

EXPLANATORY MEMORANDUM TO
THE COURTS (PRESCRIBED RECORDINGS) ORDER 2023

2023 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 His Majesty.

2. Purpose of the instrument

- 2.1 This instrument makes provision in respect of photography and video and audio recording in courts, and the use of photographs and recordings, in four ways: (a) allowing for the use of CCTV in court buildings; (b) allowing for the use of bodyworn video (BWV) in court buildings; (c) allowing for the taking of adoption photos on Celebration Days in family courts; and (d) broadening the range of judges whose sentencing remarks may be broadcast under existing provisions. In the first three instances, it does this by specifying the circumstances in which the statutory prohibitions on photography/filming and audio recording (section 41 of the Criminal Justice Act 1925 (which makes it an offence to film in court) and section 9 of the Contempt of Court Act 1981 (which provides that it is a contempt of court to record sound in court except with the permission of the court)) are disapplied. In the final instance, it amends the Crown Court (Recording and Broadcasting) Order 2020 (the 2020 Order) to add Court of Appeal judges sitting in the Crown Court to the list of judges whose sentencing remarks may be recorded and broadcast.

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 extent and territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Justice, Mike Freer MP, has made the following statement regarding Human Rights:

“In my view the provisions of The Courts (Prescribed Recordings) Order 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981 (the statutory prohibitions) prohibit visual and sound recording and broadcast of court proceedings. Section 32 of the Crime and Courts Act 2013, under which this instrument is made, provides that the Lord Chancellor, with the concurrence of the Lord Chief Justice, may make an order to disapply the statutory prohibitions if prescribed conditions are met. This instrument specifies the conditions under which the statutory prohibitions will not apply to visual and sound recordings

made by way of CCTV and BWV in court buildings and specified use of such recordings. It similarly prescribes the conditions under which the statutory prohibitions will not apply to the taking of an adoption photo on a Celebration Day. It also amends the 2020 Order, made under the same power as this instrument, which already makes provision for the conditions under which the statutory prohibitions will not apply to recording and broadcasting of sentencing remarks by judges in the Crown Court, to broaden (by including Court of Appeal judges sitting in the Crown Court) the range of judges whose sentencing remarks may be so recorded and broadcast.

7. Policy background

What is being done and why?

CCTV

- (a) Within HMCTS there is an agreed set of security minimum standards and policies to assist in providing a safe environment to all court users and staff. One of those standards is the provision of CCTV throughout the public areas of the courts and tribunal premises. All systems are required to form part of a wider set of operational requirements and comply with the Data Protection Act in terms of visibility, access, and recordings.
- (b) The operation of CCTV in a court or tribunal building appears on the face of it to risk falling foul of the prohibition on “taking photographs” in section 41 of the Criminal Justice Act 1925 if images of participants in proceedings are captured; and while there is considered to be a viable defence to any challenge, this instrument removes that risk altogether provided that the use of CCTV complies with the requirements in this instrument (which reflect long-standing requirements with which the use of CCTV has consistently complied). The existing position whereby CCTV is not used in courtrooms is maintained and entrenched by this instrument.

Bodyworn video

- (a) The issue of BWV was brought to the attention of the Ministry of Justice by Serco, the company that provides Prison Escort and Custody Services (PECS) staff to transport prisoners to and from court. BWV has been shown to increase the safety of security staff, as demonstrated in a pilot scheme from December 2017 to March 2018 in Thames Magistrates’ Court. PECS staff who wore BWV in court custody suites saw a 75% reduction in the number of recorded injuries as in the same period without BWV. However, on review it was considered that the use of BWV in this way was at risk of breaching statutory prohibition on photography of parties (in this case, defendants appearing at court); and the pilot was halted to enable consideration of the provision which this instrument now makes.
- (b) That consideration revealed a need also to cover the position of police officers and court and tribunal security staff. Recently, police officers have been mandated to wear BWV if they carry a taser (which they may have as part of their operational equipment when attending court on routine business). This has placed police officers in an inconsistent position as officers who are mandated to wear BWV risk breaching the statutory prohibitions when wearing them to visit court unless they take care to switch them off.

- (c) While court and tribunal security staff have not been at risk of breaching the statutory prohibitions because their use of BWV has been restricted, there are considered to be clear benefits in enabling them to use BWV more widely in court buildings, including whilst delivering their security search duties, in order to increase their safety.

Adoption photos in family courts on Celebration Day

- (a) There is a well-settled practice in the family court of organising a Celebration Day following the making of an adoption order, in which the adopters, their family and the adopted child/children attend the court and (with the judge's permission) meet the judge to celebrate the adoption. The judge will robe up and photographs in the court with the family are taken. This is an emotionally important and valuable part of the adoption process for all those involved.
- (b) This practice, however, is potentially open to challenge as a breach of the section 41 prohibition (depending on the precise circumstances). This instrument specifies the circumstances in which the statutory prohibition on photography will not apply to an adoption photo, so that the practice of taking adoption photos can continue without concerns about its lawfulness.

Broadcasting of sentencing remarks: Court of Appeal judges in the Crown Court

- (a) The Crown Court (Recording and Broadcasting) Order 2020 allows the filming and broadcasting of judges' sentencing remarks in the Crown Court, and the first such broadcast took place on 28 July 2022. Currently, the filming of sentencing remarks can only take place if the judge in question is:
 - (i) a High Court Judge;
 - (ii) a Senior Circuit Judge who is also a Resident Judge; or
 - (iii) a Senior Circuit Judge whose base court is the Central Criminal Court (Old Bailey).
- (b) However, the most serious criminal trials and sentencing hearings may be presided over by Court of Appeal judges sitting in the Crown Court, who are not included in the 2020 Order's provisions; and so sentencing remarks in such cases may not presently be recorded and broadcast, regardless of the public interest. This instrument accordingly amends the 2020 Order to include Court of Appeal judges (including those sitting in retirement) among the judges whose sentencing remarks may be recorded and broadcast.

8. European Union Withdrawal and Future Relationship

- 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 The Ministry of Justice has no plans to consolidate the legislation at this time.

10. Consultation outcome

- 10.1 No public consultation has been carried out in relation to these Regulations. There have been communications with stakeholders who have expressed or been identified as having an interest in this work, in particular Serco (who operate PECS), HMCTS (for CCTV in court buildings), police stakeholders, HMPPS, the Lord Chief Justice

and other senior judicial office holders. The Ministry of Justice has consulted with these stakeholders through email, letter, and on occasion, online meeting, for their input to draft this instrument, ensuring that their (operational) needs were satisfied in the final product.

11. Guidance

- 11.1 No formal guidance has been produced by the Ministry of Justice but details about these new provisions will be made available to the judiciary, magistracy and HMCTS operational staff ahead of changes coming into force. Judicial Office will produce formal guidance for the judiciary.

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 A full Impact Assessment has not been prepared for this instrument because no, or no significant impact on the private, voluntary or public sector is foreseen.

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 effect of the changes made by this instrument will be monitored and reviewed as part of ongoing operational agency meetings and functions.

15. Contact

- 15.1 Kirsty Warne at the Ministry of Justice Telephone: 07935702139 or email: kirsty.warne@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Ben Archibald, Deputy Director for Criminal Justice Strategy and Criminal Court Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Mike Freer MP, Parliamentary Under Secretary of State for the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.