

**Civil Partnerships, Marriages and Deaths (Registration etc) Bill**  
**Supplementary Delegated Powers Memorandum (Civil Partnerships)**  
**By the Home Office**

**a) Introduction**

1. Clause 2 of the Bill, as amended at Committee in the House of Lords on 1 February, requires the Secretary of State to make regulations to amend the Civil Partnership Act 2004 (“the CPA”) so that two people who are not of the same sex are eligible to form a civil partnership in England and Wales, with such regulations coming into effect no later than 31 December 2019. Clause 2 and clause 5(2) also permit the Secretary of State to make other related provision by regulations as described more fully below.
2. Regulations made under the powers are intended to rectify the existing inequality between same-sex and opposite-sex couples in terms of both their eligibility to form civil partnerships and their access to the rights, benefits and obligations which flow from civil partnership and which are currently available only to same-sex couples. At present, same-sex couples can choose between a civil partnership or marriage, but opposite-sex couples are able only to marry. The provisions in 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>.

**b) Reasons for the delegated powers**

3. 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 access to civil partnership and the resultant rights, benefits and obligations, will need to be removed.
4. Clause 2 does this by enabling removal of the same-sex requirement in the CPA. Government policy, as announced by the Prime Minister on 2 October 2018, is to remove the difference in treatment by extending eligibility, rather than by abolishing civil partnership or phasing it out.

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

5. The clause also facilitates changes to the existing law on civil partnership to ensure it functions to confer appropriate rights on opposite-sex couples, and to make other appropriate provision related to the extension of eligibility.
6. Marriage and civil partnership are devolved to Scotland and Northern Ireland. Respecting the convention that Parliament will not normally legislate in relation to devolved matters without the consent of the relevant devolved administration, clause 2 facilitates extension of civil partnership to opposite-sex couples as a matter of the law of England and Wales only.

### **c) Effect of the provisions**

#### **Clause 2(1), 2(3), 2(5) and 2(7)**

<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>

7. Subsection (1) of clause 2 seeks to remove the difference in treatment between same-sex and opposite-sex couples by allowing civil partnership to be extended to opposite-sex couples, in England and Wales only. The same-sex requirement is preserved in the law of Scotland and Northern Ireland (including the law relating to recognition in Scotland and Northern Ireland of civil partnerships formed in overseas jurisdictions).
8. The scope of the power is limited: it can be exercised to enable opposite-sex couples to form a civil partnership only if they would be eligible to do so but for the question of sex. The effect of this is to preserve the remaining bars to eligibility set out in section 3 of the CPA, which prevent two people from forming a civil partnership if either of them is already a civil partner or lawfully married, if either of them is under 16, or if they are within prohibited degrees of relationship as determined by and under Part 1 of Schedule 1 to the CPA (for example if they are siblings).
9. Subsection (3) confers a power to make other provision that appears to the Secretary of State to be appropriate in view of the extension of eligibility to opposite-sex couples. The current civil partnership regime is bespoke to same-sex couples. Subsection (3) enables the Secretary of State to ensure that a coherent scheme can be introduced for opposite-sex couples, whilst confining him or her to making provision which is rationally connected to the extension of eligibility.

10. Subsection (4) sets out more detail of the matters that might be covered by regulations made under (3).
11. Subsection (5) allows the Secretary of State to make provision in relation to conversion. Civil partnership was created to allow same-sex couples to formalise their relationship at a time when marriage was not available to them. When marriage was extended to same-sex couples in the Marriage (Same-Sex Couples) Act 2013 (“the MSSCA”), same-sex couples were also given the right to convert their civil partnership into a marriage. The government intends to consult on the question of conversion and thereafter will determine whether and how to exercise the power in subsection (5), and whether changes should be made to the existing right to convert conferred by section 9 of the MSSCA. Subsection (6) provides that the Secretary of State must consult before making regulations under subsection (5).
12. Subsection (7) permits the Secretary of State to protect the ability to act in accordance with religious belief in relation to civil partnership. The existing law seeks to reconcile the right to manifest one’s religion or belief with the rights of others<sup>2</sup>. This subsection would enable appropriate provision to be made to ensure religious freedoms continue to be protected in relation to the new civil partnership regime.

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

<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>

13. Clause 5(2) confers a power on the Secretary of State to make provision in consequence of regulations under clause 2, including the 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.
14. The current civil partnership regime is bespoke to same-sex couples. A power to make consequential provision will enable anomalies which arise

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<sup>2</sup> By way of example, religious organisations are free to decide not to host civil partnership conversions.

from extension of the regime to opposite-sex couples to be addressed, for example provisions which assume that civil partners are of the same sex.

15. Where the regulations amend primary legislation, they will be subject to the affirmative resolution procedure, which 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)).

#### **d) Justification of the Delegation**

16. The powers are necessary to allow the government to address the incompatibility identified by the Supreme Court at the earliest opportunity. The government had originally intended to rectify this incompatibility through a second session bill, as announced by the Minister for Women and Equalities in a Written Ministerial Statement to Parliament on 26 October. On the same day, however, the House of Commons decided on an alternative and speedier approach to equalising access to civil partnerships by agreeing to an amendment to the Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill. This approach, and the timelines for the Bill, mean that the government has not yet settled the policy relating to all of the issues beyond the extension of eligibility. Some of these issues, such as conversion, will require further discussion with key stakeholders and a public consultation exercise.
17. The powers in the previous version of clause 2, as agreed by the Commons at Report stage, would not have operated to give opposite-sex couples the equivalent rights and benefits to those enjoyed by same-sex couples. The Committee recommended in its Report on the Bill<sup>3</sup> (paragraph 31) that the changes to the CPA needed to remedy the incompatibility referred to in the Supreme Court's judgment should appear in clause 2 itself, and that the regulation-making power in clause 2 should be narrowed so that it would allow only for necessary consequential amendments to other legislation.
18. The changes to eligibility suggested in paragraph 24 of the Committee's report would involve legislating for Scotland and Northern Ireland in a devolved area, which is not the government's intention, and would not make provision for recognition of equivalent opposite-sex relationships formed overseas. More fundamentally, such an approach would prevent the government from establishing a fully functioning and compliant opposite-sex civil partnership regime to the extent that this requires provision – for example

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<sup>3</sup> 45th Report of Session 2017-19

in relation to conversion rights – that goes beyond that which is consequential on the extension of eligibility.

19. In paragraph 27 of its Report on the Bill, the Committee raised the option of using the order-making power conferred by section 10 of the Human Rights Act 1998 (“the HRA”). The remedial order procedure is available only where there are compelling reasons for making use of it. In their report on ‘Making of Remedial Orders’ the JCHR (Seventh Report of Session 2001-02 at [33]) gave several examples of when it may, in the JCHR’s view, be appropriate to make a remedial order rather than enact primary legislation, none of which appear to apply to this case.<sup>4</sup>
20. The remedial order procedure would also confine the government to addressing the specific incompatibility that is the subject of the declaration, together with making incidental, supplemental, consequential or transitional provision. It would not enable the Minister to make other changes that might be desirable, or which are necessary for a reason other than to remove the incompatibility. Again, this would create the risk that government would not be able to establish a fully-functioning and compliant opposite-sex civil partnership regime.
21. The powers in new clause 2 will enable the government to tackle a range of complex and partly technical issues relating to the introduction of opposite-sex civil partnerships, such as parental responsibility, the effect of a legal change of gender, the financial consequences of a partnership and any conversion entitlements. On some of these issues, such as conversion rights, it is important that the government seeks the views of interested parties, including religious organisations, before legislating. Clause 2(6) therefore requires the Secretary of State to consult before making regulations on conversion.
22. The powers in clause 2 will enable the government to put in place a fair and fully-functioning regime for opposite-sex couples at the same time as eligibility is extended, to ensure couples have certainty about their legal rights and obligations when they register as civil partners.

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

23. The extension of eligibility to form a civil partnership to opposite-sex couples will require changes to be made to primary legislation. Any regulations made

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<sup>4</sup> The examples given are: when legislation is subject to a review with a view to major legislative reform in a number of years; where the legislative timetable is fully occupied by other important legislation; or where the need to remedy an incompatibility should be prioritised and a remedial order will cause less delay (e.g. where an incompatibility affects the life, liberty, safety or physical or mental integrity of an individual).

under subsections (3), (5) and (7) of clause 2 to create a coherent new civil partnership regime may also require changes to both primary and secondary legislation. Clause 5 of the Bill, as amended in Committee, now makes any regulations made under clause 2 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.

24. The Committee stated in paragraph 27 of its Report that it would be inappropriate for the Bill to confer a power with a less stringent parliamentary procedure than that for remedial orders (the super-affirmative procedure). While noting the Committee's concerns, the power in the amended clause 2 is now more narrowly constructed. While the HRA power would allow the government to remedy any declaration of incompatibility in any way, the power in clause 2 only allows the government to remedy a specified incompatibility in one way that will have been debated by Parliament. The government's view is that the super-affirmative procedure would not be appropriate for this level of delegation.

Home Office

14 February 2019