

**CIVIL PARTNERSHIPS, MARRIAGES AND DEATHS (REGISTRATION ETC.)  
BILL**

**DELEGATED POWERS MEMORANDUM**

**BY THE HOME OFFICE**

**INTRODUCTION**

1. The Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill is a Private Member's Bill. Both the provisions dealing with the registration of marriages, clause 1 supplemented by clause 5, and the clause dealing with civil partnership, clause 2, consist entirely of powers to make delegated legislation. The provisions relating to coroner's investigations into still-births, clause 4 supplemented by clause 5, require the Secretary of State to prepare and publish a report on whether, and if so how, coroners should investigate still-births, and provide powers enabling the Lord Chancellor, if appropriate, to make regulations enabling or requiring coroners to investigate still-births. This Memorandum explains the reasons for the approach taken and in relation to the individual powers conferred, explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

2. Clause 1 of the Bill enables the modernisation of the marriage registration processes in England and Wales, including the introduction of an electronic marriage register and the closer alignment of processes with arrangements in place for civil partnerships in England and Wales, and for marriage and civil partnerships in Scotland and Northern Ireland. These changes are of some urgency because they facilitate long-overdue reform of the marriage register entry (and marriage certificates), which since 1837 have included details of the fathers of the spouses, but not their mothers. Whilst the content of the marriage register entry could be amended by secondary legislation (under section 55(1) of the Marriage Act 1949), under current registration processes that change would necessitate the replacement of some 84,000 bound marriage registers, at considerable cost. The proposed electronic system enables changes to be made to the entry, now and in future, so that it can keep pace with societal developments. The provisions of the Bill relating to marriage registration are substantively the same as those contained in the Registration of Marriage Bill [HL] that have previously been considered by the Delegated Powers and Regulatory Reform Committee and which achieved Third Reading in the House of Lords on 24 July 2018.

3. Clause 2 of the Bill requires the Secretary of State to make regulations to change the law relating to civil partnership, to bring about equality between same-sex and other couples, with such regulations coming into effect within 6 months of the Bill being passed. This is intended to rectify the existing inequality between same-sex and opposite-sex couples in terms of their access to civil partnerships. At present same-sex couples can choose between either a civil partnership or a same-sex marriage, however same-sex couples are only able to form a marriage. The provisions in the Civil Partnership Act 2004 ("the CPA") which restrict civil partnership to same

sex couples have been declared incompatible with the European Convention on Human Rights by the Supreme Court.<sup>1</sup>

4. Clause 4 places a duty on the Secretary of State to make arrangements for the preparation and publication of a report on whether, and if so how, the law should be changed to enable or require coroners to investigate still-births. After the report has been published, clause 4 gives a power to the Lord Chancellor to make regulations to amend Part 1 of the Coroners and Justice Act 2009 providing for coroners to investigate still-births. Clause 5 provides further detail on the exercise of the power to make regulations. Under clause 4 “still-births” is given the meaning in section 41 of the Births and Deaths Registration Act 1953. Under the Coroners and Justice Act 2009, coroners have a duty to investigate deaths in certain circumstances, such as where the death is violent or unnatural. Coroners can only investigate the deaths of babies who show signs of life after being born. Coroners can make enquiries to decide if a duty to conduct an investigation arises if there is any doubt as to whether a baby was still-born but they will not investigate if they find it was a still-birth. They will not investigate the circumstances of why the baby was still-born.

### **Reasons for the delegated powers**

#### **Clause 1: Marriage registration**

5. The mechanics of marriage *registration* (as opposed to questions relating to who may marry, where and by whom), and in particular the changes enabled by this Bill, are uncontroversial and it is therefore considered appropriate for them to be made in secondary legislation.

6. The use of secondary legislation to make the detailed registration process changes to the 1949 Act provides flexibility. This flexibility is necessary as, during the implementation period, as there may be unforeseen technical changes to the operation of the system. The Home Office will work closely with key stakeholders, such as the local registration service and the Church of England, when implementing the new provisions. Changes or amendments to the intended secondary legislation may be identified during implementation to ensure all requirements have been captured and the process runs smoothly. Any changes made to primary legislation will be subject to the affirmative procedure ensuring that Parliament will be able to scrutinise them in detail.

#### **Clause 2: Reform of civil partnership**

7. If the incompatibility identified by the Supreme Court is to be addressed, the difference in treatment between same sex and opposite sex couples, in terms of their future ability or otherwise to form a civil partnership, will need to be removed. This will necessitate changes to the CPA.

8. The clause seeks to use secondary legislation to amend the existing civil partnership regime and to impose a duty to do so within 6 months of Royal Assent in order to end the existing discrimination quickly. As changes to primary legislation will be required, the regulations will be

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<sup>1</sup> *Steinfeld & Keidan v Secretary of State for International Development* [2018] UKSC 32.

subject to the affirmative procedure ensuring that Parliament will be able to scrutinise them in detail.

#### **Clause 4: Coroners' investigations into still-births**

9. Coroners do not currently have jurisdiction to investigate still-births. There have been calls in recent years from some coroners, parliamentarians, bereaved parents and organisations that support them for coroners to have a role that would allow them to contribute to the understanding of the circumstances surrounding still-births and help prevent future still-births.

10. The Bill provides an opportunity to make progress here, but there are important and sensitive issues that the Government needs to consider before detailed proposals can be brought forward. These include how far into a pregnancy coronial involvement should be triggered and the potential relevance of factors such as medical negligence or violence to the mother. We need to talk to stakeholders to hear the full range of views, including the views of those who may not wish for coronial involvement. Unfortunately, the limited time available during the passage of a Bill does not allow for the full and proper consideration of these issues and for detailed proposals to be on the face of the Bill itself. Therefore, we consider that delegated powers are necessary, with safeguards on their use, to enable change to be properly considered and if appropriate, the right proposals to be made in secondary legislation. Parliament will have scrutiny under the affirmative resolution procedure where the secondary legislation amends primary legislation.

#### ***Clause 1: Marriage Registration***

##### ***Clauses 1(1), 1(2) and 1(3)***

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative, laid before and approved by a resolution of each House of Parliament.</i>

#### **Effect of the provision**

11. The power in clause 1(1) enables the Secretary of State to amend the Marriage Act 1949 to provide for a system whereby details relating to marriages in England and Wales are recorded in documents used as part of the procedure for marriage, and entered into and held in a central register which is accessible in electronic form.

12. Clause 1(2) identifies the specific amendments the regulations may make to the 1949 Act.
- a. Paragraph (a) enables the replacement of the existing superintendent registrar's certificates for marriage (which serve as the authority for the marriage to proceed after civil preliminaries) with a marriage 'schedule', which will function not only as the authority for the marriage, but also as the document the parties sign at the

solemnisation (instead of a register book) and which records the particulars to be registered.

- b. Paragraph (b) makes similar provision for marriages following ecclesiastical preliminaries, providing for a document that will form the basis of the registration of (although not the authority for) a marriage conducted according to the rites of the Church of England or Church in Wales.
- c. Paragraphs (c), (d) and (f) enable the regulations to amend the 1949 Act to provide for the signing of the above-mentioned documents, their delivery to a registrar, and the registration of the particulars they contain.
- d. Paragraph (e) enables amendments to be made to require the Registrar General to maintain a marriage register, which will replace the bound marriage register books currently held in register offices but also in some 30,000 churches and other religious buildings.
- e. Paragraph (g) enables amendments to be made that remove provisions of the 1949 Act relating to the registration of marriage that will not fit into the new marriage registration system created by the regulations.

13. Clause 1(3) empowers the Secretary of State to amend the 1949 Act to create a specific criminal offence, aimed at enforcing the registration of marriages. This offence is to be modelled on section 24(2)(e) of the Marriage (Scotland) Act 1977. The maximum penalty (a fine not exceeding level 3 on the standard scale) is specified in the Bill.

14. Under clause 1(6) the power for the Secretary of State to make regulations under Clauses 1(1)-1(3) will cease to be exercisable after the period of three years beginning with the day on which the powers are first exercised.

### **Justification of the Delegation**

15. Paragraphs 4-5 above set out the overarching reasons the changes enabled by this Bill are made by way of delegated powers.

16. Marriage registration is primarily governed by the 1949 Act (and regulations made under it). The clause 1(1), 1(2) and 1(3) powers enable changes to be made to marriage registration provisions in the 1949 Act to ensure a coherent system of marriage registration.

17. Clause 1(6) contains a sunset clause making sure the power to make regulations is not open-ended. The power to make the regulations will cease to be exercisable after the period of three years beginning with the day on which the power to make regulations is first exercised.

### **Justification of the level of Parliamentary Scrutiny**

18. Where the powers in clauses 1(1) to 1(3) are exercised to amend or repeal the 1949 Act, the regulations will be subject to the affirmative resolution procedure (clause 5(6)). This is the appropriate procedure for amendments to primary legislation.

### ***Clauses 1(4) and 1(5)***

<i>Power conferred on:</i>	<i>Registrar General</i>
<i>Power exercisable by:</i>	<i>Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>None</i>

### **Effect of the provision**

19. This clause enables regulations under clause 1(1) to sub-delegate regulation making powers to the Registrar General under section 74(1) of the 1949 Act. The provision that may be sub-delegated is set out in paragraphs (a) to (f) of clause 1(4) and relates to administrative aspects of the registration process, such as prescribing forms, making provision for corrections to register entries and for the keeping of books, documents or other records. These regulations are intended to supplement the corresponding provisions of the 1949 Act

### **Justification of the delegation**

20. It is considered appropriate for the detailed provision relating to these administrative matters to be sub-delegated to the Registrar General in order to match (and in some cases replace) the Registrar General's existing powers to make regulations under the 1949 Act (see the Registration of Marriages Regulations 2015), so as to enable provision to be made in one instrument.

21. The Registrar General already has powers to prescribe, for example, the form of marriage register entry and the particulars to be registered (section 55(1) of the 1949 Act); and the form of certificates of a superintendent registrar (section 31(2)). These powers will be replaced by the power to prescribe the form and content of marriage schedule and marriage document (which will contain the particulars required to be registered).

22. The Registrar General also has existing powers to make provision about the custody of marriage register books (section 59), which will be replaced by new powers to make provision about the keeping of signed marriage schedules or documents, and the custody of pre-commencement register books. It is likely that in most cases, pre-commencement register books (currently held in register offices, churches and other religious premises) will continue to be held in those locations, but will be required to be annotated so as to indicate that the books are no longer in use, and that certified copies may not be issued from them.

23. The Registrar General's existing powers to prescribe the duties of persons authorised to register marriages (section 74(1)(a) of the 1949 Act), and the duties of registrars and superintendent registrars in the execution of any enactment relating to their functions (section 20(a) Registration Service Act 1953) are used to make provision about functions relating to corrections to marriage register entries (see regulations 16 to 20 of the Registration of Marriages Regulations). This

provision will be replaced by the new powers to make provision about corrections to entries in the marriage register or pre-commencement marriage register books (paragraph (d) of clause 1(4)).

24. Whilst it is true to say that the 1949 Act itself does at present contain provision relating to corrections and the custody of register books, for example, this is attributable to the age of the legislation, which contains a level of administrative detail that would be considered inappropriate if the Act were passed today. By contrast, the Civil Partnership Act 2004 ('the 2004 Act'), delegates provision about corrections and custody of documents to regulations made by the Registrar General (section 36(1) and (2)(b) of the 2004 Act and regulations 19 and 20 of the Civil Partnership (Registration Provisions) Regulations 2005).

### **Justification of the level of Parliamentary Scrutiny**

25. The Registrar General's existing powers to make regulations (under the 1949 Act, the 2004 Act and elsewhere) are subject to no parliamentary procedure, as the Registrar General cannot speak to them in Parliament. For reasons given above, it is appropriate that the Secretary of State is enabled to sub-delegate administrative aspects of the registration process to no procedure regulations made by the Registrar General for reasons of consistency with the Registrar General's existing powers, to reduce the number of statutory instruments required to be made, and in doing so, to enhance the clarity of the legislative scheme.

#### ***Clause 2: Reform of civil partnership***

##### ***Clauses 2(1), 2(2) and 2(3)***

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative, laid before and approved by a resolution of each House of Parliament</i>

### **Effect of the provision**

26. The power in clause 2(1) seeks to require and enable the Secretary of State to make regulations to change the law relating to civil partnership, with the intention of bringing about equality between same-sex couples and other couples, in terms of their future ability or otherwise to form civil partnerships. This will require changes to be made to the Civil Partnership Act 2004.

27. Clause 2(2) imposes a duty to give effect to the intended equality within 6 months of the Bill reaching Royal Assent.

28. Clause 2(3) seeks to provide that "other couples" means couples who are not of the same sex, by reference to the eligibility criteria set out in section 3(1)(a) of the CPA.

### **Justification of the Delegation**

29. Proceeding by way of secondary legislation enables an ECHR incompatibility to be addressed quickly.

### **Justification of the level of Parliamentary Scrutiny**

30. As bringing about equality as set out in clause 2(1) will require changes to be made to primary legislation, the regulations will be subject to the affirmative resolution procedure, ensuring the opportunity for scrutiny in both Houses of Parliament. This is the appropriate procedure for amendments to primary legislation.

### ***Clause 4: Coroners' investigations into still-births***

*Power conferred on:* Lord Chancellor

*Power exercisable by:* Statutory Instrument

*Parliamentary procedure:* Affirmative, laid before and approved by a resolution of each House of Parliament.

### **Effect of the provision**

31. Clause 4 requires the Secretary of State to prepare and publish a report into whether and, if so, how the law should be changed to enable or require coroners to investigate still-births. Once the report has been published, clause 4(4)(a) confers a power on the Lord Chancellor to make regulations to amend Part 1 of the Coroners and Justice Act 2009 to enable or require coroners to conduct investigations into still-births. There is further provision about the power to make the regulations in clause 5. Under clause 4(2) "still-births" is given the meaning in section 41 of the Births and Deaths Registration Act 1953. Section 41 of that Act provides: "'still-born child" means a child which has issued forth from its mother after the twenty-fourth week of pregnancy and which did not at any time after being completely expelled from its mother breathe or show any other signs of life, and the expression "still-birth" shall be construed accordingly". Part 1 of the Coroners and Justice Act 2009 contains the current powers of coroners to investigate deaths.

32. Power to make regulations is given to the Lord Chancellor rather than the Secretary of State in order to be consistent with the Coroners and Justice Act 2009, which confers certain functions in relation to coroners on the Lord Chancellor. For example, section 43 confers a power on the Lord Chancellor to make regulations on the practice and procedure in relation to coroners' investigations with the agreement of the Lord Chief Justice.

33. Clause 4(4)(b) provides that regulations may limit the circumstances in which investigations are to take place, for example, this power could be used to provide that an investigation is limited to still-births of a specified gestation period. Clause 4(4)(c) provides that regulations may provide the purposes of a coroner's investigation into a still-birth. The primary purpose of a coroner's investigation into a death is to confirm the identity of the deceased and when and how they came about their death where it was not by natural causes. In still-birth cases we may wish for coroner investigations to identify the reasons the baby was not delivered alive regardless of whether this was a natural occurrence or otherwise for the purposes of contributing to the general improvement

in maternity care. Under clause 4(4)(d) regulations may make provision equivalent or similar to provisions in Part 1 of the CJA that relate to investigations into deaths.

34. Under subsection (5) of clause 4, regulations may not create criminal offences other than by applying (with necessary modifications), or making equivalent or similar provision to, provision already contained in Part 1 of the CJA. Subsection (5) also provides that regulations may not confer any power to make provision of a legislative character other than applying, or making equivalent or similar provision, to provision already contained in Part 1 of the CJA. For example, this power could be used to make provision equivalent to the Lord Chief Justice's power in section 45 of the CJA to make rules relating to inquests.

35. Under clause 4(6) the power to make regulations will cease to be exercisable after the period of five years beginning with the day on which the report is published under clause 4(3).

36. The power to make regulations amending Part 1 of the CJA under clause 4 is subject to the affirmative resolution procedure (clause 5(6)). Under clause 5(4) regulations may make different provision for different purposes; provision generally or for specific cases; provision subject to exceptions; or incidental, supplementary, transitional, transitory or saving provision.

### **Justification of the Delegation**

37. It is considered appropriate for the detailed provision to be contained in regulations. Clause 4 contains a statutory requirement for the Secretary of State to prepare and publish a report into whether and how the law should be changed to enable or require coroners to investigate still-births. That report will necessarily consider the views of stakeholders such as the Chief Coroner, coroners themselves, medical professionals, bereaved parents and organisations that support them. A broad range of issues need to be thought through such as which gestation period of a still-birth ought to be investigated, whether the coroner should have a duty or discretion to investigate, should the coroner investigate all cases or should additional factors such as alleged medical negligence be present, what powers should the coroner have in conducting an investigation (such as powers to conduct a post-mortem or require evidence), when is an inquest hearing needed and what arrangements should be made for the involvement of the family and other interested parties. These are important issues on which we expect there to be a range of views that should be properly considered before any change is made.

38. Any change will therefore be the product of a thorough consideration of all available evidence and views. As stated above in relation to the reason for the delegated powers, it is not possible to undertake this exercise in the limited time available during the passage of the Bill, however, this is an area where consideration of change is considered important and the opportunity to use the Bill to make any necessary change should not be lost due to lack of time.

39. We consider that the powers are limited to what is necessary. The power provides for amendment of Part 1 of the CJA because that Part contains the current provisions on coroners' investigations into deaths. The limited purpose of the power is to make provision concerned with enabling or requiring coroners to investigate still-births. The power gives the Lord Chancellor

flexibility in how to make such provision to amend Part 1 of the CJA because of the need to consider fully whether the law should be changed and if so how. Safeguards are written into the clause to ensure the delegated powers are used effectively. Clause 4(5) makes clear that regulations cannot be used to create any criminal offences unless the offence has an equivalent in Part 1 of the Coroners and Justice Act 2009. Any provision that confers a power to make provision of a legislative character must also have an equivalent in Part 1 of the CJA. Clause 5(6) provides that the regulations will be subject to the affirmative resolution procedure and be laid in draft and approved by a resolution of both Houses of Parliament.

40. Clause 4(6) contains a sunset clause making sure the power to make regulations is not open-ended. The power to make regulations will cease to be exercisable after the period of five years beginning with the day on which the report is published under clause 4(3).

### **Justification of the level of Parliamentary Scrutiny**

41. The powers in clause 4 enable amendment of Part 1 of the Coroners and Justice Act 2009. The regulations will, pursuant to clause 5(6), be subject to the affirmative resolution procedure requiring a draft to be laid before and approved by a resolution of both Houses of Parliament. We propose that this is the appropriate procedure for amendments to primary legislation.

### ***Clause 5: Supplementary provision about regulations***

#### ***Clause 5(1)(a)***

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative, laid before and approved by a resolution of each House of Parliament.</i>

42. Clause 5(1)(a) confers a power on the Secretary of State to amend the Marriage of British Subjects (Facilities) Acts 1915 and 1916 so that they no longer apply in England and Wales.

43. The 1915 and 1916 Acts make provision for a mutual recognition regime for certain types of notices of marriage for marriages between British subjects where one party is resident in one of certain commonwealth countries and the other is resident in England. This regime is, without significant amendment, incompatible with the introduction of a marriage schedule system as it is dependent on the existence of standalone certificates for marriage books (which will be replaced by marriage schedules and marriage documents under the new regime). It is therefore necessary to dis-apply the mutual recognition regime in the two acts in England and Wales when the schedule system has been introduced.

44. Whilst such changes are consequential in nature (and therefore fall within the scope of clause 5(1)(b)) this provision has been included on the face of the Bill to bring this proposed amendment to the attention of Parliament. Any such changes would be subject to the affirmative procedure as we propose that this is the appropriate procedure for amendments to primary legislation.

### **Clause 5(1)(b)**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative if regulations amend or repeal any provision of primary legislation (with or without other provision); otherwise negative</i>

45. Clause 5(1)(b) confers a power on the Secretary of State to make provision in consequence of regulations under clause 1, including power to amend, repeal or revoke any provision made by or under primary legislation whenever passed or made. ‘Primary legislation’ is defined in clause 5(8) and includes Scottish, Northern Irish and Welsh primary legislation and Measures of the Church of England.

46. The reforms to marriage registration processes enabled by the Bill will require consequential amendments to primary legislation, including Scottish legislation. It is prudent to enable consequential amendments to be made to Northern Irish, Welsh and Church legislation in case there are consequential amendments required that have not yet been identified.

47. Where the regulations amend primary legislation they will be subject to the affirmative resolution procedure, as we propose is appropriate for such amendments. However, where they do not amend or repeal primary legislation, they will be subject to the negative resolution procedure (clause 5(7)). The negative procedure is considered to be appropriate for regulations setting out marriage registration processes (except to the extent that these may be sub-delegated to the Registrar General). The choice of procedure has been guided by what is currently in the Marriage Act 1949 such as the power in section 65A to make regulations, which is also subject to the negative resolution procedure.

### **Clause 5(2)**

<i>Power conferred on:</i>	<i>Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative if regulations amend or repeal any provision of primary legislation (with or without other provision); otherwise negative</i>

48. Clause 5(2) confers a power on the Lord Chancellor to make provision in consequence of regulations under clause 4, including power to amend, repeal or revoke any provision made by or under primary legislation whenever passed or made. ‘Primary legislation’ is defined in clause 5(8) and includes Scottish, Northern Irish and Welsh primary legislation and Measures of the Church of England.

49. As well as amending parts of the CJA other than Part 1, this power might be used to make amendments to other legislation. For example, the Cremation (England and Wales) Regulations 2008 include provision in regulations 16 and 18 permitting the use of a coroner’s certificate as part of an application for the cremation of a deceased person. If regulations relating to still-birth investigations are to be made, consideration would need to be given as to whether any

consequential changes should be made to these cremation Regulations as part of introducing coroner investigations of still-birth cases.

50. Changes made under this power would be subject to the affirmative procedure if they amend primary legislation and the negative resolution procedure (clause 5(7)) where they do not amend primary legislation. This is considered appropriate as, whilst we propose the affirmative procedure is appropriate for amendments to primary legislation, we believe any regulations under clause 4 that do not amend primary legislation would be of a minor and technical nature. The choice of procedure has been guided by what is currently in Part 1 of the Coroners and Justice Act 2009 and the power in section 43 to make regulations, which is also subject to the negative resolution procedure.

**Home Office**  
**14 January 2019**