HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

14th Report of Session 2019–21

Corporate Insolvency and Governance Bill

Divorce, Dissolution and Separation Bill [HL]: Government Response

Ordered to be printed 10 June 2020 and published 10 June 2020

Published by the Authority of the House of Lords

HL Paper 74

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

Baroness Andrews
Lord Blencathra (Chair)
Baroness Browning
Lord Goddard of Stockport
Lord Haselhurst
Lord Haskel
Baroness Meacher
Lord Rowlands
Lord Thurlow
Lord Tope

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Publications

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Fourteenth Report

CORPORATE INSOLVENCY AND GOVERNANCE BILL

1. This Bill was introduced into the House of Commons on 20 May 2020 and passed all stages on 3 June. It was then introduced in the House of Lords on the same day and second reading took place on 9 June. Its purpose is to help businesses deal with the serious economic consequences of the COVID-19 pandemic,[1] enabling them to continue trading and avoid insolvency during a period of economic uncertainty.[2] A Delegated Powers Memorandum has been provided by the Department for Business, Energy and Industrial Strategy.[3]

2. We acknowledge that this is an extraordinary Bill for extraordinary times. Even so, **we have found many aspects of the Bill deeply troubling**, not only because of the extent to which powers are permanently conferred on ministers but also because of the level of parliamentary control over their exercise. There are provisions enabling ministers to amend or modify the effect of whole areas of insolvency law (see paragraph 16 below) and, with regard to certain powers, to choose whether the negative procedure should apply rather than the affirmative (see paragraph 25 below). **Our concerns are all the greater because of the speed at which Parliament is being asked to consider the Bill.**

Clauses 1 to 6: moratorium

3. One of the Bill's permanent changes is an extendable 20-day moratorium during which no-one will be able to take or continue legal action against a debtor company (other than employee tribunal claims) except, in certain cases, with permission of the court. Schedule 1 to the Bill inserts new Schedule ZA1 into the Insolvency Act 1986 ("the 1986 Act"), setting out whether a company is eligible to obtain a moratorium. Paragraph 20 of Schedule ZA1 enables the Secretary of State by affirmative regulations to alter the circumstances in which a company is eligible for a moratorium.

4. The power in paragraph 20 of Schedule ZA1 allows the Government to determine which companies fall within the moratorium provisions in Part A1 of the 1986 Act. The Government justify the power as follows:

> "As this procedure is new in our insolvency framework, we will want to monitor how effective the moratorium procedure is at helping companies in financial trouble and the impact on other businesses affected by the moratorium. From time to time, we may want to review the criteria for a company to be eligible to enter a moratorium in order to ensure that they remain fit for purpose".[4]

5. The power allows the Government to change the definition of "eligible company" merely if they take the view that it should mean something else. The Government say that the power will allow changes to be made more

1 Delegated Powers Memorandum ("the Memorandum"), para 2 (see footnote 3 below).
2 Corporate Insolvency and Governance Bill, Explanatory Notes, para 1.
3 Department for Business, Energy and Industrial Strategy, Corporate Insolvency and Governance Bill Delegated Powers Memorandum.
4 Memorandum, p 43.

rapidly than if further primary legislation were required, thereby avoiding potential long-term adverse impact on businesses.[5]

6. As currently framed, the Bill allows the powers to be exercised merely on the basis of a change in policy and not because there is any urgent need to protect business. **The "need for speed" is an insufficient justification given the wide scope of the power in paragraph 20 of Schedule ZA1. Even if it were a sufficient justification, the power should be framed so that its exercise is subject to a pre-condition under which the Secretary of State is required to be satisfied that significant damage would be caused to business were the power not exercised. We recommend accordingly.**

7. New Part A1 of the 1986 Act, inserted by clause 1 of the Bill, contains a large number of Henry VIII powers allowing the Bill itself to be amended: A6(4), A10(4), A11(5), A12(6), A13(9), A18(5), A38(5), A48(14), A51(4), A52(4), paragraphs 20-22 of Schedule ZA1, and paragraph 13 of Schedule ZA2. These are all designed to be permanent changes to insolvency law. The justifications offered by the Government involve:

   - ensuring that the provision remains "fit for purpose";
   - the need to act quickly;
   - the undesirability of taking up Parliament's time unnecessarily.

8. Ensuring that something remains "fit for purpose" means little more than that the Government want to be able to change the provision by regulations if their policy changes**. In our view, the presumption should be that where something needs changing which Parliament has enacted, Parliament should enact the changes by primary legislation rather than ministers make the changes by secondary legislation**.

9. As for legislating quickly, this is often best avoided. And where legislation is needed quickly, the coronavirus outbreak has shown that Parliament is capable of legislating quickly.

10. As for not taking up parliamentary time unnecessarily, this is a matter primarily for Parliament. Parliament's task is to scrutinise the Government, including the scrutiny of major legislation that has been drafted in haste and which confers wide-ranging powers on the Government.

11. **In our view, the Government have not demonstrated the need for the Henry VIII powers mentioned in paragraph 7 above. We recommend that they be removed from the Bill.**

Clause 12: protection of supplies of goods and services

12. Clause 12 inserts new section 233B into the 1986 Act, restricting the ability of suppliers of goods or services from terminating contracts with a company that has entered a "relevant insolvency procedure".[6] This is subject to exclusions found in a new Schedule 4ZZA to the 1986 Act. The Government explain that this will help companies trade through a restructuring or insolvency

5 *Ibid.*, p 44.

6 Including a moratorium, administration, administrative receivership, voluntary arrangements, liquidation: see section 233B(2).

process, thereby maximising the opportunities for the rescue of the company or the sale of its business as a going concern.[7]

13. Clause 12 allows the Secretary of State, by affirmative regulations:

- to remove types of insolvency proceedings from the list in section 233B(2), reducing the impact of that section on what would otherwise be the status quo (section 233C(1) of the 1986 Act); and
- to remove, amend or add to the exclusions in Schedule 4ZZA (section 233C(2) of the 1986 Act).

14. The power conferred by section 233C(2) is wide, both in terms of the scope it affords ministers to add to, and remove from, the list of exclusions, but also in the way in which the exclusions can be framed. It affords a very wide discretion to ministers to determine by subordinate legislation the types of cases to which section 233B is to apply. Section 233B is itself significant because it prevents a supplier of goods or services from being able to terminate a contract it has with a company where an insolvency procedure occurs in relation to the company. Given the significance of section 233B one would expect convincing arguments for changes to its scope to be made by subordinate legislation made under section 233C. We found the Government's arguments[8] unconvincing for the following reasons:

(a) The power in section 233C is justified because of the need to address "situations that cannot currently be foreseen". But new Acts of Parliaments are equally capable of addressing situations that are not originally foreseen.

(b) The power will allow "changes to be made quickly". But ministers are not alone in being able to act quickly. Parliament is able to act very quickly, as the Coronavirus Act 2020 and this Bill demonstrate.

(c) The Government say that "flexibility is required" in the way that section 233B and Schedule 4ZZA can be modified. But ministers, through subordinate legislation, are not the only ones capable of legislating flexibly. Parliament is capable of legislating flexibly in primary legislation.

(d) These delegated powers will "avoid taking up Parliamentary time unnecessarily", particularly if the exemptions "may need to be amended on more than one occasion over time" thus placing an unnecessary burden on Parliament. Naturally, Parliament should not be over-burdened with minor matters that are best dealt with in subordinate legislation. But here we are dealing with major and permanent provisions of insolvency law that ministers are given the power to change by a Henry VIII power.

15. **The power in new section 233C(2) of the 1986 Act is unjustifiably wide and we recommend that it be removed from the Bill.**

7 Explanatory Notes, para 38.
8 Memorandum, p 31.

Clauses 18 to 22: power to amend corporate insolvency and governance legislation

16. Clauses 18 to 22 contain very wide-ranging powers for ministers to make changes to corporate insolvency and governance legislation by subordinate legislation. Regulations made under clause 18 are subject to the "made affirmative" procedure.[9] The exercise of the powers is subject to restrictions, though some of the restrictions are more apparent than real.

- It is true that, under clause 19, the regulations must relate to mitigating the adverse effects of coronavirus on business. Likewise, under clause 20, regulations must be proportionate in view of the purposes for which they are being made.
- Clause 21(1) limits the regulations initially to six months in duration. However, clause 21(2) allows repeated six-monthly extensions.
- The regulations must be kept under review and revoked when no longer required–albeit this is no more than common sense.
- Although the regulations cannot seemingly be made after 30 April 2021, this date can itself be changed by regulations an unlimited number of times.

17. The Government argue[10] that these powers are required to enable them to deal with the impact of the COVID-19 emergency and to allow them to "react with speed to changing developments in order to be able to deal with the economic consequences of the crisis". The Government say that there are no specific plans to use these legislative powers to make temporary changes at present.

18. **Given the enormous width of this power and the presumption that what Parliament has enacted it should be for Parliament to change by further enactment, rather than for ministers to change by regulations, we recommend an important restriction on the use of the power in clause 18. Before making such regulations, the Secretary of State must consider there to be an urgent need to do so and that it would not be reasonably practicable to enact primary legislation within the period within which it was considered necessary to act.**

Clause 23: consequential provision

19. Clause 23 confers a power on the Secretary of State to make consequential, incidental etc. provision in connection with provision made by regulations under clause 18. The powers include the power to make provision amending, or modifying the effect of, any Act of Parliament ever passed - including the Bill itself. This latter factor (a power for ministers to amend the very Act that confers the powers) makes it what might be called a "super-Henry VIII power". And yet, by virtue of clause 24(7), regulations under clause 23 are subject to the negative resolution procedure even where they amend primary legislation. No explanation is given by the Government why this provides an adequate level of scrutiny for Henry VIII powers. **We recommend that the affirmative procedure should apply where regulations under clause 23 amend primary legislation.**

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9 See para 23 below.
10 Memorandum, p 33.

Clause 37: temporary power to extend periods for providing information

20. Clause 37 allows the Secretary of State to make regulations extending the period within which information must be provided by companies and other entities under various pieces of legislation. These regulations contain a Henry VIII power but are subject only to the negative procedure. The Government's justification for departing from the usual affirmative procedure is as follows:

> "The negative resolution procedure will enable the government to act quickly to give limited extensions to periods at a time when it may not be possible to obtain approval for an affirmative instrument. It will be important to be able to act quickly given the immediate pressures that businesses are facing as a result of the pandemic."[11]

21. This implies that a negative resolution instrument can always be made more quickly than an affirmative instrument. This is wrong. True, in most cases where a Bill requires a statutory instrument to be subject to the affirmative resolution procedure, the instrument has to be laid in draft and approved by both Houses before the instrument can be made and come into force. These so-called "draft affirmative" instruments do take longer to be made than negative resolution instruments, because debates in both Houses must precede the making of the instrument.

22. However, another procedure exists under which an affirmative instrument may be made and come into force before it is approved by both Houses. This is known as the "made affirmative" procedure. Under this procedure, the instrument is able to come into force as soon as it is made, but it will automatically cease to have effect if it is not approved by both Houses within a specified period of time. The period specified for approval is usually 28 days or 40 days, subject to extension for periods of dissolution, prorogation or adjournment for more than four days.

23. Regulations under the "made affirmative" procedure can be made and laid as expeditiously as regulations subject to the negative procedure. They can also be laid during a parliamentary recess, unlike draft affirmative instruments. By way of example, the main coronavirus regulations (SI 2020/350) have restricted civil liberty in a way that no other legislation has done in peacetime. They were made in considerable haste and during a parliamentary recess, and yet were still subject to the "made affirmative" procedure. **In the absence of cogent reasons for the negative procedure to apply to the Henry VIII power in clause 37(4)(b), we recommend that the affirmative procedure should apply where the regulations amend primary legislation.**

Clause 39: changing the duration of temporary provisions

24. Clause 39 allows the Secretary of State by regulations to extend or reduce the periods when certain temporary provisions under the Bill would otherwise expire. Although we imagine that the powers will only be exercised if, for example, the extension of a period is required because of the effect of the COVID-19 emergency, there is nothing in clause 39 that explicitly limits the exercise of the powers to that circumstance. **We recommend that there should be such a limitation.**

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11 Memorandum, p 37.

Clause 41: modified procedure for regulations

25. Clause 41 allows certain powers to be exercised subject to the negative procedure, rather than the affirmative procedure, for a period of six months. The justification is based on the need to act quickly and the fact that, according to the Government, retaining the affirmative procedure "would be a much lengthier process".[12] However, once again this does not take account of the fact that the "made affirmative" procedure is as expeditious as the negative procedure. If the affirmative procedure is the appropriate level of Parliamentary scrutiny, a temporary suspension should only occur for cogent reasons–which the Government have not offered in relation to clause 41. **In the absence of such reasons, we recommend that the power in clause 41 be removed from the Bill.**

Schedule 14: meetings of companies etc.

26. Each of paragraphs 2, 4 and 6 of Schedule 14 confer Henry VIII powers. For example, paragraph 4 allows ministers to disapply or modify a provision of any Act of Parliament relating to general meetings of certain companies and other bodies. In each case the negative resolution procedure applies and is justified on the basis that:

> "The negative resolution procedure will safeguard against an inability to act when Parliament is in recess or unable to make effective provision at an appropriate pace. It is important that the government is able to act quickly".[13]

27. Although the regulations may be justifiable under the negative resolution procedure for other reasons, in our view the justification offered by the Government is unconvincing. The Government have again overlooked the fact that the "made affirmative" procedure can be used as expeditiously as the negative procedure, including during recess, something that they acknowledge at paragraph 44 of the Explanatory Notes in another context. **In the absence of cogent reasons for the negative procedure to apply to the Henry VIII powers in Schedule 14, we recommend that the affirmative procedure should apply.**

DIVORCE, DISSOLUTION AND SEPARATION BILL [HL]: GOVERNMENT RESPONSE

28. We considered this Bill in our 5th Report of this Session.[14] The Committee has received a response from the Rt Hon. Lord Keen of Elie QC, Ministry of Justice spokesperson for the Lords. The response is printed at Appendix 1.

12 *Ibid.*, p 40.
13 *Ibid.*, p 68.
14 *Fifth Report*, Session 2019–21 (HL Paper 24).

APPENDIX 1: DIVORCE, DISSOLUTION AND SEPARATION BILL [HL]: GOVERNMENT RESPONSE

Letter from the Rt Hon. Lord Keen of Elie QC, Ministry of Justice spokesperson for the Lords, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

I am writing in response to the House of Lords Delegated Powers and Regulatory Reform Committee's report of 13 February 2020 on the Divorce, Dissolution and Separation Bill (the Bill).

I welcome the care taken by the Committee in its scrutiny of the Bill. I have reflected carefully on the comments of the Committee and the views expressed subsequently by Peers during the Bill's passage through the House of Lords and provide the Government's response below.

In the Government's original Delegated Powers Memorandum, it justified the taking of the powers contained in subsection (6) of a new section 1 of the Matrimonial Causes Act 1973 (MCA) inserted by clause 1, and subsection (3) of a new section 37A of the Civil Partnership Act 2004 (CPA) inserted by clause 4(3)) by reference to the need for flexibility to adjust the time periods in those Clauses without recourse to primary legislation. It also noted that Parliament had long allowed the flexibility to so adjust the time period between decree nisi and the earliest date the court could make a decree absolute in section 1(5) of the MCA and between conditional and final orders in section 38(2) of the CPA.

However, the Committee viewed this justification as insufficient to justify a power to allow the Lord Chancellor "entire discretion to change the length of either or both stages, the only restriction being that the overall period cannot be extended to longer than 26 weeks", where "the Courts in individual cases have the power to shorten the period" and where Ministers had in debate described the minimum 20-week period for reflection between the start of proceedings and the date that the court can make a conditional order as "a key element of the reformed legal process". The Committee recommended omitting these two powers from the Bill, or in the alternative, that the affirmative procedure should apply.

The Government acknowledges the Committee's concern and offers the further explanation that the Government considers that there could be good reasons why there might be a need to adjust either time period or the overall time frame for all divorce or dissolution cases, even where the court has the power to shorten the timeframes in certain exceptional individual cases. While the minimum 26 week time period is an important element of the reforms, the Government recognises that this approach has not yet been tested in practice. As the Government has set out in its impact assessment, the introduction of a new minimum time period before conditional order would make about 80% of divorces longer overall. The Government thinks it prudent therefore to have the flexibility to adapt the time period in the future if necessary and in light of evidence about how the revised legal process is working, and with the limitation that the overall time frame of 26 weeks, as passed by Parliament, cannot be exceeded.

Whilst the Government has decided to retain these delegated powers in the Bill, the Government accepts the Committee's recommendation that the powers should be made subject to the affirmative procedure. Accordingly, the Government moved two amendments during Report stage in the Lords, to new sections 1(9) of the MCA and 37A(7) of the CPA which were passed, and which have the effect that

the powers in new sections 1(6) of the MCA and 37A(3) CPA are now subject to the affirmative resolution procedure. This will provide for greater parliamentary scrutiny in the event that the Government seeks to use the power in future.

Finally, the Committee also recommended that the Bill should require the Lord Chancellor to undertake a public consultation exercise before exercising these powers. While the Lord Chancellor would plan to consult if he were to contemplate exercising the power, the Government does not consider that it is necessary to set out a requirement to do so in the Bill, particularly given the increased parliamentary scrutiny afforded by the change to the affirmative procedure.

We thank the Committee for its consideration.

4 June 2020

APPENDIX 2: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://www.parliament.uk/hlregister. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 10 June 2020 Members declared no interests.

Attendance

The meeting on 10 June 2020 was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Goddard of Stockport, Lord Haslehurst, Lord Haskel, Baroness Meacher, Lord Rowlands, Lord Thurlow and Lord Tope.