

DIVORCE, DISSOLUTION AND SEPARATION BILL DELEGATED POWERS MEMORANDUM

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Divorce, Dissolution and Separation Bill (“the Bill”). The Bill will be introduced in the House of Lords on 7 January 2020. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

2. The Bill will change the legal requirements for obtaining a divorce, dissolution or legal separation in England and Wales by amending the Matrimonial Causes Act 1973 (“the MCA”) and corresponding provisions in the Civil Partnership Act 2004 (“the CPA”). The following changes are made in relation to applications for divorce and dissolution to—
 - a. **Replace the requirement to provide evidence of conduct or separation “facts” with a new requirement to provide a statement of irretrievable breakdown.** This retains the current sole ground for divorce (irretrievable breakdown), but removes the requirement to show one of the five facts currently specified in statute as evidencing breakdown, that relate to adultery (divorce only), behaviour, two years separation (if the parties agree to the divorce or dissolution), five years separation (without the need for agreement of both parties) and desertion. It thereby also removes the requirement for the court to inquire so far as it reasonably can into any such facts.
 - b. **Remove the possibility of contesting the decision to divorce or to dissolve the civil partnership, as the statement of irretrievable breakdown is now to be taken as conclusive evidence that the marriage or civil partnership has broken down irretrievably.** This will remove scope for a respondent to dispute that the marriage has irretrievably broken down. Divorce or dissolution proceedings could still be challenged for other reasons including jurisdiction, validity of the marriage, fraud and procedural compliance.
 - c. **Retain the current stages of a divorce and dissolution application but introduce a new minimum timeframe of six months (26 weeks) the start and the final stage.** This is to be made up of a new minimum 20 week period between the start of proceedings and confirmation to the court that a conditional divorce or dissolution order should be made, combined with the existing minimum six week period between conditional dissolution or divorce order (presently, for divorce, the decree nisi) and the making of the final order and (presently, for divorce, the decree absolute).
 - d. **Enable the Lord Chancellor by order made by statutory instrument to adjust the minimum time periods** between the start of proceedings and conditional order of divorce/dissolution final order of divorce/dissolution stages, subject to the requirement that the total period may not exceed 26 weeks (six months). A similar delegated power, (subject to the same bar on making the overall period longer than 6 months) is already in place for the current minimum timeframe between conditional order and final order in

respect of civil partnerships, and a slightly different power, expressed as one to shorten the period from six months (and therefore not to be used to extend it beyond six months), is in place for the current minimum timeframe between decree nisi and decree absolute for divorce.

- e. **Introduce a new option of joint application** for cases where the decision to divorce or dissolve the civil partnership is a mutual one and couples wish to cooperate from the outset, in addition to retaining the current ability of one spouse to initiate the legal process of divorce or dissolution.
- f. **Update terminology** in the MCA by replacing, for example, terms such as “decree nisi”, “decree absolute” and “petitioner” with “conditional order”, “final order” and “applicant”. This is intended to make the law more accessible, and more clearly consistent as between divorce and dissolution of civil partnership.

Delegated Powers

- 3. The Bill contains the following delegated powers:
 - a. Three powers to enable the Lord Chancellor to amend the minimum time period for the making of orders, each power depending on the order in question—
 - (i) a power for the Lord Chancellor to amend minimum time periods prescribed in the MCA as amended by this Bill for the making of divorce orders (which power replaces a general order power of the High Court to do so);
 - (ii) to amend minimum time periods for dissolution orders prescribed in the CPA that are being amended by this Bill (which power is similar to and will partially re-enact an existing power in that Act);
 - (iii) to amend minimum time period for nullity of marriage orders, replacing a power that currently exists in the MCA for the High Court to do so and replicating a power currently found in the CPA;
 - b. Two powers to enable rules of court to be made governing the procedure for joint applications to become sole applications—
 - (i) for applications for divorce;
 - (ii) for applications for dissolution;
 - c. A regulation-making power conferred on the Lord Chancellor to make consequential amendments, including amendments to primary legislation; and
 - d. A commencement power to be exercised by the Lord Chancellor.
- 4. Four of the powers above are “Henry VIII” powers — the three powers listed at (a), because they operate by enabling the Lord Chancellor to amend the relevant sections of the MCA and CPA to change the time periods set out in those sections as amended; and the consequential amendment power listed at (c), to the extent that it enables consequential amendments of primary legislation. As discussed in this Memorandum, the Committee recommended that two of these powers - the powers

to amend the time frames for divorce orders and dissolution orders – should be subject to the affirmative procedure. The third power, to amend the time period for nullity orders, is subject to the negative procedure. The fourth power, to make consequential amendments is subject to the affirmative procedure where amendments are to be made to primary, or the negative procedure where amendments are to be made to secondary legislation. re

Clause 1: Power for Lord Chancellor to substitute a different period for the purposes of new section 1(4)(b) or (5) of the MCA

Power conferred on: Lord Chancellor

Power exercised by: Order

Parliamentary Procedure: Affirmative resolution

Context and Purpose

5. In clause 1, new section 1(4)(b) and (5) of the MCA introduce a new minimum timeframe of 26 weeks for the legal process for divorce, comprising two stages. The first stage is between the start of proceedings and the date that the applicant or applicants can confirm to the court that s/he or they wish the process to continue, which allows the court to make a conditional divorce order. New section 1(4)(b) prescribes a minimum period of 20 weeks for this stage. The second stage is between the date on the court makes the conditional order and the date on which it may make the order final; and new section 1(5) prescribes a minimum period of six weeks for this stage.
6. This timeframe in two parts replaces a current minimum period set out at section 1(5) of the current MCA. The MCA provides for a six-month period between the two orders (decree nisi and decree absolute), but a different period of six weeks currently applies by virtue of general orders issued by the High Court in 1972 and 1973¹ under a power conferred on it by a predecessor provision to current section 1(5).
7. This power for the High Court to make a general order is very unusual and in this context predates the Supreme Court of Judicature (Consolidation) Act 1925. When the Government introduced the then Civil Partnerships Bill in 2003 and created a dissolution process for civil partners which generally replicated the divorce process in the MCA, it took the position that it would be inappropriate to confer such a power again on the High Court². The Government instead introduced, at what is now section 38(1) of the CPA, a six-week time period to replicate the six-week time period applicable in divorces by virtue of the High Court's general order, and a power in section 38(2) for the Lord Chancellor by order to substitute a different period, though this power could not lengthen the minimum period beyond 6 months (the period prescribed in the MCA).

¹ Matrimonial Causes (Decree Absolute) General Order 1973, SI 15/3/1973 and Matrimonial Causes (Decree Absolute) General Order 1972, SI 20/7/1972. Both Orders were made under sections 5(7) and 10 of the Matrimonial Causes Act 1965.

² See paragraph 15 of the Delegated Powers Memorandum for the Civil Partnerships Bill, attached as Annex 1 to the Sixteenth Report of the Delegated Powers and Regulatory Reform Committee, Session 2003-04.

8. The same approach has been taken here: the order-making power is given to the Lord Chancellor, rather than the High Court. The power is to shorten or lengthen either or both of the two component minimum periods of the new period of 26 weeks (new subsection 1(6)), but the Lord Chancellor may not provide for a period which would result in the total number of days in the two prescribed periods exceeding 26 weeks.

Justification for the power

9. The Government view is that whilst it is appropriate to continue to set out a minimum time period for divorce (and dissolution – see next section) in primary legislation, it is also appropriate to continue to allow for flexibility for that time period to be adjusted without recourse to primary legislation, as Parliament has long allowed in section 1(5) of the MCA and in section 38(2) of the CPA. As in 2003, the Government takes the view that it would be inappropriate to continue to grant that general power of adjustment to the High Court, but that it is appropriate to continue to confer that power on the Lord Chancellor as Parliament did in the CPA. The Lord Chancellor will be able to make adjustments to the time periods, for example if policy considerations meant that it would be appropriate to shorten one or both of the time periods, but the Lord Chancellor could not adjust the time period so as to lengthen the prescribed overall 26-week timeframe, which is an inherent limitation on the power similar to that contained in current section 38(3) of the CPA.
10. However, the DPRRC indicated that it was not content with this justification given that Ministers had in debate described the 20-week period for reflection in the first stage as “a key element of the reformed legal process”, but that the Government had offered insufficient justification for taking a power which would allow the Lord Chancellor to change both this new 20-week period and the existing 6-week time period for all divorces, particularly in the light of the court power to adjust the period for individual cases.
11. The Government acknowledges this concern and offers the following further explanation, in addition to the change the Government has made to the procedure that will apply (discussed below). The Government considers that there could be good reasons why there might be a need to adjust the overall time period for all divorce or dissolution cases, even where the court has the power to shorten the timeframe in certain exceptional individual cases. While the minimum six-month 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.

Justification for the procedure

12. Following the Report of the DPRRC, the Government moved two amendments during passage of this Bill in the Lords, which was passed, and which have the effect that powers in Clauses 1 and 4 are now subject to the affirmative resolution procedure, as recommended by the Committee. The Committee was concerned in particular that the power could be used to change the duration of the divorce process, which was likely to be of considerable interest to Parliament. The Government acknowledges

this concern and has therefore made the power subject to affirmative resolution so as to provide for greater parliamentary scrutiny in the event that the Government in future seeks to use the power.

Clause 4(3): Power in new subsection 37A(4) of the CPA for Lord Chancellor to substitute different definitions of prescribed period

Power conferred on: Lord Chancellor

Power exercised by: Order

Parliamentary Procedure: Affirmative resolution

Context and Purpose

13. This power broadly replicates for civil partnerships the power in clause 1 described above, and essentially re-enacts the Lord Chancellor order-making power currently found in section 38(2) of the CPA, but for the differences in prescribed time periods which are changed by this Bill.
14. As with divorce, this Bill introduces in clause 4(3) a new minimum timeframe of 26 weeks for the legal process for civil partnership dissolution. This timeframe will comprise the current minimum period of six weeks between the date the court makes the conditional order and the date on which it may make the order final, plus a new minimum period of twenty weeks (between the start of proceedings and the date that the applicant or applicants confirm the court may make a conditional order).
15. These time periods replace the current minimum period of six weeks between conditional and final orders in s38(2) of the CPA. As discussed above, the time frame in the current CPA is also a replication of the time frame applicable in divorce.
16. New subsection 37A(3) of the CPA, inserted by clause 4(3), essentially re-enacts the order-making power currently found in section 38(3) of the CPA for the Lord Chancellor to substitute different periods for the 6-week and 20-week periods set out in subsection (2). The provision is formulated in terms of substitution of different definitions for prescribed periods, rather than in the way that new section 1(5) of the MCA is formulated, in order to maintain consistency in the formulation of the provisions currently found in section 38 of the CPA, which remain in the CPA and will now also apply to annulment and presumption of death orders (see below).
17. As with the current power, and the new power in the MCA described above, the Lord Chancellor will be able to shorten or lengthen either of the two time periods, but will not be able to provide for a period that would exceed 26 weeks.

Justification for the power

18. As with the power in clause 1 in relation to divorce, the Government view is that whilst it is appropriate to continue to set out minimum time periods for dissolution in primary legislation, as the CPA currently does, it is also appropriate to continue to allow for flexibility for that time period to be adjusted without recourse to primary legislation, as Parliament has long allowed in section 38(2) of the CPA which the new power replaces (and in section 1(5) of the MCA).

19. The Lord Chancellor will be able to make adjustments to the time periods, for example if policy considerations meant that it would be appropriate to shorten one or both of the time periods, but the Lord Chancellor could not adjust the time period so as to lengthen the prescribed overall 26-week timeframe, which is an inherent limitation on the power similar to that contained in current section 38(3) of the CPA.
20. As with the power in clause 1, the Government acknowledges the concerns of the Committee in respect of this power and offers the further explanation that it has offered in relation to the power to amend the divorce time periods (in addition to its change to the parliamentary procedure – discussed below). As with the power to amend the time periods applicable to the divorce process, the Government considers that there could be good reason for changing the time periods for all cases that could only come to light once the new time periods apply, given that these are currently untested.

Justification for the procedure

21. As with the power in the new MCA section 1(6), the Government has listened to the concerns raised by the DPRRC and therefore has moved an amendment in the Lords, which has passed, which has made the power subject to the affirmative resolution procedure, so as to provide for greater scrutiny in the event that the Government in future seeks to use the power.

Clause 6 and paragraph 12 of the Schedule: power to amend minimum time periods for nullity of marriage orders

Power conferred on: Lord Chancellor

Power exercised by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

22. Paragraph 12 of the Schedule to this Bill, introduced by Clause 6, inserts new section 12B into the MCA. The section partly replicates the effects of current section 15 of the MCA, which creates the same decree nisi and decree absolute stages for nullity of marriage as for divorce, applies the same 6-month minimum time period (amended to 6 weeks by High Court order as cited above) as for divorce, and the same High Court order-making powers.
23. New section 12B replicates the new conditional order and final order nomenclature that the Bill introduces in clause 1 for divorce, and replicates the provision made in the CPA for nullity orders which itself partially replicated the effects of section 1(5) of the MCA. A minimum time period of six weeks between conditional order and final order is provided for which is identical to that applicable to nullity in the CPA by the combined effect of sections 37(2)(b) and 38, and a power is conferred on the Lord Chancellor, identical to that conferred on the Lord Chancellor in section 38(2) of the CPA to amend the time period. As in section 38(3), the power is limited in subsection (3) in that the Lord Chancellor cannot prescribe a period that exceeds 6 months.

Justification for the power

24. As with the power to amend the minimum time period applicable to civil partnership nullity orders in the current section 38(2) of the CPA, the Government takes the view that whilst it is appropriate to continue to set out in the MCA a minimum time period between decrees nisi and absolute for nullity of marriage – now to be named conditional and final nullity orders -- it is also appropriate to continue to allow for flexibility for that time period to be adjusted without recourse to primary legislation, should policy reasons arise.
25. That flexibility is currently created in the MCA by virtue of a general order-making power in the High Court -- a legislative power of the High Court that the Government viewed in 2003 in introducing the Civil Partnerships Bill would be inappropriate to retain (see discussion at paragraph 7 above). The Government continues to view that it would be inappropriate to continue the High Court general order-making power.
26. For these reasons, and in order that the married couples are treated the same under the MCA as in the CPA, the Government considers it appropriate to maintain the flexibility currently provided by section 1(5) of the MCA and to replicate the flexibility currently provided in section 38(2) of the CPA, by conferring a power on the Lord Chancellor to amend the minimum time period. As in section 38(3), the Lord Chancellor's power is limited by new subsection (3) in that he cannot amend the period so as to exceed 6 months.

Justification for the procedure

27. The Government considers it appropriate to use the negative resolution procedure because the power is clearly circumscribed, and subject to the further limitation that the Lord Chancellor may not lengthen the prescribed period beyond six months. Further, the negative resolution procedure currently applies to the identical power in section 38(2) of the CPA (by virtue of section 38(6)).

Clauses 1 and 3(7): Power to make Family Procedure Rules in relation to joint applications

Power conferred on: Family Procedure Rule Committee

Power exercised by: Rules made by statutory instrument under section 75(1) of the Courts Act 2003

Parliamentary procedure: Negative resolution

Context and purpose

28. Clause 1, which inserts new section 1 in the MCA, and clause 3, which amends section 44 of the CPA, both make provision for divorce and dissolution applications to be made jointly by spouses or civil partners where the decision to divorce is a mutual one and couples wish to cooperate from the outset. The Government wishes to allow, however, for the possibility that one spouse or civil partner might wish to continue the application, whilst the other does not, such that the application should proceed as if made by one spouse or civil partner only, and not jointly. Without such provision, a spouse or civil partner who had applied jointly would not be able to progress the application if the other spouse or civil partner refused to continue the proceeding.

29. The details for how a joint application would become a sole application would be highly procedural and technical in nature, and are considered more appropriate for rules of court that govern practice and procedure in family proceedings, rather than primary legislation. The rules would be made by the statutory body charged with making procedural rules for family proceedings – the Family Procedure Rule Committee, created by sections 75(2) and 77 of the Courts Act 2003.
30. Clause 1 of the Bill therefore inserts new section 1(10) in the MCA, and clause 3(7) inserts new subsection (6) into section 44 of the CPA, allowing Family Procedure Rules to provide for the procedure for joint applications for divorce or dissolution, respectively, to become sole applications.

Justification for the power

31. As stated above, the procedural detail for conversion of a joint application to a sole application is considered more appropriate for Family Procedure Rules, rather than for primary legislation, given its technical and procedural nature, given the flexibility afforded by Family Procedure Rules, which are made by statutory instrument, and given the family proceedings expertise of the Family Procedure Rule Committee, as demonstrated by the composition of the Committee set out in section 77 of the Courts Act 2003.
32. Although there is a general power to make Family Procedure Rules under section 75 of the Courts Act 2003, as elaborated in section 76 of that Act, and it might be argued that that power would extend to governing practice and procedure for progress of an application which commenced as a joint application but has to proceed on the basis that it is now being pursued by only one of the parties, the ability to make a joint application for divorce or civil partnership dissolution is novel in the law of England and Wales, and the Government wished to put beyond doubt that Family Procedure Rules could be used to set out procedure for joint applications to become sole applications.

Justification for the procedure

33. Family Procedure Rules are made by statutory instrument subject to the negative procedure, by virtue of section 79(6) of the Courts Act 2003. It is considered appropriate that the negative procedure apply in the ordinary way to rules of court that would be made by virtue of new subsections 1(10) of the MCA and/or 44(6) of the CPA, in particular since the rules would contain rules of practice and procedure akin to those contemplated by section 75 of the Courts Act 2003.

Clause 6(2): Power to make consequential amendments

Power conferred on: Lord Chancellor

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution

Context and Purpose

34. This clause enables the Lord Chancellor by regulations to amend, repeal or revoke primary legislation, secondary legislation or the legislation of the Devolved

Administrations, which has passed into force prior to the Bill receiving Royal Assent, in consequence of any provision of the Bill as well as any transitional or saving provision.

35. The Government believes it is necessary to take such a power to avoid any implementation difficulties, or legislative inconsistencies that may otherwise arise, beyond those addressed in the Schedule. The Schedule to the Bill already contains minor and consequential amendments to primary legislation but primary legislation on divorce, including cross-references in a wide range of statutes to the status or evidence of, and/or reasons for divorce (such as references to decrees nisi and/or absolute and adultery grounds) began with the Matrimonial Causes Act 1857 and continue through provision that remains in force today such as the Wills Act 1837, the Inheritance (Provision for Family and Dependents) Act 1975, the Agricultural Holdings Act 1986, the Taxation of Chargeable Gains Act 1992 and the Family Law Acts of 1986 and 1996 (the Schedule to this Bill contains further examples). Whilst the Government has made extensive efforts to identify primary legislative provision that requires minor and consequential amendment as a result of the provisions of this Bill, the Government considers that a delegated power to amend primary legislation for this purpose remains necessary due to the historic and wide-ranging references to divorce in the primary legislative statute book, which extend from property to wills and estates to tax to pensions to conflicts of law and numerous aspects of family law, and which, despite extensive efforts to identify at this stage, may only become apparent at a future time.
36. The Government has considered very carefully the Committee's guidance and reports on delegated powers to amend primary legislation, including the Committee's recent report on the delegated power in the Telecommunications Infrastructure (Relief from Non-Domestic Rates) Bill to make minor and consequential amendments to primary legislation.³ The Government has considered in particular that like the now Telecommunications Infrastructure (Relief from Non-Domestic Rates) Act 2018 (c. 1) (the "2018 Act"), this Bill has a relatively narrow focus. The Government believes, however, that the 2018 Act is distinguishable from this Bill at least on the basis that that Act effected a limited tax relief change for optical fibre installation in a relatively limited and relatively contemporary area of the statute book, leading, as the Schedule to that Act demonstrates, to limited consequential amendments to the Local Government Finance Act 1988 and the Business Rate Supplements Act 2009.
37. This Bill, on the other hand, whilst relatively narrowly amending the legal requirements to obtain a divorce, dissolution or legal separation contains changes that have (minor and consequential) ramifications for a wide and relatively historic range of the statute book. The Government believes that the power to make minor and consequential amendment to primary legislation which is contained in this Bill is more akin, for that reason, to the similar power found, for example, in recent statutes such as the Pension Schemes Act 2017 (section 38), the Children and Social Work Act 2017 (section 66), the Criminal Justice and Courts Act 2015 (section 93) and the Legal Aid, Sentencing and Punishment Act 2012 (section 149) all of which contained changes affecting a range of primary legislative provision.

³ 5th Report of Session 2017-19, paragraphs 7 – 10.

38. Similarly, this Bill, whilst relatively narrowly amending the legal requirements to obtain a divorce, dissolution or legal separation, contains changes that have (minor and consequential) ramifications for a wide and relatively historic range of the statute book. The Government therefore considers it necessary to include this power so that full effect can be given to the provisions of the Act.

Justification for the procedure

39. Whilst the Government considers that a delegated power to make consequential amendments to primary legislation is necessary for the reasons set out above, it considers that it would be appropriate that such amendments be subject to the affirmative resolution procedure so that Parliament may give them due scrutiny. Where only secondary legislation is being amended, the negative resolution will apply.

Clause 8(8): Commencement power

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

40. Clause 8 contains a power for the Lord Chancellor to bring provisions of the Bill into force by commencement regulations.

Justification for the power

41. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation (including rules of court), issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

42. As is usual with commencement powers, regulations made under clause 8 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

**Ministry of Justice
March 2020**