



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

9th Report of Session 2019–21

Coronavirus Bill

Fisheries Bill [HL]: Government Response

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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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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 Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Ninth Report

CORONAVIRUS BILL

Introduction

1. The Coronavirus Bill was introduced in the House of Commons on 19 March 2020. A Delegated Powers Memorandum (“the Memorandum”) has been provided by the Department of Health and Social Care.¹ This is a report on the version of the Bill as introduced into the House of Commons.
2. **The Coronavirus Bill deals with an unprecedented national emergency in peacetime. The circumstances in which we—and Parliament—are considering it are exceptional, both in terms of the magnitude of the issues which the Bill is intended to address and the speed at which the Government are having to address them.**
3. Given the Bill’s size (321 pages, consisting of 87 clauses and 27 Schedules) and complexity, and the limited time available to us and to Parliament, we have made fewer definitive recommendations than would normally have been the case for such a very substantial Bill. This is, however—as the House will understand—an exceptional report made in exceptional circumstances. As always, our remit is limited to the delegated powers in the Bill.
4. Our overriding concern is with the sunset provision in clauses 75 and 76 (see paragraphs 16 and 28 below). The Government have chosen to set the expiry date for the Bill at two years, with the possibility of extension. This sunset provision is the principal safeguard in the face of such significant powers being conferred on Ministers and consequently **we recommend below that the expiry date should be reduced to one year, without a power to extend.**

Specific clauses drawn to the attention of the House

5. **Clause 21** allows for the appointment of temporary Judicial Commissioners by the Investigatory Powers Commissioner. The powers include the power to provide for the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016 to apply with specified omissions or other modifications. In substance this is a Henry VIII power (that is, it allows a minister to amend primary legislation) because it will allow the Acts to operate differently where functions are exercised by temporary Judicial Commissioners. Judicial Commissioners exercise supervisory functions in relation to warrants authorising interception of communications etc. The regulations can only last for 12 months, and can only be made if the Investigatory Powers Commissioner notifies the Secretary of State that, because of the effects of coronavirus, there is a shortage of Judicial Commissioners and in the view of the Commissioner the powers need to be exercised to deal with the shortage.
6. **Despite the fact that clause 21 contains significant Henry VIII powers, they are only subject to the negative procedure.** In paragraph 120 of the

¹ Department for Health and Social Care, Delegated Powers Memorandum: https://publications.parliament.uk/pa/bills/cbill/58-01/0122/Delegated%20Powers%20Memorandum%20Coronavirus%20Bill_Final.pdf [accessed 23 March 2020].

Memorandum, the Department justifies the negative procedure (that is, the minister makes the regulations and Parliament may then veto them within a set period) on the ground that action may be needed at very short notice. In an emergency, a statutory instrument can be made as expeditiously under the “made affirmative” procedure (that is, the minister makes the regulations and they then require parliamentary approval or they lapse) as under the negative procedure. **We accordingly draw clause 21 to the attention of the House.**

7. **Clause 31** allows Welsh Ministers to disapply certain statutory provisions relating to who is a fit and proper person to work in regulated health and social care services. The power to modify the requirements for DBS (disclosure and barring service) checks for workers as a precondition for their starting work is said by the Department to be an essential requirement to increase flexibility and to allow providers to respond rapidly to fluctuations in the demand for their services.² Although (a) there is a duty on Welsh Ministers to state in the notice why the action is appropriate and proportionate as a response to coronavirus, and (b) the notice can only last for a period of one month (albeit renewable), **the provision removes protections and we accordingly draw it to the attention of the House.**
8. **Clause 32** confers a power on Scottish Ministers by direction (rather than by statutory instrument subject to a parliamentary procedure) to disapply or modify primary legislation that prevents barred individuals from working with vulnerable adults and children. As with clause 23 (power to require information relating to food supply chains) **clause 32 is not limited to circumstances occasioned by the coronavirus outbreak**; indeed, there is no limit on the circumstances in which the power in clause 32 can be exercised. **Clause 32 is too widely drawn and should be related to coronavirus.**
9. We make a similar point in paragraphs 10, 11, 14 and 16 below. **The House may wish to seek an explanation from the Minister about why these powers are not, on the face of each individual clause, explicitly linked to coronavirus. We anticipate that the House will look to the Minister to provide an ironclad assurance that the powers contained in the Bill will be exercisable in relation to the coronavirus outbreak only and in no other circumstances.**
10. **Clause 58** confers power on the Secretary of State or the Minister for the Cabinet Office to make regulations to postpone the date of the poll in certain kinds of election or referendum (listed in subsections (3) and (4)). The power only applies where the date of the poll is between the day on which the Bill is enacted and 5 May 2021. The latest date for the postponed poll is 6 May 2021. The powers are subject to the negative procedure, which is acceptable given the relatively narrow scope of the powers. They include power to amend, repeal or revoke any enactment but only for the purpose of postponing a poll. **However, we draw the House’s attention to the fact that the power to delay elections and referendums is not linked to the coronavirus outbreak or any other health emergency.**
11. **Clause 59** confers powers to delay a recall petition until, at the latest, 6 May 2021. The regulations are subject to the negative procedure. As with clause

2 Memorandum, para. 133.

58, there appears to be nothing to require the power to be exercised only in connection with the coronavirus outbreak or any other health emergency. We likewise draw it to the attention of the House.

12. **Clause 60** allows regulations to make consequential, supplementary etc. provision in connection with clauses 57 to 59 and regulations made under them. The regulations are subject to the negative procedure even though they:
 - include a power to amend or repeal primary legislation;
 - include a power to make retrospective provision; and
 - appear to include a power to create criminal offences (with no maximum limit for any punishment on the face of the legislation).
13. **There would ordinarily be a strong presumption for the affirmative procedure to apply to powers of this kind. Accordingly, we draw clause 60 to the attention of the House.**
14. **Clauses 62 to 66** make provision for the postponement of various elections in Wales or Scotland. For example, in elections for constituency vacancies and local authority elections in Scotland for casual vacancies, the power to postpone is given respectively to the Presiding Officer of the Scottish Parliament and the local returning officer. As with clause 58, **we draw the House's attention to the fact that these powers to delay elections and referendums are not linked to the coronavirus outbreak or any other health emergency.**
15. **Clause 74** allows a relevant national authority by regulations to suspend and revive the operation of any provision of the Act other than the ones listed in subsection (6). The power may be exercised for reasons unrelated to the coronavirus outbreak. The regulations are not subject to any parliamentary procedure. **A decision to suspend or revive emergency measures might well be politically contentious. We would expect such regulations to be subject to a parliamentary procedure. Accordingly, we draw clause 74 to the attention of the House.**
16. **Clause 76** allows a relevant national authority by regulations to alter the date on which any provision of the Act would otherwise expire (namely, two years beginning with the day on which it is passed, subject to exceptions in clause 75(2) and previous variation under clause 76). **The power may be exercised for reasons unrelated to the coronavirus outbreak.** The power includes the power to specify an earlier date or a later date. Where a later date is specified, each extension cannot be for more than six months but can be renewed. The powers include the power to make different provision for different purposes or areas, so that the Act might continue in some areas and not others. **In our view, the expiry date should be set at one year without a power to extend, and recommend accordingly, thereby enabling the Government to exercise these necessary powers immediately whilst allowing time for a further bill to be introduced and subject to parliamentary scrutiny in slower time.**
17. **Clause 77(1)** allows a relevant national authority to amend or repeal a provision of the Act, although the power only applies to provisions modifying subordinate legislation. The power may only be exercised if the amendment

or the repeal is *necessary* in consequence of the amendment or revocation of the provision of subordinate legislation. The exercise of the powers is subject to an affirmative procedure under clause 79. **Given its relatively narrow scope, the power is acceptable albeit a Henry VIII power.** The same arises under clauses 80 for Wales, 81 for Scotland and 82 for Northern Ireland.

18. **Paragraph 3 of Schedule 12** specifies methods for “qualified informants” to inform about death and still births, including methods specified in guidance issued by the Registrar General. **We normally deprecate provisions allowing guidance to change the law.** The same point arises with paragraphs 5 and 13 of Schedule 12, where the method of delivery of certain documents may be specified in guidance issued by the Registrar General. **However, in the exceptional circumstances of this Bill, the provision is acceptable.** In non-emergency legislation, however, we will uphold the principle that guidance should not be used to achieve a result that should only be achieved by legislative provision.
19. **Paragraphs 9 and 16 of Schedule 12** deal with the timescales for the delivery of certain documents. Sub-paragraph (3) in each case allows the Registrar General by direction either to vary or to disapply the period specified on the face of the primary legislation in sub-paragraph (2). **In effect it is a type of Henry VIII power, though exercisable without the need for legislation. In the exceptional circumstances of this Bill it is acceptable.**
20. **Paragraph 8 of Schedule 13** allows Scottish Ministers to suspend the effect of certain statutory provisions relating to declarations concerned with cremations. The suspension is achieved by a “determination” that Scottish Ministers can publish in such manner as they consider appropriate. Paragraph 9 allows Scottish Ministers to determine that other statutory provisions do not apply. **We draw the attention of the House to the fact that this result is achieved by a determination rather than by a statutory instrument.**
21. **Schedule 17** includes wide-ranging regulation-making powers for the purpose of protecting public health in Northern Ireland, and for providing a public health response, in relation to coronavirus. The powers operate on the international plane (preventing danger from vessels and aircraft etc. and giving effect to international agreements) and domestically. Exercise of the powers could have significant and adverse effects, allowing restrictions and requirements to be imposed on a person’s freedom of movement and actions. They also allow the seizure and destruction of things, and enable the creation of criminal offences.
22. The regulations are generally subject to the negative procedure (see section 25P inserted into the Public Health Act (Northern Ireland) 1967). The affirmative procedure only applies in limited circumstances: where regulations are made under section 25C which have a significant effect on a person’s rights, and where regulations amend a statutory provision for the purposes of giving effect to an international agreement. There are cases where the affirmative procedure only applies to the first exercise of the powers, although it is not clear why subsequent exercises are not liable to be as significant as the first exercise of a power.
23. **In the absence of a convincing explanation, the negative procedure is inadequate for the kinds of powers conferred by Schedule 17. We**

note that regulations made under Schedule 18 (health protection regulations: Scotland) are subject to an affirmative procedure in all cases (with the “made affirmative” procedure applying for cases of urgency).

24. **Paragraphs 2(2) and 4 of Schedule 20** confer powers on the Secretary of State to make the following declarations in respect of England:
- that an area abroad is potentially infectious;
 - that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health and that the powers conferred by the Schedule will be effective to delay or prevent significant further transmission of coronavirus in England.
25. Both powers are legislative in effect, determining respectively when a person is to be treated as potentially infectious for the purposes of the Schedule (see para. 2(1)), and when a transmission control period applies, which underpins many of the provisions in the Schedule. **There is no parliamentary control or oversight of the exercise of the powers.** In normal times this would be considered inappropriate given the significance and the extent of the powers they allow to be exercised. **In the exceptional circumstances of the current Bill, the powers are acceptable given the conditions in paragraphs 2(2)(a) and (b) and 4(1) of Schedule 20 governing their exercise.**
26. **Paragraph 3 of Schedule 21** confers power on the Secretary of State to make a declaration if of the view that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health in England, and that the powers conferred by the Schedule will be effective to prevent further transmission, or to facilitate the most appropriate deployment of medical or emergency personnel and resources in England. As with the powers conferred by Schedule 20, this seems in substance to be the delegation of a legislative power: it has the effect of determining when a public health response period applies, which underpins many of the powers given by Schedule 21. **In the exceptional circumstances of the current Bill, the powers are acceptable despite the lack of parliamentary scrutiny, because of the conditions which govern the powers’ exercise.**
27. The various powers to give directions under Part 2 of Schedule 21 are legislative in character to the extent that they apply generally and are not limited to particular events or premises. **In the exceptional circumstances of the current Bill, this is appropriate given the conditions that limit the circumstances in which the powers can be used.**

Conclusion

28. At the beginning of this report, we acknowledged that the intention of this Bill is to respond to an unprecedented national emergency in peacetime. Given the speed with which the Government need to act and the significance of the powers needed to address the emergency, we have, on this occasion, chosen mainly to highlight points of concern rather than make definitive recommendations. Whilst in no way resiling from the appropriateness of this exceptional approach, **we nonetheless believe that it is important for us to state clearly that, had the country not been in the midst of a developing national emergency, there are powers in this Bill, including far-reaching Henry VIII powers, about which our commentary would**

have been far more trenchant and our recommendations far more robust. Given this, we have recommended that the expiry date for the Bill should be set at one year without a power to extend – not two years, with the possibility of extension – thereby enabling the Government to exercise the powers needed in the immediate future while allowing a further bill to be introduced and subject to parliamentary scrutiny in slower time. This sunset provision is, as we have said above, the principal safeguard in the face of such significant powers being conferred on Ministers.

FISHERIES BILL [HL]: GOVERNMENT RESPONSE

29. We considered this Bill in our 6th Report of this Session.³ The Government have now responded by way of a letter from Lord Gardiner of Kimble, Parliamentary Under Secretary of State for Rural Affairs and Biosecurity at the Department for Environment, Food and Rural Affairs. The response is printed at Appendix 1.

3 [6th Report](#), Session 2019-21 (HL Paper 27).

APPENDIX 1: FISHERIES BILL [HL]:GOVERNMENT RESPONSE

Letter from Lord Gardiner of Kimble, Parliamentary Under Secretary of State for Rural Affairs and Biosecurity at the Department for Environment, Food and Rural Affairs, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

The Government is grateful for the report from the Delegated Powers and Regulatory Reform Committee on the Fisheries Bill. You recommended that the House seek a fuller explanation of the Government's intentions in relation to the application of criteria other than price for allocating fishing opportunities under clause 27 of the Bill (sale of English fishing opportunities for a calendar year), including the interrelationship between these other criteria and price, and their relative weighting.

Clause 27 was included in the Bill to give the Secretary of State a statutory charging power. It permits the Secretary of State to sell rights to use English fishing opportunities (quota or days at sea) for a calendar year. In most cases, the Department envisages including additional conditions in the tendering process, as contemplated by clause 27(3)(h). These might include conditions relating to the use of sustainable fishing gear.

However, the Department might in some cases include conditions relating to price alone. This is in the context of the Bill allowing a scheme to be set up with tight eligibility and other criteria. For example, under clause 27(3)(d), a scheme could provide that only certain descriptions of person were eligible to buy rights. Under clause 27(3)(g), a scheme could provide for only limited rights to be sold. Regulations could set up a scheme under which only small artisanal boats were eligible. If all eligible boats could, by virtue of their design and engine power, be assumed to be fishing sustainably, it might be appropriate for price to be the sole criterion for the sale of rights.

The Department will work with industry and other stakeholders on the design of any schemes under clause 27 such as an auction or tendering exercise and would consult on it before regulations were made.

17 March 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.