

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

21st Report of Session 2017–19

Registration of Marriage Bill [HL]

Ordered to be printed 18 April 2018 and published 18 April 2018

Published by the Authority of the House of Lords

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:

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

Registered Interests

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Publications

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General Information

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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 and the fax number is 020 7219 2571. The Committee's email address is hlddelegatedpowers@parliament.uk.

Historical Note

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

Twenty First Report

REGISTRATION OF MARRIAGE BILL [HL]

1. This six-clause private member's Bill was introduced in the House of Lords by the Lord Bishop of St Albans on 29 June 2017. The Bill received its second reading on 26 January 2018. The Bill is supported by the Government. An identical private member's Bill¹ was introduced in the House of Commons on 14 November 2017 and has its second reading on 27 April 2018.
2. The Explanatory Notes for the Bill state that its purpose is to allow the system of marriage registration in England and Wales to be changed from one which is paper-based (and relies on the maintenance of around 84,000 hard-copy marriage registers) to one which is electronic (with a single electronic register).
3. The Lord Bishop of St Albans began his second reading speech with the words, "My Lords, the purpose of this Bill is to correct a clear and historic injustice".² He was referring to the fact that the names of the mothers of spouses are not recorded in marriage registers.³ He explained that making the necessary change for all future marriages, "is not as simple as creating another box for mothers' names on marriage certificates ... To do so would require 84,000 hard-copy marriage registers, located around the country, to be replaced at a cost of roughly £3 million". An electronic system would allow the change to be made much more easily, and (he argued) would make marriage registration records more secure.
4. Leaving aside the 'wrapping up' provisions⁴ in clauses 5 and 6, the Bill consists entirely of powers to make delegated legislation:
 - Clause 1 confers a very broad power on the Secretary of State to make regulations about marriage registration.
 - Clause 2 allows the Secretary of State, by regulations under clause 1, to give the Registrar General⁵ power, exercisable with the approval of the Secretary of State, to make tertiary legislation (by regulations not subject to Parliamentary procedure) about specified matters (described in the Explanatory Notes as "administrative aspects" of marriage registration).
 - Clause 3 allows the Secretary of State to make provision by regulations in consequence of regulations under clause 1.
 - Clause 4 contains supplementary provision about regulations under clause 1 or 3 (including allowing regulations under clause 1 or 3 to make transitional or saving provision).

1 The Registration of Marriage (No.2) Bill.

2 HL Deb, 26 January 2018, cols 1233–34.

3 Since 1837, marriage register entries in England and Wales have contained information about the fathers of spouses but not the mothers of spouses.

4 On interpretation, extent, commencement and short title.

5 Head of the General Register Office for England and Wales, which is the government agency responsible for the recording of births, marriages and deaths.

5. Clauses 1 and 3 confer Henry VIII powers. Regulations under those clauses that amend or repeal primary legislation are subject to the affirmative procedure⁶ and are otherwise subject to the negative procedure. Regulations made by the Registrar General under clause 2 must be made by statutory instrument but are not subject to any Parliamentary procedure.
6. The Home Office has produced a Delegated Powers Memorandum for the Bill.⁷
7. No illustrative regulations have been produced for the Bill. At the Bill's second reading in the House of Lords, Baroness Williams (Minister of State, Home Office) said that it was the Government's aim to make draft regulations available before Committee stage.⁸ The Bill was scheduled to be considered in Committee on 19 April 2018.
8. We draw the following powers to the attention of the House.

Clause 1—power for Secretary of State to make regulations about marriage registration

9. This clause allows the Secretary of State by regulations “to make provision in relation to the registration of marriages in England and Wales”. This includes power to amend or repeal provision made in any Act of Parliament.⁹
10. Clause 1(3) contains a non-exhaustive list of matters which the regulations may provide for by amending the Marriage Act 1949 (“the 1949 Act”).
11. We draw the House's attention to two points in particular about clause 1:
 - it provides for all amendments to primary legislation to be made by delegated legislation;
 - it confers a very broad power, far wider than that required to achieve the policy aims set out in paragraphs 2 and 3 above.

(1) All amendments to primary legislation are to be made by delegated legislation

12. It is clear that it is necessary to amend the 1949 Act to allow the registration system to be changed from one that is paper-based to one which is electronic, yet no amendments to that Act (or any other Act) appear on the face of the Bill itself.¹⁰ Instead, clause 1 provides for all such amendments to be made by regulations.
13. This is justified in the Delegated Powers Memorandum with the following arguments:
 - (a) “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”;¹¹ and

6 See clause 4(3).

7 Home Office, Registration of Marriage Bill [HL] [Delegated Powers Memorandum](#), the final version of which was received on 16 April 2018.

8 HL Deb, 26 January 2018, [col 1248](#).

9 See clause 1(2).

10 Nor has the option of amending primary legislation by Legislative Reform Order under the Legislative and Regulatory Reform Act 2006 been pursued.

11 See paragraph 3 of the Delegated Powers Memorandum.

- (b) “the use of secondary legislation ... provides the ability to amend process in response to change, for example to keep pace with technological developments”.¹²

14. The Committee does not find these arguments persuasive:
- (a) while amendments to primary legislation about marriage registration may not necessarily be controversial, the Bill does not provide an opportunity for Parliament to see what changes the Government wish to make and then to debate them. And we cannot know what further changes future Governments might use the power to make. Clause 1(1) confers a very broad power: it would enable wide-ranging and potentially controversial changes;
- (b) flexibility of this kind comes at the expense of allowing Parliament the opportunity to scrutinise a Bill making the changes to primary legislation that the Government intend to make, and to make amendments; and nothing is said to substantiate the reference to “technological developments”.
15. An obvious and acceptable alternative to the Bill consisting entirely of powers to make delegated legislation is for the necessary amendments to the 1949 Act (and any other Act) to appear on the face of the Bill itself, perhaps coupled with more focused powers to deal with detailed aspects of marriage registration by regulations.
16. **In our view, insufficient justification has been provided in the Delegated Powers Memorandum for adopting the approach that none of the changes to primary legislation which are intended to be made in connection with the establishment of a system of electronic registration is made by the Bill itself, and instead all such changes are left to be made by Ministers in regulations.**
17. **The Committee therefore consider that clause 1 of the Bill contains an inappropriate delegation of power.**

(2) Clause 1 confers a very broad power

18. **In any event, the Committee also draws the attention of the House to the breadth of the power conferred by clause 1, which in our view would allow much more wide-ranging change than the stated policy aims require.**
19. At first sight, the list of matters in clause 1(3)(a) to (f) (which regulations may provide for by amending the 1949 Act) suggests a narrowly-focused power. However, this is not the case: (a) to (f) are simply examples of matters which the regulations may provide for. This is apparent from the following:
- clause 1(1), which confers a broad power on the Secretary of State to “make provision in relation to the registration of marriages”;
 - the opening words of clause 1(3) (“the regulations may, *in particular* ...”); and

¹² See paragraph 3 of the Delegated Powers Memorandum.

- the ‘catch-all’ words in clause 1(3)(g), which allow regulations to amend the 1949 Act “to make other provisions in relation to the registration of marriages”.
20. The Department’s explanation¹³ is that, “although other provision is not anticipated”, the power provides “the ability to make any associated or unforeseen amendments needed to the 1949 Act and other legislation”; and “is required to mitigate the risk of unforeseen changes resulting from technicalities in the implementation process”.
 21. This suggests to us that it has not yet been determined what amendments are required to the 1949 Act (and any other Act) to allow the introduction of an electronic marriage register. Yet reform of the registration system is not a new idea. Indeed, at second reading, the Lord Bishop of St Albans explained in his opening speech that the Church, the Home Office and the General Register Office have been working “for many years” on the finer points of implementation of change to that system.
 22. In fact, the power provides a means by which the laws about the registration of marriage could be completely rewritten in regulations. It would give Ministers the following options:

EITHER (A) to make textual amendments to the 1949 Act;

OR (B) to repeal all the current relevant provisions of that Act and to create a new regime about marriage registration in regulations.
 23. The affirmative procedure would apply to the initial regulations under Option A or B, but future regulations under Option B would be subject to the negative procedure only.
 24. **The Committee’s view is that no sufficient justification has been given for the Bill conferring such broad regulation-making powers on the Secretary of State. Any such power should be limited to making provision in connection with the establishment of a system of electronic registration.**¹⁴

Clause 2—power for Registrar General to make regulations

25. This clause allows the Registrar General to make tertiary legislation (because it allows regulations made by the Secretary of State under clause 1 to sub-delegate regulation-making powers to the Registrar General).
26. Clause 2(1) lists the matters in respect of which the Registrar General may be given power to make regulations. Those matters relate to administrative aspects of the registration process, such as prescribing the form and content of marriage records, corrections of such records and the keeping of such records. Regulations made by the Registrar General require the approval of the Secretary of State and must be made by statutory instrument, but are not subject to Parliamentary procedure.

¹³ See paragraph 5(e) of the Delegated Powers Memorandum.

¹⁴ One which allows the name of each spouse’s mother to be included in marriage register entries.

27. The list of matters in clause 2(1) is exhaustive. Most are comparable to matters in respect of which the Registrar General has existing powers to make delegated legislation but the Committee notes that two of these matters (correction of existing marriage records¹⁵ and the keeping of such records¹⁶) are matters which, under existing law, are provided for in primary legislation (the 1949 Act).
28. **The Committee considers that the Delegated Powers Memorandum has provided reasonable justification for the powers in clause 2, save that the House may wish to seek an assurance that the scope of the powers conferred (in particular by clauses 2(1)(d) and (e)) would not allow provision to be made in relation to matters which, under existing law, are provided for in primary legislation.**

15 See clause 2(1)(d).

16 See clause 2(1)(e).

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 18 April 2018, Members declared the following interests in relation to the Registration of Marriage Bill [HL]:

Lord Lisvane

Married to a Church of England priest who solemnises marriages

Attendance

The meeting on the 18 April 2018 was attended by Lord Blencathra, Lord Flight, Lord Jones, Lord Lisvane, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.