



JUDICIARY OF
ENGLAND AND WALES

**OPEN JUSTICE – REMOTE OBSERVATION OF HEARINGS –
NEW POWERS**

PRACTICE GUIDANCE

Introduction

1. From 28 June 2022, courts and tribunals will have new powers to allow reporters and other members of the public to observe hearings remotely. The purpose of this Practice Guidance is to help judicial office holders understand and apply the new law.

Background and sources

2. Open justice has been a fundamental principle for centuries. The principle is a broad one, but at its core has always been a right of access to a public hearing. Historically, this has meant access for reporters and other members of the public to the court or other room in which the hearing takes place. Recently, there has been a move towards remote access.
3. Remote observation of public hearings was first allowed by temporary provisions enacted by the Coronavirus Act 2020. Those provisions applied only to wholly video or wholly audio hearings. The temporary provisions are repealed and replaced by a new and permanent regime with expanded powers. Courts and tribunals are now able to give directions to allow remote observation of in-person and hybrid hearings as well.
4. The primary legislation is contained in section 85A of the Courts Act 2003 as inserted by [section 198 of the Police, Crime, Sentencing and Courts Act 2022](#). The regime is implemented by the Remote Observation and Recording (Courts and Tribunals) Regulations 2022. Judicial office holders will need to familiarise themselves with the statutory text. Fortunately this is relatively concise and clear. What follows is a summary of the main features of the legislation.

Nature, purpose and scope of the new power

5. The power is to “direct that images or sounds of the proceedings be transmitted electronically”. It is to be exercised “for the purpose of enabling persons not taking part in the proceedings to watch or listen to” them.¹ So it is not designed for those taking part in the proceedings. Other powers cover remote participation.
6. This power is given to any “court”, but in this context that term has the expanded meaning of “any tribunal or body exercising the judicial power of the state”.² This Guidance adopts that meaning. The power can be exercised in “proceedings of any type” that are (a) in public or (b) not open to the general public but “specific categories of person, or specific individuals, who are not taking part in the proceedings are entitled to



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be present by virtue of provision made by or under any enactment or of being authorised by the court.”³ The second category would include youth court proceedings, family proceedings to which the media or researchers are admitted under FPR 27.11(2), and other hearings in private, where the court has allowed a non-participant to attend.

7. There are two kinds of direction that can be made.⁴ The first is a direction for transmission to “premises” designated by the Lord Chancellor as live-streaming premises. The second option is a direction for transmission “to which individuals are given access”. The first option might be used in a case that generates a high level of public interest, to enable proceedings to be watched from a second court room or a room in some external premises. This would require a designation⁵. The second option can be used alongside the first. Or it can be used as a stand-alone measure, which is likely to be more common. If this option is used, the individuals must first identify themselves to the court.⁶ It is not a form of broadcasting.
8. There are two straightforward threshold criteria for giving a direction. Before making a direction the court must be satisfied that (a) it would be in the interests of justice to make it; (b) there is capacity and technological capability to enable transmission and giving effect to the direction would not create an unreasonable administrative burden.⁷
9. There is a list of mandatory considerations.⁸ The court must take into account the need for open justice; the timing of any access request and its impact on the business of the court; the extent to which the resources necessary for effective remote observation are or can be made available; any statutory limitation on those entitled to observe; any issues that might flow from observation by people outside the UK; and any impact which the making or withholding of such a direction, or its terms, might have upon (i) the content and quality of the evidence; (ii) public understanding; (iii) the ability of the media and public to observe and scrutinise; and (iv) the safety and right to privacy of any person involved with the proceedings. This is a useful checklist of matters which a court would be likely to consider in any event.

The form of a “direction”

10. For over two years, courts have been making directions for remote access under the temporary provisions, with varying degrees of formality. The Regulations do not require any fundamental changes of practice, but they do prescribe some minimum requirements.
11. Any direction other than an order for live-streaming to designated premises must require those who want to watch or listen to (a) identify themselves to the court by providing their full name and email address beforehand, unless the court dispenses with the requirement to provide their full name and email address and (b) conduct themselves appropriately, and in accordance with the court’s directions, during the transmission.⁹



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These twin requirements need not burden judicial office holders. They can be built into standard forms of messaging, via email or on the platform being used to give remote access. Those standard messages will also need to make plain that unauthorised recording or transmission of the hearing is a contempt of court.¹⁰

- 12.** Where the proceedings are only open to certain categories of person the direction must contain provision for them to demonstrate their right to attend and it must prohibit observation by those who are not authorised.¹¹ Again, these standard requirements can be built into standard forms.
- 13.** Responsibility for the fair and lawful processing of personal data required for these limited purposes will lie with HMCTS or the other public authority responsible for court administration.¹²
- 14.** A direction can also include other provisions, for instance about the manner of the transmission, and about who can watch or listen.¹³ A direction can impose conditions or limits on access. Conditions could, where appropriate, include deadlines by which to apply for access, restrictions on the numbers given access, or enhanced requirements for identification to enable the court to be confident that a person seeking remote access will not risk impeding or prejudicing the administration of justice. The requirement that those who wish to observe remotely must identify themselves remotely cannot be relaxed, but the court could expressly dispense with the default requirement for names and email addresses - for instance, where a family group attends from home. In such cases those wishing to observe remotely must identify themselves by other means.

Principles

- 15.** Judicial office holders must consider the prescribed factors and apply the statutory test. What follows is no substitute for the statutory provisions, nor is it intended to be exhaustive, but it is a list of general factors that courts will wish to keep in mind, assuming the threshold requirement of technological capability is met. More detailed guidance or protocols may be developed in particular jurisdictions.
- 16.** *The decision whether to make any and if so what direction for remote observation will always be a judicial decision not an administrative one.* In order to minimise the burden on judicial office holders the judiciary will help HMCTS develop effective operating procedures. It is likely that a degree of standard practice will develop. This may include standing access arrangements for those who regularly report on proceedings. But the ultimate power and responsibility for a decision on remote access lies with the judicial office holder in the individual case.
- 17.** *Decision-makers must give due weight to the importance of open justice.* This is a mandatory consideration. Open justice serves the key functions of exposing the judicial



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process to public scrutiny, improving public understanding of the process, and enhancing public confidence in its integrity. Remote observation can promote all those purposes. Access for reporters, legal commentators and academics is likely to do so. Judicial office holders may take as a starting point that remote access for other observers is desirable if they would be entitled in principle to have access to a courtroom in which the hearing was taking place,¹⁴ and giving them remote access is both operationally feasible and compatible with the interests of justice.¹⁵

- 18.** *Timing and impact on the business of the court must be considered.* Media applications and others that are timely and uncontroversial may pose no difficulty. On occasion, however, applications may be late, or numerous, or raise complex issues. Judicial office holders might properly guillotine the process, limit the numbers given access, or decline to deal with an application if they would otherwise be disabled or impeded from administering justice in the case itself, or diverted from other pressing judicial duties.
- 19.** *Decision makers must give due weight to all the relevant circumstances, including the factors identified in the Regulation.* The Regulation is not an exhaustive list, other factors may arise too. Nor do the matters listed in the Regulation operate necessarily as trump cards in every case. All circumstances have to be considered. For example, taking into account the impact on a right of privacy of a person involved, in relation to the remote observation of a hearing which is to be in open court, does not necessarily mean remote observation should always be refused. Whether to do so or not will depend on the circumstances.
- 20.** *Remote observation should be allowed if and to the extent it is in the interests of justice; it should not be allowed to jeopardise the administration of justice in the case before the court.* The primary duty of any court is to administer justice in the case before it. In some circumstances, remote observation could jeopardise that aim. For example, a witness might be reluctant to give evidence under remote observation by an unknown number of unseen persons, or the quality of the evidence might be impaired by the prospect. Remote observers may be more likely than someone watching in a court room to breach a reporting restriction or the ban on filming or photography or to engage in witness intimidation. They may be harder to observe, identify and hold to account if they do. For observers outside the jurisdiction these risks may be greater, and it is unlikely that sanctions for disobedience could in practice be imposed.¹⁶ Judicial office holders should consider whether any such risks exist in the case that is before them when assessing whether remote access would be in the interests of justice. They should reflect the answer in their decisions and in the content of any directions they make.
- 21.** *Issues about remote observation should not undermine the court's ability to meet the needs of other cases.* Decision-makers are required to satisfy themselves that giving effect to a direction would not unreasonably burden the court or its staff. In some cases the



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parties may provide the means of remote access. Otherwise, the facilities and personnel will be provided by HMCTS or another public sector body. Provision varies. Most salaried judicial office holders will know very well what facilities and personnel are available to them. Others may be reliant on information from those responsible for their court. The court must bear in mind the need to allocate its scarce resources in an appropriate way between the cases that come before it. Open justice has been and still can be achieved without remote access.

- 22.** *Any derogations from open justice should apply equally to remote observers.* It is sometimes necessary to derogate from open justice, for instance by restricting public access to aspects of the evidence or restricting reporting of what takes place in open court. In such a case it is very likely that the court will need to impose equivalent restrictions on remote observers. That may have practical implications which will need consideration. For example, if screens are used to prevent a witness being seen in court, steps will be needed to make sure that restriction applies to remote observers. Reporting restriction orders may need to be communicated to remote observers by email.
- 23.** *The ultimate decision will inevitably depend on the nature of the jurisdiction, the particular resources available at the relevant time, and the specific facts and circumstances of the case.* The work undertaken in courts and tribunals covers a vast spectrum. The turnover of work, the technical facilities and available staff resources vary greatly geographically and over time. These are all matters that can properly influence a decision.
- 24.** *It will not usually be necessary to give more than the briefest reasons.* These are multi-factorial assessments which will often have to be made at speed by judicial office holders who are best placed to identify and evaluate the considerations relevant to the application before them and to reach robust decisions in the interests of justice.

Unauthorised recording

- 25.** Remote observers must be warned that they must not record or transmit what they see and hear and may be punished if they do. The statutory bans on [filming and photography](#) and [audio recording](#) in the courtroom remain in place. The new [s 85B of the Courts Act 2003](#) makes it both a summary offence and a contempt of court for a person remotely attending court proceedings to make or attempt to make an unauthorised recording or transmission of an image or sound that is being transmitted to them. The maximum sentence is therefore two years' imprisonment.
- 26.** Some established systems contain written warnings. Examples are [here](#). If the method they are using does not do this, judicial office holders will need to give an oral warning. It may be wise to do so in any event. Judicial office holders need not assume that in all instances a warning will be enough to deter such misconduct.



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June 2022

Lord Burnett of Maldon
Lord Chief Justice

Sir Keith Lindblom
Senior President of Tribunals

¹ PCSCA s 85A(2)

² s 85A(1), incorporating the definition of “court” contained in s 19 of the Contempt of Court Act 1981

³ Reg 2.

⁴ s 85A(3), (4)

⁵ Designation is a matter for the Lord Chancellor. It is not yet known what procedure will be adopted to designate livestreaming premises.

⁶ Or to a person acting on behalf of the court: s 85A(3)(b). For further detail about identification see paras 11 and 14 of the Practice Guidance.

⁷ Reg 3. For examples of cases where access might be withheld due to administrative burden see para 18 of the Practice Guidance.

⁸ Reg 4. The list is not exhaustive: see para 19 of the Practice Guidance.

⁹ Reg 5(2).

¹⁰ See paras 24-25 of the Practice Guidance.

¹¹ Reg 5(1).

¹² Eg, in the case of the Central Criminal Court, the City of London; and for Coroners’ Courts the Local Authority responsible.

¹³ s 85A(5).

¹⁴ That is, they are not disqualified because the proceedings are in private or (for instance) the case is a criminal trial in which they are to be a witness, or they are below the minimum age for access to the court in question, or by some statutory provision.

¹⁵ For more on compatibility with the interests of justice, see in particular paras 20 and 21 of the Practice Guidance.

¹⁶ Reg 4(e) makes it mandatory to consider “any issues that might arise” if persons “outside the UK” are among those watching or listening. It could also be relevant for courts in England and Wales to consider whether any issues might arise from giving access to persons in another UK jurisdiction.