

Supplementary Delegated Powers Memorandum

Police, Crime, Sentencing and Courts (PCSC) Bill

Prepared by the Ministry of Justice

1. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Police, Crime, Sentencing and Courts Bill (“the Bill”).
2. This memorandum identifies proposed Government amendments to the Bill which amend or affect the operation of provisions of the Bill containing powers to make delegated legislation. It explains in each case the effect of the amendment, why the power has been taken and the nature of, and the reason for, the procedure selected.

Clause 167(1) – new section 85A of the Courts Act 2003, as amended: Power to specify proceedings in relation to which directions for transmission may be made

Power conferred on: Lord Chancellor (with concurrence of Lord Chief Justice or Senior President of Tribunals or both)

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution, but with first exercise of the power subject to “made affirmative” procedure

Context and Purpose

3. Clauses 167 and 168 and Parts 1 and 2 of Schedule 19 together presently make provision to replace the temporary modifications (made by Schedule 25 to the Coronavirus Act 2020) to the Courts Act 2003, and Tribunals, Courts and Enforcement Act 2007 (“public participation in proceedings conducted by video and audio”). The clauses enable the court or tribunal in specified proceedings to make a direction that the proceedings be transmitted to enable persons to watch or listen to them, to ensure the principle of open justice is maintained.

4. The existing measures in clauses 167 and 168 and Parts 1 and 2 of Schedule 19 make separate and self-contained provision applying to a comprehensive list of courts (clauses 167 and 168), the First-tier Tribunal and Upper Tribunal (paragraphs 1 and 4 of Schedule 19), employment tribunals, the Employment Appeal Tribunal (paragraphs 2 and 5 of Schedule 19), and the Competition Appeal Tribunal (paragraphs 3 and 6 of Schedule 19). Subsection (8) of the new section 85A of the Courts Act 2003 inserted by existing clause 167(1) gives the Lord Chancellor, acting with the concurrence of the Lord Chief Justice, power by regulations to specify proceedings in which the court's power to direct transmission may be exercised. Similar provision in respect of the mentioned tribunals, and specified proceedings in those tribunals, is made (the power in each case being exercisable by the Lord Chancellor with the concurrence of the Senior President of Tribunals) by Part 1 (paragraphs 1 to 3) of Schedule 19.
5. As proposed to be amended, the measures introduce (by modifying the new sections 85A and 85B of the Courts Act 2003 and omitting Parts 1 and 2 of Schedule 19) a single set of provisions applicable to all courts and tribunals (except for the Supreme Court and courts and tribunals which are within devolved competence), but retain the structure of the new sections whereby the court or tribunal's power to direct transmission is available only in proceedings specified in regulations. This has the effect of reducing four identical powers to make regulations (one in relation to courts, and one each in relation to three separate tribunals or groupings of tribunals) to one which may be used in relation to all courts or tribunals except for those explicitly excluded from the scope of the new sections.

Justification for taking the power

6. Rather than extending the power to direct transmission to all proceedings in all courts and tribunals, or providing for a closed list of proceedings in specified courts or tribunals in which the court or tribunal may direct transmission, these provisions allow for a measured approach, operating by agreement with the senior judiciary via the Lord Chief Justice or Senior President of Tribunals or both (with the Lord Chancellor deciding which is most appropriate in each circumstance), so that the list of proceedings in which the power to direct transmission may be exercised is to be specified in secondary legislation and can be changed if and when appropriate in the light of developments - including experience with the use of that power. Such an approach also provides a more flexible method of responding to changing circumstances. The difference effected by the amendments is that the power to direct transmission will be able to be extended to tribunals other than

those covered by Parts 1 and 2 of Schedule 19, so that such other tribunals may benefit without having to wait for a future primary legislative vehicle.

Justification for the procedure

7. This approach is similar (and still more so as proposed to be amended) to that provided for enabling recording and broadcasting of proceedings in courts and tribunals under section 32 of the Crime and Courts Act 2013. While the power to direct transmission will not be exercisable so as to authorise broadcasting to the public (which remains the province of orders under section 32), there are similarities between the two which make it appropriate to adopt for the new power the same Parliamentary procedure as that adopted in section 32.
8. There is a difference for which the amendments provide, however, in that the first exercise of the power to make regulations would (by virtue of the new clause to be inserted after clause 170) be subject not to affirmative procedure requiring a draft of the regulations to be laid before Parliament and approved by each House before the regulations can be made, but to “made affirmative” procedure requiring the regulations to be laid after making and approved by each House within 28 days if they are to remain in force. This is considered appropriate to avoid or minimise any period during which Schedule 25 to the Coronavirus Act 2020 is no longer in force and regulations cannot yet be made to replace those provisions – which have proved vital not only in enabling hearings during the most stringent restrictions to combat the pandemic, but also in assisting with backlogs and recovery from the impact of the pandemic on court business – with equivalent coverage for proceedings which are conducted wholly remotely. Regulations going further than the coverage of Schedule 25 to the 2020 Act would, under the incremental approach described above, be brought forward later, and subject to draft affirmative procedure as originally provided for.

Ministry of Justice

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