in general only be filmed with their consent, that the default position should be that they are assumed not to consent, and that any broadcasting of inadvertent filming of court staff should require consent.

5.3 *Protected categories of witness*

5.3.1 The New Zealand pilot operates on the basis that the interests of vulnerable people in the community such as children and victims must be protected and that includes protection from the damaging glare of publicity. The matter might not be expressed in quite the same way in Scotland, but the principle that steps may require to be taken to enable a witness to give evidence to the best of their ability is well recognised. The emphasis is on taking steps to make sure that the quality of the evidence is not adversely affected by the need to give evidence in open court. At common law the court has power to exclude the public if

satisfied that it is in the interests of justice to do so (*HMA v Mola* 2007 SLT 462).

5.3.2 Section 92(3) of the Criminal Procedure (Scotland) Act 1995 provides:

“From the commencement of the leading of evidence in a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the court-room.”

In practice the operation of this section is usually confined to the evidence of the complainer(s), although the power available under the section is not so restricted. Equally, although the provision is wide enough to cover them, the practice is not to exclude members of the press, although it is understood that discretion will be exercised in the reporting of those parts of the proceedings held in closed court. In *X v Sweeney* 1982 JC 70 @ p92 Lord Avonside described the position thus:

“In our Courts a victim alleged to have been raped almost invariably gives evidence behind closed doors. In such a situation the public is not permitted to hear her evidence. It has been the practice, particularly in Glasgow, to allow the Press reporters to remain. They are asked to exercise a wise discretion, and in my experience, this they do admirably. The trial judge could, of course, if he thought it desirable, exclude the Press and clear the court completely.”

The identity of complainers in such cases is usually withheld in press reports as a matter of press discretion, without the court requiring to make an order to that effect in terms of section 11 of the Contempt of Court Act. Section 46 of the Children and Young Persons (Scotland) Act 1937 gives the court power to prohibit publication of the identity or any particulars calculated to lead to the identification of a person under the age of 17 years who is involved in any proceedings. Again, this is usually achieved with the co-operation of the press and without an order under the section requiring to be made. Further protection for children and vulnerable witnesses is provided by section 271 of the

Criminal Procedure (Scotland) Act 1995 which allows the measures outlined in sections 271A-M to be adopted as appropriate. Child witnesses are automatically entitled to the protection offered. For witnesses with a mental disorder, or those who assert fear or distress in connection with giving evidence, the court may only approve the measures if satisfied that otherwise there would be a significant risk that the quality of the evidence given would be diminished. In certain circumstances the court may make a witness anonymity order. The facts that such extensive provision has been made for the protection of children and vulnerable witnesses confirms our view that it would not be appropriate to allow filming in cases involving such witnesses, or in cases of sexual assault.

5.4 First instance proceedings – Live transmission and news broadcast-Criminal Proceedings

5.4.1 It seems that respondents were inclined to the view that one could differentiate between filming for live transmission and filming for news broadcasting, with the possibility of filming for news broadcast receiving more support than filming for live transmission. Save as briefly referred to elsewhere in this report, it is our view that in terms of risk there is very little to differentiate filming for either purpose. We gained the impression that respondents might have been slightly confused as to the extent to which the two could be differentiated, and we accept that perhaps we might have made it clearer in the consultation paper that we were in each case referring to film which would be broadcast, or available for broadcasting, during the currency of proceedings. This possible confusion may be seen in, for example, in the inclusion in the list of matters which could be filmed for news

broadcasting of “pre-trial hearings, but only where there was a subsequent conviction”: this suggests that it might not have been appreciated that filming for news purposes envisaged that the footage would be shown during the currency of the proceedings. In similar vein, there may be difficulty in equating the view of one respondent, seeming to favour filming of all aspects of a case for news broadcasting, with the view from the same respondent that live transmission created a real risk of an adverse effect on the proper administration of justice, and might have the potential to inhibit witnesses from giving evidence and lead to distortion of evidence. In addition, although a majority of respondents suggested that filming for live/news would be possible, on further examination it was clear that they were envisaging that this would only be appropriate for certain aspects of the proceedings, as noted at paragraph 4.4.1. This in itself would create the risk that an unbalanced impression of the proceedings might be created, despite the best efforts of broadcasters.

5.4.2 In addressing this issue it is illustrative to look at some of the different considerations which apply to documentary film-making, as opposed to filming for live transmission or news broadcast. One important element in the reduction of risk is that a documentary would not be broadcast during the currency of proceedings, and if an appeal were envisaged, it would not be broadcast until after the conclusion of those proceedings. A documentary thus lacks the immediacy of a news broadcast or live transmission of proceedings. The risk that broadcasting might influence the proceedings during their currency is eliminated. Moreover, the risks relating to the effect on witnesses would also be reduced, since it appears to us, and from some of the responses we received, that the risks associated with filming arise in

particular when filming and broadcasting are fairly contemporaneous events. A further important factor is that the documentary format is one which seems to create the optimum format for educational purposes. As Channel 4 expressed it:

“Documentaries provide the greatest perspective and coverage of proceedings. Contributors are allowed time to have their contributions explained to them and put into context. This is able to happen after the conclusion of the trial, where contributors are not preoccupied by any immediate pressures of appearing in court. Further, as documentaries are broadcast after the trial, as opposed to during the trial (for example with news coverage), their broadcast cannot affect trial proceedings.”

5.4.3 The educational benefit can therefore be achieved without the risks associated with live transmission or news broadcast. The latter in particular seems to provide minimal opportunity for educational benefit. In New Zealand, where the issue of in-court filming is now under review, the consultation paper released in March of this year suggests that news coverage is too short and too focused to give the public much of an impression about how the courts work. Questionnaires answered by judges with experience of cameras in court revealed that although reporting of sentencing was generally considered to be fair, accurate and balanced, a different picture emerged in relation to the reporting of trials. Relaxation, at the request of the media, of the former 2 minute minimum broadcast rule has resulted in coverage which many judges referred to as being mere “sound bites”, superficial, and incapable of giving any real understanding of the issues at the trial. Some were concerned at selectivity and sensationalism in reporting. This tends to accord with the view expressed by US judges that the broadcast coverage did not provide a high level of detail about the legal process in the cases covered and that the educational function was best achieved through

extended coverage of proceedings rather than snippets, and that what was perceived to be the greatest potential benefit from filming, namely the education of the public had only been achieved to a moderate extent, or not at all.

5.4.4 We should point out that most of the responses from broadcasters very responsibly recognised that filming for live transmission or news broadcast carried genuine risks in relation to witnesses and jurors. Channel 4 noted that:

“We consider that live broadcast of proceedings which involve the hearing of witness evidence is possible without risk to the administration of justice but is more difficult to achieve.”

A joint response from the media group responsible for filming the Court of Appeal in England and Wales recognised that there were special sensitivities regarding witnesses in criminal cases. Sky noted that:

“We recognise that the prospect of being recorded on video might in certain circumstances have an impact, particularly on lay witnesses, and the utmost care must be taken to prevent the process of justice being affected. That said, we believe that the videoing of witnesses should not be ruled out. In particular we believe that there is a distinct difference between lay witnesses and professional ones.”

The same broadcaster commented:

“We believe that live or as-live transmission of sentencing remarks could be the next step in the evolution of video in courtrooms.”

This view was repeated by STV in their submission that:

“A presumption in favour of broadcasting appeal hearings and sentencing diets as a 1st step has much to recommend it.”

5.4.5 It was suggested by some respondents that the presence of unobtrusive cameras would be unlikely to add significantly to any apprehension which witnesses may have. The point however is that it is not the mere presence of cameras or the act of filming itself which creates apprehension, it is the prospect of contemporaneous, or near contemporaneous, broadcasting of their evidence which may do so. This was made clear in the response from Victim Support which observed:

“We know that giving evidence in a criminal trial can be traumatic for victims and witnesses, with this experience often cited as a main source of secondary victimisation. To add the possibility of being filmed to this process could add strain and anxiety to an already difficult situation, impacting on their choice to engage in the criminal justice system in the future..... Knowing that their evidence may be subsequently broadcast on television may put witnesses under additional strain before and during court, which may adversely impact on the justice process by the negative influence this could have on the ability of witnesses to give the best possible evidence.”

5.4.6 We consider that it is necessary to recognise that those who become involved as jurors or witnesses, through no actual choice of their own, and even though under compulsion of citation, already find the whole process highly stressful, and there must be a real risk that it will be more stressful if their evidence is to be filmed and broadcast live or in an evening news broadcast. They may to some extent be conscripts rather than volunteers but that is no reason to add to the stress of performing what remains a civic duty.

5.4.7 Several respondents raised the concern that live transmission or filming for news broadcast might increase the possibility of disruption in the public gallery. In relation to these concerns, the issue is not one of seeking to censor that outbursts or disturbances have happened: when they occur at present they may be reported on. The point is that

if there is live transmission or transmission for news broadcast there is an increased risk that those with an agenda quite apart from the subject matter of the case might seek to use it as an opportunity of protest or self promotion. Of course the court can deal with these by ejecting protestors and dealing with any contempt of court which arises but the concern is simply to prevent the administration of justice being needlessly interrupted or disrupted in such a way. Those who have been present when there has been significant disruption in court will be aware that such events can be unsettling and upsetting for jurors, and would be likely to have a similar effect on witnesses if occurring during the giving of evidence.

5.4.8 We have not touched upon the issue of the inconvenience which filming for live transmission or broadcast might entail, although several responses did so. One observed that:

“Any possible live broadcast of cases involving witnesses would require a collaborative discussion and planning between the court and programme makers/broadcasters to avoid any interference with the administration of justice.”

We accept that to be the case, particularly since there would inevitably be numerous types of evidence which could not be filmed. An assessment would need to be made in each individual case and in relation to each individual witness. That in itself militates against such a process. It is important during any trial that judges and court officials are not distracted from the important issue, namely the case in hand and the securing of a fair trial. Having regard to all the relevant factors, we have reached the conclusion that filming of criminal trials, save for sentencing remarks, which we address below, should not be allowed for either live transmission or news broadcast.

5.6 *Sentencing*

5.6.1 The majority of respondents suggested that sentencing statements might be filmed for news broadcast or live transmission with no risk to the administration of justice. Some media organisations suggested that this might be a reasonable next step in allowing filming of the court process. We note that despite some concerns in other regards, filming of sentencing statements has been considered in New Zealand to be fair accurate and balanced.

5.6.2 Filming of sentencing statements has been carried out successfully in Scotland on several occasions. We therefore recommend that filming of sentencing statements should be permitted. However, the filming should be of the judge only, as the sentencing statement is delivered. This focuses on the points which the judge actually thinks are important to take into consideration in sentencing, not those advanced by the Crown or the defence, and helps to ensure that sentencing material continues to be put before the court in a dispassionate and professional manner. There should be no filming of the accused, counsel or the public benches. There should be a time delay on transmission to cater for the possibility of any disturbance in court.

5.7 *Civil Proceedings*

5.7.1 We recognise that the issues which may arise are much less acute in civil cases, at least those in which no jurors are involved. However, the pressures on witnesses remain. The majority of civil cases relate essentially to private disputes between individuals in which there is

little public interest and which are seldom reported, other than at the stage when a judicial opinion has been issued. Cases with a public element are likely to be cases of judicial review which do not as a rule involve witnesses but only legal debate: if our recommendations are accepted these cases may be filmed in any event. We do not consider that there is any justification for extending filming to civil proceedings in which witnesses are involved, standing the risks which may be anticipated.

5.8 *Live Text Based Communication (LTBC)*

5.8.1 Although certain risks associated with LTBC may be identified, we are satisfied that provisions may facilitate the use of LTBC. The risk of communication of matters heard by a judge outwith the presence of the jury may be addressed by suspending the use of LTBC at such stages of proceedings. The risk of interference with court recording equipment – something which is sometimes encountered at present when mobile phones have not been switched off – should not be underestimated, but should this become a problem in a given case, the court could again suspend the use of LTBC. Control over the proceedings could be maintained by the use of a register. It is our understanding that in relation to allowing journalists access to information from court documents such as indictments, it is intended in due course that these documents should be placed within an electronic portal to which journalists require to register in order to obtain access. If access to the portal were to include a declaration relating to compliance with the provisions of the Contempt of Court Act 1981, anyone so registered could be allowed to use LTBC from court, by intimating their identification to the clerk of court who can check the register. Anyone

not so registered would require to obtain permission on a case by case basis, and would require a declaration regarding contempt of court. It is important to obtain confirmation of a knowledge and understanding of the restrictions which apply to the reporting of court proceedings. In the meantime, a separate register of journalists allowed to use LTBC from court can be introduced.

5.8.2 We consider that this is required because of the degree of discipline which requires to be exercised by those using LTBC and the difficulty which the court might have in policing such communications. As STV noted:

“We would prefer the opportunity to do live text updates. Acknowledging that this does place more responsibility on an individual journalist”

In their response, STV indicated that all their journalists are given guidelines on using social media within court precincts, and that this would continue were live texting allowed. We anticipate that this would be the case in relation to other media organisations. A protocol could be devised setting out the conditions upon which use of LTBC may be allowed, stipulating also the use of unobtrusive equipment. Anyone not abiding by the protocol would run the risk of having permission to use LTBC rescinded. Not all LTBC operate in the same way. In particular, with systems such as twitter, the low character count might impact upon the balance of the coverage which such communications might present. If this were to become a problem, further regulation might be imposed relating to the nature of LTBC which should be permitted.

5.9 *Guidance*

5.9.1 As noted above, we consider that it is appropriate that all filming should be subject to clear and comprehensive guidelines. As to the nature of the guidelines which might be issued, we consider there is a clear distinction to be drawn between filming for the purpose of news broadcast or live transmission and filming for documentary purposes, such that it would be inappropriate and impractical, to apply exactly the same guidelines to each. Although we were impressed by the thoroughness of the New Zealand guidelines, they address situations which would not arise for consideration were our recommendations to be accepted, and are more detailed and complex than the local situation would merit. In relation to filming for news broadcasting a simplified version (since primary legislation is not required) of the provisions and protocol which apply to the filming of the Appeal Court of England and Wales might be developed. Those specify the nature of proceedings which may be filmed, but the court may nevertheless decide that in any given case filming is not in the interests of justice, which decision is not open to appeal. Filming is effectively restricted to submissions of legal representatives (not party appellants), exchanges between legal representatives and the court, and the court giving judgment. Close ups, filming of papers in any readable form, exchanges between judges or between legal teams, remarks by members of the public and footage of parties or the public are disallowed. A 70 second time delay is provided for, and the recording is carried out by a court video journalist with appropriate security clearance who has been employed by the media parties involved. The usage to which the footage may be put is regulated, having regard to the importance of fair and balanced reporting of trials, and footage must not be broadcast out of context.

5.9.2 Similar stipulations in Scotland would, in the general run of cases, effectively minimise the already small risk to the administration of justice which filming of such proceedings might entail. In the Court of Appeal for England and Wales, the nature and layout of equipment used is agreed in advance, and it takes only about 30 minutes for further set up on the day of filming, minimising inconvenience to the court, and reducing the period of notice which requires to be given. Our understanding is that fixed, remote control cameras are utilised. The advances in camera design are such that we do not think it necessary to restrict use to one fixed camera, as was envisaged originally in New Zealand. Moreover, there appear to be practical advantages in the use of more than one camera: should, for example, a member of the public accidentally stray into view it is possible to cut to a different camera.

5.9.3 The guidelines which might be developed in relation to filming for documentary purposes would require to be somewhat more detailed than the protocol for filming of appeals and the like which we recommend at paragraph 5.1.2, although many of the same considerations might be expected to arise. Detailed agreements were entered into in relation to the Windfall Films project and we suggest that these could be a useful starting point for the establishment of comprehensive guidelines for the making of documentaries.

5.9.4 The objective of guidelines should be to achieve both clarity and consistency as to the circumstances in which filming may be allowed. In this regard, it is perhaps worth mentioning that several broadcasters disputed the suggestion in the consultation that the 1992 Guidance has

worked relatively well, suggesting, in the words of Channel 4, that the process to gain permission to film proceedings “remains a process that is rare, lengthy, expensive, unpredictable and fraught with difficulty.”

5.9.5 The development of protocols or guidelines is, of course, a matter for your Lordship. We note that for the development of the project involving Windfall Films a Working Group was established. If our recommendations are accepted, your Lordship might find it useful to appoint a media committee to develop the appropriate guidance and protocols. There are also practical issues relating to which courts could realistically be fitted by media companies with the appropriate equipment: this would be feasible for appeals in the Court of Session and High Court, and no doubt for debates in the Court of Session. It might be possible to arrange for a courtroom to be appropriately equipped in the main sheriff court centres, and in due course for the sheriff appeal court. In the first instance practical realities may dictate a pilot centred on the Court of Session and High Court.

6. Summary of Recommendations

6.1 Appeals and Legal Debates

6.1.2 Filming of civil and criminal appeals, and legal debates in civil first instance proceedings, such as judicial review or procedure roll hearings, should be allowed for live transmission, subsequent news broadcasting and documentary film-making, subject to clear and comprehensive guidelines.

6.2 First Instance Criminal

6.2.1 The court should allow criminal trials to be filmed for documentary purposes in certain circumstances, subject to the safeguards referred to above. Cases involving children, sexual offences and vulnerable witnesses should not be filmed.

6.2.1 For subsequent news broadcasts, the delivery of sentencing remarks of the judge should be permissible, with filming focused only on the sentencing judge.

6.2.2 Filming for live transmission should not be allowed.

6.3 *First Instance Civil*

6.3.1 Filming for documentary purposes only should be allowed, but should exclude certain groups such as family cases and those involving asylum seekers.

6.3.2 Filming for live transmission or for subsequent news broadcast of civil proceedings which involve witnesses should not be allowed.

6.4 *A Structured Approach to Considering Applications to Film*

6.4.1 All filming should be subject to robust, clear and comprehensive guidelines.

6.5 *Live, Text-Based Communication (LTBC)*

6.5.1 Journalists who register with the Scottish Court Service to gain access to information from court documents, which will in due course be placed in an electronic portal, should be required to undertake compliance with the Contempt of Court Act. Journalists so registered should be permitted the use of LTBC, subject to clear and comprehensive guidelines.

6.5.2 Anybody not on the register should seek the permission of the presiding judge on a case by case basis.