EXPLANATORY MEMORANDUM TO

THE COURT OF APPEAL (RECORDING AND BROADCASTING) (AMENDMENT) ORDER 2020

2020 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument amends the Court of Appeal (Recording and Broadcasting) Order 2013[1] (the "2013 Order"), which sets out the conditions under which the visual and sound recording and broadcast of selected proceedings in the Court of Appeal may take place. The amendments are to enable the recording and broadcasting of appeals from decisions in family proceedings, which is currently not permitted by the 2013 Order.

3. Matters of special interest to the Joint Committee on Statutory Instruments

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.3 The Department has reached this view because the instrument applies only in relation to the Court of Appeal (which is part of the Senior Courts of England and Wales), and the power under which it is made extends to England and Wales only.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 The Lord Chancellor has made the following statement regarding Human Rights:

"In my view the provisions of the Court of Appeal (Recording and Broadcasting) (Amendment) Order 2020 are compatible with the Convention rights."

[1] https://www.legislation.gov.uk/uksi/2013/2786/made

6. Legislative Context

6.1 Section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981 impose statutory prohibitions on the visual and sound recording and broadcast of court proceedings.

6.2 Section 32 of the Crime and Courts Act 2013 provides that the Lord Chancellor, with the concurrence of the Lord Chief Justice, may make an order to disapply these statutory prohibitions if prescribed conditions are met.

6.3 Article 5(a) of the 2013 Order, made under the power in section 32 of the 2013 Act, disapplies the statutory prohibitions referred to in paragraph 6.1 above in relation to appeals in the Court of Appeal, other than those under section 12, 15 and 16A of the Criminal Appeals Act 1968 or from a decision in family proceedings as defined in section 75(3) of the Courts Act 2003. Article 5(d) of the 2013 Order disapplies those prohibitions in relation to an application to appeal or refer, subject to the same exclusions, including family proceedings. Articles 6 and 7 prescribe conditions for the making of a recording of proceedings for which article 5 lifts the statutory prohibitions; and article 8 permits the broadcasting of a recording of appeal proceedings made in accordance with articles 5 to 7.

6.4 This instrument removes the exception for family appeal proceedings and applications currently contained in articles 5(a) and (d) of the 2013 Order, so that the conditions under which the visual and sound recording and broadcast of proceedings in the Court of Appeal are permitted are extended to such proceedings.

7. Policy background

7.1 Section 32 of the Crime and Courts Act 2013 aims to increase public engagement and understanding about what happens in courts, allowing judgments to be filmed and broadcast in certain circumstances. The rationale behind broadcasting judicial decisions is that this should help to raise public confidence in the courts, which may lead to benefits to society if the public have greater confidence that the courts are fair and just. Research into court fees and confidence in the Family Justice System has shown that people are more likely to be confident in civil courts than family courts[2]. It has shown that around a quarter of the people asked said they did not know how confident they were, suggesting that there is a lack of knowledge and understanding of the system. It also showed that levels of confidence varied by household type, with people living in households with dependent children more confident in family courts than people living in a one-person household.

7.2 A pilot for the live streaming of selected civil proceedings in the Court of Appeal, initiated by the Master of the Rolls, was launched in November 2018. Selected civil cases were live streamed on a dedicated YouTube channel, with a link on the judiciary website. At that time, Sir Terence Etherton, the Master of the Rolls, said: "This is an exciting way of opening up our courts to help the public understand and see for themselves the way that courts work, and how appeals are heard"[3]. It was then, and has remained, the intention to extend live streaming at a later date to family cases, subject to the outcome of the initial pilot. Family cases were not included from the outset for two reasons. First, because, unlike in civil cases, legislative changes to the

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262917/public-attitudes-civil-family-court-fees.pdf

[3] https://www.judiciary.uk/announcements/launch-of-live-stream-of-civil-appeal-hearings/

2013 Order were needed to allow live streaming of family cases; and second, family cases may more often raise a need to protect vulnerable parties and sensitive and personal information than civil proceedings.

7.3 Family proceedings are often regarded as being insufficiently transparent. Steps have been, and continue to be, taken to make them more open. The live streaming of Court of Appeal family proceedings should be seen in this context, as well as that of making the Court of Appeal and the courts in general more accessible to the public. Other steps to increase the transparency of family proceedings include: accredited media representatives being allowed access to certain hearings in the family courts since 2009; guidance issued in 2014 by the previous President of the Family Division leading to the increased publication of judgments[4]; a pilot allowing legal bloggers to report on family proceedings (under conditions corresponding to those applicable to accredited media representatives) started in 2018[4]; and guidance published by the current President of the Family Division on anonymising judgments for publication in 2018[5] and on reporting in the family courts in 2019[6]. The President is also currently undertaking a review on transparency.

7.4 This instrument is necessary to facilitate the live streaming of family Court of Appeal cases. There is currently no intention to broadcast family proceedings in the Court of Appeal other than as part of this ongoing livestreaming pilot although it is anticipated that if the pilot has a successful outcome, it should become business as usual. It is also important to note that proceedings in the Court of Appeal on appeal from decisions in family proceedings are already open to the public unless the judge decides otherwise. This pilot is not intended to alter the number of cases which are open to the public, but to increase the extent to which those cases are accessible through broadcasting.

7.5 This Order will also allow only the broadcasting of judgments and advocates' arguments in family cases in the Court of Appeal. This will allow the public to see what happens in court and to hear decisions in the judges' own words. Appeal cases do not commonly involve family members or other witnesses giving evidence in person, except where representing themselves, and safeguards are in place to protect their interests. These have been found to work well. The Crime and Courts Act 2013 allows discretion for the judge in any case to prevent broadcasting to protect the interests of justice and prevent undue prejudice to anyone involved.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument simply repeals parts of the 2013 Order, and there are therefore no consolidation issues.

[4] https://www.judiciary.uk/publications/transparency-in-the-family-courts/
[5] https://www.judiciary.uk/publications/practice-guidance-family-court-anonymisation-guidance/
[6] https://www.judiciary.uk/announcements/president-of-the-family-division-guidance-as-to-reporting-in-the-family-courts/

10. Consultation outcome

10.1 The instrument will simply facilitate the extension of the ongoing livestreaming pilot in the Court of Appeal to selected family proceedings. Parties in cases identified as being suitable for livestreaming are contacted in advance and given the opportunity to raise any objections that they might have. As of February 2020, approximately 60 Court of Appeal cases have been livestreamed, and the pilot is considered to be working well. Therefore a structured consultation exercise has not been considered necessary for the purpose of this instrument, but the extended pilot will be subject to review and any necessary changes can be made.

11. Guidance

11.1 The Judiciary and court staff have already been required to undertake training in relation to the live streaming of civil proceedings, and consideration is currently being given by the Court of Appeal standing committee about whether any further training is required for Judges. Court staff will receive further training for an extension to family broadcasting. HMCTS will provide signage and letters to advise members of the public that filming will be taking place.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 As such, an impact assessment has not been prepared for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The trial will be subject to review as part of the pilot, and any necessary resultant changes to the approach will be made.

15. Contact

15.1 Oliver Lendrum at the Ministry of Justice. Telephone: 020 3334 4619 or email: Oliver.Lendrum@justice.gov.uk can be contacted with any queries regarding the Instrument.

15.2 Neal Barcoe, Deputy Director for Family Justice Policy at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Alex Chalk MP, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.