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Clause 47 of the Deregulation Bill: an invitation to comment on a proposed amendment affecting production orders under the Police and Criminal Evidence Act 1984

The Government is considering an amendment to the Deregulation Bill now before Parliament. Ministers would be grateful for your views. Please let me know **by Friday 11 April 2014** if you have any comments.

Schedule 1 to the Police and Criminal Evidence Act 1984 allows a judge to make a 'production order', which requires the person to whom it is directed to give an investigator access to material, usually documents, which are needed in the investigation of a serious criminal offence but which that person could not otherwise lawfully hand over. Production orders can be made to give the police access to banking or other financial records, for example. A production order gives the person to whom it is directed at least 7 days within which to comply with it, or to apply to the judge to alter or withdraw it. It is not the same as a search warrant, which allows the investigator to enter premises at once, by force if necessary, and search for material without any prior warning.

The Criminal Procedure Rule Committee is an independent committee established by the Courts Act 2003 and chaired by the Lord Chief Justice. Its purpose is to make rules of procedure for the criminal courts. The rules it makes must also be approved by the Lord Chancellor and laid before Parliament. The Rule Committee has already made rules about applications for orders under other Acts which are like production orders under the 1984 Act. However, the Committee cannot make rules about production orders under the 1984 Act because of an unintended difference in wording between that Act and the Courts Act 2003. The Committee asked the Government to change the law to allow it to make rules for applications under the 1984 Act as well. The Government agreed. The objective is for the Rule Committee to make rules for applications under all those Acts which are fair, consistent and simple to follow.

Clause 47(3) of the Deregulation Bill makes two changes to Schedule 1 to the Police and Criminal Evidence Act 1984:

- (i) it allows Criminal Procedure Rules to govern applications under that Schedule;

(ii) it omits the paragraphs in that Schedule which contain procedure, so that all the procedure can be in the Rules. One of those paragraphs requires an 'inter partes' court hearing.

The Rule Committee has already prepared draft rules which in its members' opinion strike the right balance between the importance of investigating serious crime, the rights of suspects, and the rights and duties of the people the judge can order to hand over information to an investigator. Among other things, the draft rules would allow the holders of information, usually businesses and frequently banks, to waive the right to attend a court hearing of the investigator's application for a court order. Then the court could deal with the application more efficiently, in less time and at less expense to all concerned, than now.

However, press and media representatives are concerned that unless the 1984 Act itself continues to include all the relevant procedure the police may be able to obtain court orders against journalists without giving them advance notice and without a court hearing. If that happened, then the journalists would have no opportunity to make representations to the court before the order was made. They would only be able to apply for the order to be altered or withdrawn during the 7 days before they had to comply with it. Even though the draft rules prepared by the Rule Committee include special provision for journalists so that, for them, there would always be advance notice and a court hearing, the media are concerned that the Rule Committee might one day change those rules.

To reassure them, the Government is considering changing the way in which Schedule 1 to the Police and Criminal Evidence Act 1984 would be amended. The suggestion is that, instead of allowing Criminal Procedure Rules to govern all applications for production orders under that Schedule, the Rules would not apply to an application for a production order which relates to material that consists of or includes journalistic material. On an application for a production order under that Schedule which relates to other sorts of material, the procedural requirements for advance notice and court hearings, if any, would be in the Rules, just as they are already for applications under other Acts.

Journalistic material is already defined in the 1984 Act. Section 13 says:

13 Meaning of "journalistic material"

(1) Subject to subsection (2) below, in this Act "journalistic material" means material acquired or created for the purposes of journalism.

(2) Material is only journalistic material for the purposes of this Act if it is in the possession of a person who acquired or created it for the purposes of journalism.

(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.

Do you think that any other material ought to be treated in the same way, so that the Police and Criminal Evidence Act 1984 itself would always require advance notice and a court hearing of an application for the production of that material?

When the Deregulation Bill was published in draft in July last year, the Parliamentary Joint Committee which scrutinised the draft received 308 written submissions and took oral evidence from 44 witnesses, excluding Government ministers. Only the Newspaper Society

and the Society of Editors raised this particular concern. You may already have considered this question, therefore. Any views you have would be welcome nonetheless.

Yours faithfully,

Richard Chown

Responses to Consultation:

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Complaints or comments on the Cabinet Office consultation process:

If you have a complaint or comments on the consultation process itself, please contact:

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