CRIMINAL BAR ASSOCIATION

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

Introduction

1. The Criminal Bar Association ("the CBA") represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring that those who are guilty are convicted and those who are not are acquitted.

1 On 7th February 2011 the Judicial Office for England and Wales issued a consultation on the use of live, text-based forms of communications from court for the purposes of fair and accurate reporting; it closes on 4th May 2011.

2 Interim Guidance has already been issued which, whilst allowing such communication in principle, requires permission to be sought from the court before using any equipment to transmit any communication of the proceedings and making the point that permission might be given to the press but not necessarily to the wider public.

3 The purpose of this consultation is to consider in more detail

- Whether there is a legitimate demand for live, text-based communications to be used from the courtroom
- If there is, under what circumstances should it should be allowed
- Who should be allowed to use it

4 Nowhere in the consultation is the term 'live text-based communications' defined. One strict interpretation, bearing in mind the use of the word 'live' is that this only relates to communications that are publicised the instant they are sent, such as comments sent by Twitter, or uploaded to an online blog. However the consultation also considers, under the heading "Different Platforms for Live, Text-Based Communications from Court" the use of email to file 'copy', which may well be edited before publication; in any event there will be a delay between filing and publishing. Finally, emails themselves and SMS texts are somewhere between the two, being live communication, but to the addressee only and not automatically more widely published.

5 This response addresses all forms of text-based communication.

6 The CBA response to this consultation focuses primarily upon the impact of such communication in criminal trials.

Executive Summary

7 There are six questions: -

1. Is there a legitimate demand for live, text-based communications to be used from the courtroom?
2. Under what circumstances should live, text-based communications be permitted from the courtroom?
3. Are there any other risks which derive from the use of live, text-based communications from court?

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

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

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

8 The CBA consider there is a legitimate demand for text-based communications to be used from the courtroom, by both accredited members of the media and other interested parties.

9 Because there are risks to the fair administration of justice in cases involving juries and live evidence we take the view that different approaches should be taken to text-based communications which result in instant publication, such as Twitter, and other forms of communication where there may be some mediation, and there is certainly some delay, between transmission and publication. On balance we take the view that platforms such as Twitter should not be used from within the courtroom, but there is no corresponding risk to allowing the transmission of emails or SMS messages to specific addressees.

10 The proposals in the consultation paper to ensure the use of mobile phones or other electronic devices to transmit messages appear to us to be sensible and proportionate.

11 We also agree that such communications should only be allowed by the court on receipt of an application stating who wishes to transmit, for what purpose and using what system or device. This would enable the court to grant permission on a case by case basis and, assess the risks and set any limits or conditions on the use of such communications.

Question 1: Is there a legitimate demand for live, text-based

communications to be used from the courtroom?

12 The consultation paper considers a variety of types of text-based forms of communication. There is in fact a broad spectrum of possible forms of such communication, ranging from the electronic filing of a reporter's copy to their editor to the communication of a remark, opinion or quote within seconds of it being uttered or considered, for example via Twitter. The former is barely 'live' in the strictest sense, the latter so live as to be an almost simultaneous broadcast.

13 In our opinion the strict answer to the question is yes, but only to a degree. Subject to the need, identified in the consultation paper, to ensure there is no technical interference with a court's own electronic systems, it seems pointlessly restrictive to require a reporter to leave court to transmit their copy. By the same token, given that anyone is entitled, if they wish, to pass on to friends, family and the wider world what they have heard in court, there seems to be no legitimate reason to prevent them doing so by electronic means from the courtroom itself. It would be Canute-like to seek to impose restrictions which create artificial hurdles which could be easily circumvented: ie by leaving court momentarily. The court is perfectly capable of regulating its own proceedings and it possesses the ultimate sanction - a finding of contempt. However, it is in our opinion prudent to consider whether there are appropriate controls that could be imposed to prevent, rather than to have to punish, actions that could cause damage to the fair administration of justice.

14 The consultation paper also states that its focus is "the use by the media" of this form of communication. However, it goes on to point out that: -

"the identity of those wishing to report court proceedings has also changed; the internet provides a platform for some who are not members of the accredited media to report, comment upon (or, indeed, criticise) court proceedings……A further and significant factor is the potential for misuse of the internet by jurors. Technological advances in reporting, based upon the ever widening platform of the internet, will inevitably serve to fuel the potential for prejudicial, unfair and inadmissible material to

be seen on the internet by jurors."

15 It is within the experience of members of the criminal bar for people interested in a trial to report the daily proceedings via the internet in various ways, most commonly by posting them on their own websites or social networking websites. They have done so by taking careful notes in court and then writing them up after court. There is no power to prevent this happening, other than to invoke the law of contempt if the report risks prejudicing the trial.

16 Whilst not wishing to address issues not raised by the consultation paper, we would observe that the Supreme Court's published policy on this issue states that: -

"Subject to the exemptions which are outlined below, any member of a legal team **or member of the public** is free to use text-based communications from court". Of course the Supreme Court hears cases in very different circumstances to other courts and in particular does not hear evidence and there is no jury. However there are exemptions to this freedom to take account of the fact that its proceedings may be subject to reporting restrictions."

17 In the course of responding to this consultation paper we do on occasion consider the effect of the use of live, text-based communications by person other than the media.

18 Given that there appears to be no principled reason for preventing live text-based communications from the courtroom, the focus must be, as the interim guidance makes clear, on preventing this causing prejudice to the administration of justice.

Question 2: Under what circumstances should live, text-based communications be permitted from the courtroom?

Question 3: Are there any other risks which derive from the use of live, text-based communications from court?

Question 4: How should the courts approach with the different risks to

proceedings posed by different platforms for live, text-based communications from court?

19 It appears to us that it would be more helpful to answer Question 3 before Question 2. The consideration of the risks and how they operate in different circumstances leads to an answer to Question 4.

20 The consultation paper sets out a number of risks that are said to arise from live text-based communications

- Risk of disruption to court proceedings
- Risks to the fairness of court proceedings
- Risk of coaching witnesses

21 The risk of possible disruption can, we believe, be simply countered by anyone wishing to use such communications having to seek the court's permission and the court having the power to limit the number and type of devices in use if there is a risk of interference with the court's own systems.

22 The risks to the fairness of court proceedings created by the internet are well-known. Does the use of live communications from court increase those risks? Clearly anything that increases the amount of information about a case that is transmitted and thus published increases those risks. However, the answer is not to try to put the genie back into the bottle by making it just a little harder to publish information. Furthermore the answer to the question depends to a degree upon the type of communication. For example, it is difficult to imagine the risks being increased by allowing journalists to file their copy from court.

23 On the other hand there are significant risks associated with the use of genuinely live text-based communications, such as Twitter. We are all familiar with the stream of news stories associated with public figures Tweeting remarks which they later –

sometimes not very much later – regret; this exemplifies the risk that often things are Tweeted that might have been said, but probably would not have been written, had the person had time to reflect. However, once committed to this or any other form of text-based communication, it has the semi-permanence of writing.

24 Secondly, the nature of the system is such that a Tweet can, and usually is, 're-published' often at an exponentially increasing rate so that it may achieve an audience of thousands or even millions very rapidly.

25 Obviously a Tweet which is published by someone who has heard something in court and then Tweeted it after leaving court carries the same risks, but that does not seem to be a convincing reason to heighten the risks by allowing Tweeting to take place in court, for instance as an immediate reaction to something they may have just heard from the witness box.

26 We do of course acknowledge that it would be very easy to text/email to a third party who then publishes on Twitter – almost instantaneously. Even without a third party to assist, a person would just physically leave court and Tweet: this would take seconds. It could be argued that to prevent this is a doomed attempt to keep the genie in the bottle. For the same reasons, if a witness says something that someone wants to Tweet about surely he will just go ahead and Tweet – in or out of court?

27 However the fact that it is impossible to remove all risk of damage to the integrity of proceedings is not a reason to fail to take proportionate and reasonable measures to try to prevent such damage. On balance we feel that in cases involving live evidence and juries the extra risks attaching to the use of real live text-based communications in court – such as Twitter – that do not apply to the transmission of other information from court, for example in an email or an email attachment, justify forbidding the use of such communication from within court. It may well be the case that the risks associated with Twitter also exist in the case of live updating a blog for example.

28 However, we believe that the requirement to positively obtain permission from the court to communicate from within court and the fact that the court would state, once it

has granted such permission, that the penalty for inappropriate publications about the proceedings is contempt proceedings, would strike the right balance.

29 As a secondary, but still significant consideration, there exists a small but real issue concerning the transmission of information in real time from a member of the public to a witness who may be waiting to give evidence. Once again, the same risk attaches to anyone taking a note in court and passing on the information to a witness, or even telling a witness what has been said in court.

30 Finally, another risk associated with live text-based communications is the possibility that a Tweet may accurately represent what was said in open court, but the trial judge may subsequently rule against publication. It might then be too late to prevent the dissemination or even formal publication of the material. This risk is reflected in the Supreme Court's policy which allows for the banning of live text-based communications from court where reporting restrictions have been put in place by the court or where the UKSC has ordered that a judgment should not be reported.

31 In answer to Question 2, we think that, on balance, the public interest in avoiding the risk of causing unfairness in a trial outweighs the public interest in allowing anyone to transmit anything said in court as and when it is said.

32 We would not wish to express a firm opinion as to whether the press should be able to transmit live text-based communications using a system such as Twitter, given that they could, in our view, send material to their editors from court. In our opinion the balance is fairly struck by allowing the press to transmit to their editors what they wish as the press have experience of considering what is and is not "fair and accurate". We are not convinced that prohibiting both the press and members of the public from 'Tweeting' as and when they wish from within court is a significant infringement of freedom of speech or a barrier to proper public scrutiny of the administration of justice. Indeed, given the risks of committing a contempt of court by Tweeting something that is then subject to a ban on publication, we believe that it is likely that most if not all journalists would prefer not to be expected to Tweet from court.

33 In summary therefore, in cases not involving jurors or the hearing of evidence, a policy such as that in force in the Supreme Court would appear to be appropriate, although we note that it only prevents live text-based communication where reporting restrictions are already in place, or where an order that a judgement should not be reported has already been made. For the reasons set out above, in other courts, and certainly in courts where evidence is heard and jurors are involved we would suggest that the risks inherent in live text-based communication – that is communications that are instantly published – outweigh any need to be able to transmit such communications.

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?

34 The consultation paper states: -

"Because most live, text-based communications from court are conducted from mobile telephones or similar devices, it is necessary to consider how the normal and almost invariable rule that mobile phones must be switched off in court should apply when permitting live, text-based communications from court."

35 As we have already pointed out, the paper also addresses the use by the media for example of electronic filing of 'copy'. In such cases this is usually done by internet enabled laptop computer. This section of the consultation appears to focus exclusively on SMS or MMS communication by mobile telephone.

36 For the reasons already explored, we are sceptical that there is any compelling case for the use of Twitter or similar platforms from within court. However, the proposals in the consultation paper appear a reasonable compromise solution.

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?

37 We agree with the solutions suggested in the consultation paper that: -

- An application should be made to the court to grant permission each time live, text-based communications are to be used; these applications may come from accredited and non-accredited persons
- Depending upon the circumstances the court may choose to say that accredited members of the media may use all, or a specified type of text-based communication, such as email during the proceedings, but not other users of the court. However, we still maintain the view that methods of internet-based communication that result in instant publication should not be used in courts involving juries and hearing evidence.

Paul Keleher Q.C.

Tom Allen

Ben Williams