



Broadcasting the Courts

**JUSTICE Submission to consultation by the
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1. JUSTICE is a British-based human rights and law reform organisation with around 1600 members. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. The broadcasting of court proceedings in England and Wales is subject to a statutory ban. S41 Criminal Justice Act 1925 makes it an offence to
 - (a) take or attempt to take in any court any photograph ... or attempt to make ... in any court any portrait or sketch of any person ...
 - (b) publish any [such] portrait, photograph or sketch ...

S9 Contempt of Court Act 1981 makes it contempt of court to use take recorder in court. Photography has been interpreted as including filming for cinema or television.¹
3. Debate on the broadcasting of court proceedings has some history. For example, a Bar Council working party in 1989, chaired by Jonathan Caplan, recommended an experiment with the use of television.
4. Non-statutory inquiries are not caught by either of the statutory bans. As a result, recent judicial pronouncements on the issue of broadcasting in England and Wales have come in the context of applications to broadcast non-statutory inquiries. Thus, Lord Scott (arms to Iraq); Dame Janet Smith (Shipman); Lord Phillips (BSE); Lord Cullen (Ladbroke Grove); Lord Saville (Bloody Sunday) and, most recently, Lord Hutton (death of Dr Kelly) all made decisions on the broadcasting of their respective inquiries.
5. The judicial chairman have not maintained a total ban on broadcasting proceedings but have not allowed televising the evidence of witnesses. A number have allowed televising of all or some of the opening and closing statements (eg Lords Hutton, Saville and Cullen). Lord Phillips accepted radio broadcasting. There has been an acceptance that hearings should be in public even where broadcasting has not been permitted. In addition, there have been increasingly sophisticated measures for quick publication of the evidence on inquiry websites.
6. Lord Hutton gave his reasons for not allowing televising proceedings as follows:
 - (a) The right of freedom of expression under Article 10 of the European Convention is not engaged. The assertion of a right to broadcasting is to a right of access to information, not free expression.
 - (b) The requirements in favour of open justice are outweighed – so far as broadcasting is concerned - by the need to protect witnesses, even ministers and civil servants, from undue strain and pressure as far as broadcasting was concerned. He said:

Those who give evidence will be placed under strain even if their evidence is not filmed and broadcast on television. But the strain will be all the greater if they know that their evidence is being filmed and broadcast and that every answer, every qualification or correct of an answer, every hesitation, every facial expression and every alternation to their posture will be watched by hundreds of thousands of people on

¹ Re Barber v Lloyds Underwriters [1987] 1 QB 105; R v Loveridge, Lee and Loveridge [2001] 2 Cr App. Rep 29, CA.

their television screens and will be liable to be replayed on television on a number of occasions.

It might be noted that the family of David Kelly opposed broadcasting.

(c) The requirement of open justice can be fulfilled by measures short of broadcasting. Indeed, the Hutton Inquiry produced an exemplary website.

7. Scotland has similar contempt legislation but does not have the same statutory ban as in the 1925 Act. As a result, there has been more flexibility. The Lord President, Lord Hope, drafted a Practice Note in August 1992 which allowed strictly controlled broadcasting in some cases, including:
- News coverage of ceremonies in a court room and the taking of library pictures without sound of judges on the Bench;
 - The making of programmes of an educational and documentary nature where there would be no risk to the administration of justice; the approval of the presiding judge before and after filming; and the consent of the parties.

Initially, first instance trials were excluded but, in the event, a set of five programmes were allowed to be broadcast, by the BBC as 'The Trial', which showed some first instance footage. The requirement for consent of all parties was maintained and this could be withdrawn within 24 hours of filming. This resulted in five programmes broadcast by the BBC as 'The Trial'. Lord Hope is reported in the consultation paper as saying:

The conclusion can be drawn ... that proceedings can be shown on television, but that caution is needed and will always be needed if this is to be done without risk to the administration of justice.

8. This experiment does not seem to have been pursued further. However, the BBC obtained permission to broadcast the appeal of Abdel Baset Ali Mohamed Al-Megrahi against his conviction for the Lockerbie bombing though not of any evidence by witnesses. This took place, as had the first instance trial for which similar permission was refused, in the Netherlands. Permission had been given to relay the trial proceedings to Scottish locations but only so that they could be seen by the families of the victims.

Principles

9. Article 6.1 of the European Convention on Human Rights expresses the principle of 'open justice':
- In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and the public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
10. The 'open justice' principle implies three principled justifications for transparency in the operation of the courts:
- (a) protection of the individual defendant, litigant or party; and
 - (b) legitimacy based on the possibility of open inspection by the public and, in today's world, the media.
 - (c) education in the workings of the constitution.

11. We consider that, in principle, it is now appropriate to reverse the current statutory position on broadcasting in line with the thrust of Article 6 in all cases where the public may have access at the moment. This would continue the exclusion of family and security cases etc. However, it would mean that for all cases where the public are now admitted the general rule would be that broadcasting (on acceptable terms of intrusion etc) may occur save only to the extent strictly necessary where it would prejudice the interests of justice.
12. The actual mechanics of filming or recording are such that they should not, of themselves, be unduly intrusive in the court.
13. Jurisdictions take different positions on broadcasting. The US Supreme Court does not allow cameras in court. California notably did in the O J Simpson case. Australia's federal court has experimented with television since 1994 but its current extent has generally been limited to the short scene-setting shots or a judgement read to camera except that fuller coverage has occasionally been allowed, eg in 2001 of the Tampa case involving the asylum claim Afghans picked up in international waters.²
14. The Australian experience suggests that a number of concerns dissipate as the courts become accustomed to broadcasting: they have not found a problem with grandstanding by judges or lawyers or the technology intrusive or that the cameras change much: 'Our feedback suggests that judges forget the cameras are there'.³
15. The Australians have not sought to regulate the broadcasters save as to require pooling of the product. The New Zealanders have with rules about a minimum two minute broadcast of a section of a judgement.
16. Televising courts does raise a degree of nervousness. Accordingly, JUSTICE would recommend a stepped approach. As this first instance:
 - (a) the presumption should be reversed and broadcasting permitted save where it might prejudice the interests of justice;
 - (b) a committee be established, formed of members of the Civil and Criminal Justice Councils and chaired by the Master of the Rolls, to oversee the process, in particular, to implement a phased programme of implementation;
 - (c) a initial list of proceedings or types of proceedings be agreed in which broadcasting would generally be regarded as unlikely to prejudice the interests of justice.
 Australian experience suggests that the courts themselves will adapt to broadcasting by, eg, developing introductions or summaries of court judgements and proactively seeking to use their own websites to give full transcripts and broadcasts.
17. Concerns over broadcasting are most acute in relation to the potential deterrent effect on witnesses of fact – as indicated in the rulings of the various tribunal chairs quoted above. By contrast, it would seem difficult to see why any case which involved a point of law only, with no evidence as to fact, should not be televised throughout.

² Bruce Phillips *Television in the Federal Court of Australia* 1994-2004, Broadcasting Courts seminar, 10 January 2005.

³ As above.

18. We believe that a committee should be established to implement a policy of opening up the courts to broadcasting. We consider that this could be chaired by the Master of the Rolls and made up of representatives from the existing Civil and Criminal Justice Councils. The committee should have wide statutory powers to authorise broadcasting in different proceedings and to impose conditions eg sound only or restrictions on what pictures can be broadcast or in relation to requirements of balance. The committee should have responsibility for monitoring the consequences of broadcasting and for meeting any appropriate training needs that emerge as desirable, either directly or via recommendations to the Judicial Studies Board.
19. We would see it as important that an early start should be made to broadcasting. We consider it likely that UK experience would follow that in other jurisdictions. Over time, there will be increasing acceptance by all concerned of the benefits of broadcasting and diminishing fears of the difficulties.
20. The committee should be set a preliminary list of cases where sound and video broadcasting should be considered in the first instance. These should include:
 - (a) all parts of all cases in the House of Lords/Supreme Court;
 - (b) all parts of all appeals in the Court of Appeal, the High Court, Social Security Commissioners or elsewhere which relate solely to a point of law;
 - (c) judgement in all cases, civil or criminal;
 - (d) all parts of all cases at first instance which relate solely to a point of law (mechanisms would have to exist for agreeing such cases);
 - (e) all parts of all cases where the case related to an application for judicial review against a public authority (a specific category that perhaps should be separately identified because there is a public interest justification for coverage though, in fact, likely to be contained within (c) above);
 - (f) all parts of all cases in all courts and tribunals where all parties and witnesses consent to broadcasting – subject to the approval of the judge;
 - (g) ‘scene setting’ shots of individual judges sitting in court for library purposes.
21. There should be restrictions on what can be shown ie shots should be limited to counsel and judge and general coverage limited in the manner of Parliamentary coverage on the public gallery etc. Pictures or sound of the jury should not be broadcast. Publication would be subject to the general rules of contempt of court. Beyond that, we would suggest that the broadcaster would be subject to no other restrictions imposed by the court eg as to minimum length. Fairness of presentation would be left to the broadcasting regulator. We would, however, be content to leave these matters to the committee.
22. We think it crucial to begin the process of opening up the courts to broadcasting, if necessary with a degree of caution that can be subsequently eased.