EXPLANATORY MEMORANDUM TO

THE REMOTE OBSERVATION AND RECORDING (COURTS AND TRIBUNALS) REGULATIONS 2022

2022 No. 705

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 This instrument makes provision which is necessary for the power contained in section 85A of the Courts Act 2003 (as inserted by section 198 of the Police, Crime, Sentencing and Courts Act 2022) to be operative. It specifies the proceedings in which that power may be exercised, enabling any court, tribunal or other body that exercises the judicial power of the State (with the exception of the Supreme Court or a devolved court or tribunal) to make use, at judicial discretion, of the power to direct audio or video transmissions to remote observers in proceedings in which those observers are entitled to be present.

2.2 As well as specifying the proceedings in which directions under this power may be made, the instrument specifies matters of which the court must be satisfied before making any such direction; other matters that the court must take into account before making this direction; and details of provision which courts must include in any such direction.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales, Scotland, and Northern Ireland.

4.2 The territorial application of this instrument is England and Wales (in relation to all courts and tribunals other than devolved tribunals), and Scotland and Northern Ireland (in relation to reserved tribunals).

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 Remote Observation and Recording (Courts and Tribunals) Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 41 of the Criminal Justice Act 1925 prohibits the making or publication of any images from a court in England and Wales. This prohibition is absolute, meaning that courts have no power to disapply it for any reason, except in areas in which the

prohibition is disapplied by statute. Section 29 of the Criminal Justice Act (Northern Ireland) 1945 provides a similar prohibition for proceedings in Northern Ireland.

6.2 Section 9 of the Contempt of Court Act 1981 prohibits the making or publication of any sound recordings from a court in England, Wales, Scotland and Northern Ireland. This section does not apply to recordings used to create official transcripts of proceedings and courts may give leave for recordings to be made at their discretion. However, the prohibition against publishing or sharing recordings for any purpose other than making official transcriptions is absolute.

6.3 These two statutory provisions prohibit anyone, including courts themselves, from making visual recordings of proceedings and inhibit their ability to make of audio and visual transmissions available to third parties outside the court. These prohibitions cannot be overturned or circumvented by the inherent powers that courts have under the common law to manage their own proceedings. For this reason, there are statutory provisions already in place that allow these prohibitions to be disapplied in specific circumstances in order to facilitate public observation and scrutiny of proceedings.

6.4 Section 32 of the Crime and Courts Act 2013 allows the Lord Chancellor, with the concurrence of the Lord Chief Justice, by order to disapply these statutory prohibitions if prescribed conditions are met. As of June 2022, instruments under this power[1] enable certain senior courts and tribunals to broadcast their proceedings via livestreams, without the need for observers to first identify themselves to the court.

6.5 Section 55 of and Schedule 25 to the Coronavirus Act 2020 (now repealed) inserted provision into the Courts Act 2003 and the Tribunals, Courts and Enforcement Act 2007 enabling a specific and limited list of courts of tribunals, when conducting proceedings as "wholly video' or 'wholly audio' proceedings, to direct that the proceedings be transmitted to persons not taking part in the proceedings, such as the press and general public, and prohibiting (and creating an offence of) unauthorised recording and transmission of any such transmission.

6.6 New section 85A of the Courts Act 2003, under which this instrument is made, provides (like the provisions of the Coronavirus Act 2020 described above) a case-specific power which is designed to allow a more regulated form of remote public access across the entire justice system, in courts and tribunals in which allowing general broadcasting would not be appropriate. As with the Coronavirus Act provisions, unauthorised recording and transmission is prohibited and is an offence. The power is much wider and more flexible, however, since it enables any court (defined in accordance with the Contempt of Court Act 1981, and accordingly including any body exercising the judicial power of the State) to direct that transmissions of proceedings before it may be provided to persons not taking part in the proceedings, such as the press and public, so that they may remotely observe these proceedings. The proceedings in relation to which this may be done are those which specified in regulations made by the Lord Chancellor with the concurrence of the Lord Chief Justice or Senior President of Tribunals, or both (depending on the courts or tribunals affected). This instrument contains regulations specifying proceedings for that purpose.

[1] Specifically, The Court of Appeal (Recording and Broadcasting) Order 2013 (S.I. 2013/2786); The Crown Court (Recording) Order 2016 (S.I. 2016/612); The Crown Court (Recording and Broadcasting) Order 2020 (S.I. 2020/637); The Court of Appeal (Recording and Broadcasting) (Amendment) Order 2020 (S.I. 2020/631); and The Competition Appeal Tribunal (Coronavirus) (Recording and Broadcasting) Order 2022 (S.I. 2022/156).

7. Policy background

What is being done and why?

7.1 The remote observation of public hearings in most courts and in the unified tribunals system was first allowed by temporary and emergency provisions enacted by the Coronavirus Act 2020 in March 2020. Section 55 and Schedule 25 of the Coronavirus Act 2020 made temporary, emergency amendments to the Courts Act 2003 to create a power for specific HMCTS-administered courts and tribunals to make transmissions of proceedings to remote observers in wholly audio or wholly video proceedings and also created offences against the misuse of transmissions from a court.

7.2 These provisions were necessary to allow these courts and tribunals to continue to operate when Covid-19 lockdowns and social-distancing measures inhibited the ability hold proceedings in-person. They allowed these courts to satisfy the requirements at common law and under Article 6 of the European Convention on Human Rights of a public hearing when these hearings took place remotely without a public gallery.

7.3 These temporary and emergency provisions proved their worth and are now replaced by the wider and more flexible scheme of the new section 85A of the Courts Act 2003. The court's powers under that scheme are only available in proceedings specified in regulations by the Lord Chancellor, without which the powers cannot be exercised at all. This instrument specifies proceedings broadly (as explained below) so that power is available in a very wide range of cases, and also specifies certain matters of which the court must be satisfied before making such a direction; matters that the court must take into account deciding whether, and on what terms, to make such a direction; and certain provision which must be included in any such direction.

What will the instrument do?

7.4 *Specified proceedings.* Regulation 2 of this instrument specifies the proceedings in which a direction for transmission to remote observers may be made. It does so in very broad terms, with a view to allowing the widest possible range of courts and tribunals to allow remote observation of any proceedings in which observers are entitled to be present, regardless of whether those proceedings are conducted in-person, remotely using audio or video technology, or using a hybrid of both methods. This will uphold and strengthen the principle of open justice and increase the accessibility and transparency of our justice system. Regulation 2 specifies all proceedings in any court to which section 85A applies ("court" is used in this wide sense in the rest of this Memorandum), so that proceedings in the full range of judicial bodies (other than the Supreme Court and devolved courts and tribunals) are covered, such as proceedings in the Court of Protection, coroner's courts, and tribunals outside the unified system such as employment tribunals (including any new tribunals which may be established). It does not limit proceedings by reference to the mode of conducting them (in-person, remotely, or "hybrid"). The only restriction it does apply, which is a very important one, relates to whether the proceedings are in public: all proceedings conducted in public are specified proceedings, but proceedings in private are not. Proceedings which are not public, in the sense that the general public is not entitled to be present, but at which specific individuals not taking part in the proceedings are entitled by or under an enactment or by order of the court to be present, are however specified proceedings. For example, youth court proceedings (at which media representatives are entitled to attend by virtue of section 47 of the

Children and Young Persons Act 1933) or certain family proceedings which media representatives or "legal bloggers" are entitled to attend under rule 27.11 of the Family Procedure Rules 2010, are specified proceedings – but the power to direct transmission will only be available to enable transmission to such a person (see the explanation of regulation 5 in paragraph 7.7 below).

7.5 *Matters of which the court must be satisfied.* Regulation 3 of this instrument specifies matters of which the court must be satisfied before making a direction to transmit proceedings to remote observers. The pivotal requirement is that the court must be satisfied that making such a direction would be in the interests of justice. This judicial decision would involve a consideration of the general requirement for hearings – including those that are not held in-person – to be held in public except under specific circumstances, set against (for example) the extent to which the proceedings are already accessible to observers, and legitimate need to exclude observers from all or part of proceedings in the interests of justice.[2] Secondly, the court must be satisfied that it has the capacity and technological capability to make the transmission without creating an unreasonable administrative burden for the court or its staff. The instrument therefore does not create any additional obligation for courts to set up bespoke audio or video transmissions to remote observers if the administrative burden is prohibitive, so long as sufficient access, such as a public gallery, is available to satisfactorily uphold the interests of justice, including the principle of open justice.

7.6 *Matters that the court must take into account*. Regulation 4 of this instrument lists matters which the court must take into account when deciding whether to provide transmissions to remote observers. These are particularly important matters which the court must, as a minimum, consider as part of its decision of whether to make transmissions to remote observers, but they do not preclude consideration of other matters, nor is the court required to be satisfied on anything in relation to each factor.

7.7 *Provision which must be included in a direction*. Regulation 5 of this instrument describes certain provision which must be included in any direction for transmission. No specific form of words or template direction is required: instead, the regulation describes the required provisions as provision which has the necessary effect. So paragraph (b) of regulation 5 requires that when transmissions are made to observers who are entitled to attend a hearing in which the general public is not entitled to be present the court's direction must include provisions that have the effect of (a) prohibiting individuals who are not entitled to watch or listen to the transmission from doing so, and (b) requiring those who are entitled to watch to demonstrate the capacity in which they are entitled to do so, in the manner stated in the direction. That provision will ensure that transmission of youth court proceedings will only be available to media representatives who are entitled to be present (and can demonstrate their status as media representatives).

[2] European Convention on Human Rights Article 6 states: "Judgment shall be pronounced publicly but the press and 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 to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

7.8 Paragraph (b) of regulation 5 requires that when transmissions are made to individuals (other than to 'designated livestreaming premises'[3], for which such controls will not be necessary because observers will be subject to the control of the court when in such premises) the court's direction must include provision that has the effect of requiring remote observers to (a) provide their full name and email address beforehand, unless the court relaxes this requirement, and (b) conduct themselves appropriately, and in accordance with the court's directions, during the transmission. The standard requirement in the direction will therefore be that for all observers to identify themselves appropriately beforehand, and no direction will be for transmission to all comers with no identification; but the court will be able to relax that requirement in the circumstances of an individual cases and individual observers, while courts will retain inherent powers to implement enhanced requirements for identification where appropriate. This regulation allows the court to better monitor inappropriate or unlawful conduct, such as the making of unauthorised recordings or transmissions, and to identify and deal with transgressors.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 No consolidation is taking place.

10. Consultation outcome

10.1 This instrument has not been subject to formal public consultation but had the considerable benefit of judicial and HMCTS views during its development, particularly on operational aspects.

11. Guidance

11.1 The Lord Chief Justice and Senior President of Tribunals have issued joint practice guidance to the judiciary on the use of these regulations.

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 An Impact Assessment has already been provided for the parent Act under which this instrument is made (the 'Police, Crime, Sentencing and Courts Act 2022'). That assessment recommended that the cost of making transmissions to remote observers of video- and audio-enabled hearings would be sunk costs of operating the hearing, and any additional costs will be negligible.

12.4 A full Impact Assessment has not been prepared for this instrument because no significant impact on the private, voluntary, or public sector is foreseen. This instrument creates no obligation for courts to incur unreasonable administrative

[3] This option is defined by s.85A(4) of the Courts Act 2003. The Lord Chancellor may designate for non-court premises to be made available for members of the public to watch or listen to proceedings, for example to allow wider observation of proceedings that generates a high level of public interest or for the purposes of facilitating public legal education.

burden in facilitating the remote observation. For example, the remote observation facilities may not be required to be set up purely for the use of observers of in-person proceedings if it the existing public gallery was deemed to satisfactorily serve the interests of justice, including the principle of open justice. The instrument precludes directions to be made under this power if the court lacks the capacity or technological capability to enable transmissions to remote observers, for example if the court room used for in-person proceedings is not fitted with the necessary facilities. The costs of allowing courts the discretion to make transmissions in these circumstances will therefore likely be negligible.

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 approach to monitoring of this legislation is for the relevant policy officials, operational staff, and judicial bodies to routinely monitor the use of these powers, and the effectiveness of related regulations and guidance, so that they may best serve the interests of justice, including the principle of open justice.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Josh Ivinson, Senior Policy Adviser at the Ministry of Justice can be contacted with any queries regarding the instrument:

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15.2 Kate Gregory-Smith, Deputy Director for Courts, Tribunals and Transparency Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

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