



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

48th Report of Session 2017–19

**Civil Partnerships, Marriages
and Deaths (Registration etc) Bill:
Amendments**

**Civil Partnerships, Marriages
and Deaths (Registration etc) Bill:
Response**

Ordered to be printed 20 February 2019 and published 22 February 2019

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:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

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Publications

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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.

Forty Eighth Report

CIVIL PARTNERSHIPS, MARRIAGES AND DEATHS (REGISTRATION ETC) BILL: AMENDMENTS

1. The Committee reported on this Private Member's Bill on 29 January.¹ It is sponsored in the House of Lords by Baroness Hodgson of Abinger and supported by the Government. Report stage is scheduled to take place on 1 March.
2. Lady Hodgson responded to the Committee's report by a letter dated 12 February (see Appendix 1 to this report). The Committee had made recommendations in relation to clauses 1, 2 and 4 of the Bill. None of the Committee's recommendations was accepted. Given the unconvincing arguments made by the Government (to which we refer below in relation to clause 2), this response was particularly disappointing.
3. At Committee Stage on 1 February, the House agreed to amendments which substituted an entirely new clause 2 (about civil partnerships) and made consequential amendments to clause 5 and the long title. The changes were made because the Government doubted whether the original version of clause 2 would "deliver an effective and comprehensive opposite-sex partnership regime in the time it provided for".²
4. The Home Office has provided a supplementary memorandum about the delegated powers in the new clause 2, which are examined below.

Clause 2—Power to amend the Civil Partnership Act 2004

The original clause 2

5. Clause 2(1) in the Bill as introduced in the Lords imposed a duty on the Secretary of State to make regulations, within six months of Royal Assent, to change the law relating to civil partnership so as to "bring about equality between same-sex couples and other couples in terms of their future ability or otherwise to form civil partnerships".
6. The clause made provision for the amendment of the Civil Partnership Act 2004 ("the 2004 Act") and other legislation by regulations so as to allow an opposite-sex couple to form a civil partnership. The Supreme Court had declared in a judgment last year that provisions in the 2004 Act restricting civil partnerships to same-sex couples were incompatible with the European Convention on Human Rights ("ECHR").
7. In our earlier report, we criticised the width of this Henry VIII power, and the inadequate justification given in the Home Office's original delegated powers memorandum. We commented:

"More generally, we consider the power conferred by clause 2 to be objectionable as a matter of principle. Under this country's constitution, it is for Parliament not Ministers to make laws. This Committee and the

1 Delegated Powers and Regulatory Reform Committee, *Forty Fifth Report* (45th Report, Session 2017–19, HL Paper 274)

2 See the Minister's speech at Second Reading: HL Debs, 18 January 2019, [col 452](#).

Constitution Committee have repeatedly said that Henry VIII powers should be conferred only where there is very clear justification for them—which is wholly lacking in this case.

Moreover, Members of both Houses may well wish to debate the principle of allowing an opposite-sex couple to form a civil partnership, and to table amendments to the proposed legislation needed to give effect to this. They would not have this opportunity with affirmative procedure regulations.”³

8. We therefore recommended that the amendments to the 2004 Act to remedy the ECHR incompatibility identified by the Supreme Court should appear on the face of the Bill, rather than be dealt with in regulations, and that the Henry VIII regulation-making power should be narrowed so that it would allow for only necessary consequential amendments to other legislation. The Committee also questioned why the Home Office had not brought forward a proposed order under section 10 of the Human Rights Act 1998 so as to remedy the ECHR incompatibility detected by the Supreme Court.

The new clause 2

9. The new clause 2 is significantly more detailed than the previous version which was nothing more than a bare enabling power. It allows the Secretary of State by regulations:
- to amend the 2004 Act to allow an opposite-sex couple to form a civil partnership;
 - to make any other provision that the Secretary of State considers appropriate in view of the extension of civil partnerships to opposite-sex couples, and in particular to deal with the matters specified in subsection (4) (for example, about parenthood and parental responsibility and the financial consequence of civil partnership);
 - to allow for—
 - the conversion of a marriage into a civil partnership, or
 - (conversely) restricting or abolishing the existing right to convert a civil partnership into a marriage, or any new right conferred by regulations under clause 2(5)(a) to convert a marriage into a civil partnership;
 - to make “any provision that the Secretary of State considers appropriate in order to protect the ability to act in accordance with religious belief in civil partnership (including the conversion of civil partnership into marriage and vice versa)”.
10. The affirmative procedure will apply to any regulations the Secretary of State wishes to make under clause 2.⁴

³ Delegated Powers and Regulatory Reform Committee, *Forty Fifth Report* (45th Report, Session 2017–19, HL Paper 274), paras 28 and 29

⁴ *Civil Partnerships, Marriages and Deaths (Registration etc) Bill*, clause 5(7) [HL Bill 158 (2017–19)]

11. The Secretary of State may also make regulations in consequence of clause 2, by affirmative procedure if they amend primary legislation or negative procedure in other cases.⁵
12. The Secretary of State will be required to consult before making regulations under clause 2(5) about conversion of civil partnerships into marriage or vice versa, but not before using any other power conferred by that clause.⁶

Government's response

13. The supplementary memorandum (paragraph 18) explains why the Government rejected our recommendation that the necessary amendments to the 2004 Act to give effect to the Supreme Court's judgment should appear on the face of the Bill, coupled with a more limited power to make other necessary changes by regulations. The reasons given are that the Committee's approach would:
 - involve legislating for Scotland and Northern Ireland in a devolved area; and
 - prevent the Government from "establishing a fully functioning and compliant opposite-sex partnership regime, for example in relation to conversion rights—that goes beyond that which is consequential on the extension of eligibility".
14. We find neither of these reasons convincing:
 - The Committee had not suggested that clause 2 should extend to Scotland and Northern Ireland as well as to England and Wales.
 - The Government have had ample time to work out what amendments are needed to the 2004 Act so as to remove the ECHR incompatibility identified by the Supreme Court, and have failed entirely to address the Committee's suggestion, set out in paragraphs 24 and 25 of its earlier report, that, referencing the Bill introduced by Baroness Burt of Solihull on 13 July 2017, the amendments to the 2004 Act would be "straightforward" and "neither lengthy not complex".
 - Including these principal changes to the 2004 Act on the face of the Bill, along with more focused regulation-making powers to make necessary supplementary or consequential provision, would not prevent the Government from achieving "a fully functioning and compliant ... regime".
15. The supplementary memorandum (paragraph 21) asserts that—

"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 civil 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

5 [Civil Partnerships, Marriages and Deaths \(Registration etc\) Bill](#), clause 5(2), (7) and (8)

6 The supplementary memorandum gives no reason for this discrepancy.

legislating. Clause 2(6) therefore requires the Secretary of State to consult before making regulations on conversion.”

16. However, the supplementary memorandum does not adequately explain why:

- subsection (3) confers on the Secretary of State a power “to make *any other provision that appears to [him or her] to be appropriate* in view of the extension of civil partnerships to opposite-sex couples” instead of a limited power simply to deal with the matters specified in subsection (4) by regulations;
- there is no duty on the Secretary of State to consult except in relation “conversion” regulations under subsection (5);
- there is no time limit on the exercise of any of the powers conferred by clause 2.

17. The supplementary memorandum also fails to justify the inclusion of clause 2(7). Paragraph 12 merely says, rather delphically, that it would permit—

“... 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.⁷ 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.”

18. This does not explain why existing provisions of the 2004 Act are considered inadequate to protect religious freedoms, or why subsection (7) is drafted as a free-standing power not linked to the extension of civil partnerships to opposite-sex couples. It would even appear to allow the Secretary of State to make regulations which allowed for Registrars of Births, Marriages and Deaths to opt out of conducting civil partnerships (whether for same or opposite-sex couples) on grounds of their religious beliefs, and so preventing them from being disciplined or dismissed in these circumstances.⁸

19. With regard to the Committee’s query about why the Home Office had not brought forward a proposed order under section 10 of the Human Rights Act 1998 (see paragraph 8 above), the supplementary memorandum states, amongst other things, that the remedial order procedure “would ... confine the government to addressing the specific incompatibility that is the subject of the declaration ...” and “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” and that “again, this would create the risk that government would not be able to establish a fully-functioning and compliant opposite-sex couple civil partnership regime” (paragraph 20). **Nothing is said about what “other changes that might be desirable” the Government have in mind, and how their inability to make such changes by regulations would prevent the creation of a fully-**

7 The supplementary memorandum mentions, by way of example, that religious organisations are currently free under the 2004 Act to decide not to host civil partnership conversions.

8 The House may recall the judgment of the European Court of Human Rights in *Eweida and others v United Kingdom* [2013] [ECHR 37](#) in which the Court held that a local authority had not contravened a registrar’s convention rights by dismissing her after she declined to conduct civil partnership ceremonies because of her religious beliefs.

functioning and compliant new regime. The House may wish to ask the Minister for an explanation.

Recommendations

20. This Bill deals with highly sensitive issues which require full debate in Parliament. It is therefore disappointing that the new clause 2, far from meeting the concerns of the Committee, raises significant new concerns.
21. **We therefore remain of the view set out in our earlier report and recommend that the principal changes to the 2004 Act to remedy the ECHR incompatibility should appear on the face of the new clause 2. The House may wish to ask the Minister, since no explanation has been provided, to explain why the simple solution suggested in the Committee's earlier report would not be feasible.**
22. **We further recommend, for the reasons set out in this report, that the new clause 2 should be amended so that:**
 - **the power conferred by subsection (3) should be removed on the ground that it is inappropriately wide, and replaced by a focused power which allows only for the provisions referred to in subsection (4) to be made by regulations;**
 - **the consultation requirement in subsection (6) should apply to regulations under subsections (3), (4) and (7) as well as to those under subsection (5);**
 - **subsection (7) should be either narrowed or removed altogether unless the Government can provide a convincing justification as to why it is needed and how they intend to exercise it; and**
 - **no regulations may be made under clause 2 more than three years after Royal Assent.**

CIVIL PARTNERSHIPS, MARRIAGES AND DEATHS (REGISTRATION ETC) BILL: RESPONSE

23. We considered this Private Member's Bill in our 45th Report of this Session.⁹ Baroness Hodgson of Abinger, the sponsor for the Bill, has responded by way of a letter printed at Appendix 1.

⁹ Delegated Powers and Regulatory Reform Committee, *Forty Fifth Report* (45th Report, Session 2017–19, HL Paper 274)

APPENDIX 1: CIVIL PARTNERSHIPS, MARRIAGES AND DEATHS (REGISTRATION ETC) BILL: RESPONSE

Letter from Baroness Hodgson of Abinger to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

I am most grateful to the Committee for its consideration of provisions in the Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill in its 45th Report of Session 2017–2019.

I recognise that the Committee has raised several concerns in respect of the delegated powers in Clauses 1, 2, and 4 of the Bill and I have addressed these in the paragraphs below.

Clause 1—Power to amend the Marriage Act 1949

The Committee raises a concern, in paragraph 15 of their Report, in respect of clause 1(4) of the Bill, which confer powers on the Registrar General to make no-procedure regulations in relation to certain administrative aspects of the marriage registration regime (the “RG Regulations”). The Report indicates that these matters may be of interest to Parliament and concludes that they should be subject to the affirmative procedure.

I take the view that it is appropriate for powers of this kind to be subject to no parliamentary procedure. As explained in the delegated powers memo submitted by the Home Office, the provisions of clause 1(4) deal with administrative matters such as the prescription of forms and the storage of documents. I believe these sorts of provisions are, by and large, unlikely to be of great interest to Parliament. Indeed, the Registrar General has a wide range of powers to make no-procedure regulations dealing with similar administrative matters not only in relation to marriage but also in other areas such as the registration of civil partnerships, births, deaths and the clause 1(4) powers are consistent with this approach. The making of regulations relating to the administrative aspects of the registration of marriage is a core function of the Registrar General have been delegated to them in this way since at least the 1940s¹⁰ and Parliament continues to confer similar new no-procedure powers to the present day.¹¹ Making the power subject to the affirmative procedure would mark a departure from this long-standing practice.

The Registrar General is not a member of the Lords or Commons and thus could not speak to the regulations during an affirmative debate in Parliament or speak in any debate if negative resolution regulations were prayed against. Whilst it is possible that the regulations could be spoken to by a minister of the Crown or, instead, made by the Secretary of State I believe this would be undesirable. Since 1837 the registration of births, deaths and marriages and the collection of statistics have been entrusted to an independently appointed person with independent statutory powers who is outside of the elected government and not subject to direct political pressure, that person being the Registrar General. Accordingly, having a Government minister speak to Parliament on the Registrar General’s behalf would cut across this independence. If the regulations were, instead, made by the Secretary of State this would again undermine that independence by effectively transferring functions, of a kind that Parliament has consistently determined

¹⁰ See e.g. s.55 and s.75(1)(b) of the Marriage Act 1949, as enacted.

¹¹ See e.g. s.28G of the Marriage Act 1949, which was inserted by paragraph 3(1) of Schedule 4 to the Immigration Act 2014.

should be performed by an independent crown appointee, to a Minister of the Crown.

Nonetheless, I agree that Parliament has a clear interest in ensuring that the RG Regulations will enable both parents' names to be recorded in marriage schedules. I believe that the Government addressed this point at Second Reading when the Minister, Baroness Williams of Trafford, reiterated her commitment to making this important change.¹² Furthermore, the Government has indicated to me that, in the interests of transparency and scrutiny, it would be willing to make a draft of the first RG Regulations available in the House library prior to their signature to give Members an opportunity to comment on them and feed into their development.

The Report also raises a concern, at paragraph 18, that the sunset provision in clause 1(6) only commences from the day on which the first regulations are made and that this would enable the Secretary of State to “delay indefinitely the making of any regulations”. I would like to reassure the Committee that the Government has confirmed to me that it intends to implement the changes as soon as is possible. Nonetheless, it is considered prudent to allow a three-year bedding in period for implementation once the regulations have been made. The reforms being introduced are detailed and technical and the provisions underpinning them may require minor adjustments during implementation to ensure that they operate as effectively as possible.

Clause 2—Power to amend the Civil Partnership Act 2004

Before responding to the Committee's concerns about the power in clause 2, it may be helpful if I set out the background to these proposals. On 2 October 2018, the Prime Minister announced the Government's intention to extend civil partnerships to opposite-sex couples, following the Supreme Court judgment in June 2018 that deemed the current system of civil partnerships to be incompatible with the European Convention on Human Rights and a violation of the Article 8 rights of opposite-sex couples ..

I understand that the Government considered use of the remedial order procedure but decided to rectify this imbalance through a Government Bill in the second session, as announced in a Written Ministerial Statement to Parliament by the Minister for Women and Equalities 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, moved by my co-sponsor Tim Loughton MP, which is now clause 2 of the Bill.

I accept that the drafting of clause 2 presents difficulties. As the Committee's report notes, the Minister, Baroness Williams of Trafford, also had reservations about the drafting of the current clause which she expressed at Second Reading. Baroness Williams, Tim Loughton and I have worked together to prepare an alternative to clause 2 and I successfully tabled moved amendments at Committee stage on 1 February which included a new version of that clause. I understand that The Home Office will submit a supplementary delegated powers memorandum in due course shortly.

Simply changing the eligibility criteria in the Civil Partnership Act 2004 to allow opposite-sex couples to form a civil partnership would not be enough to give such

12 HL Debs, 18 January 2019, [col 451](#).

couples equivalent rights and benefits to those enjoyed by same-sex couples. The existing legal framework for civil partnerships was designed only with same-sex couples in mind. I am keen to ensure a fair and fully-functioning regime is in place for opposite-sex couples at the same time as eligibility is extended, to ensure couples have certainty about their legal rights and obligations.

The amendments new version of clause 2 set out in much greater detail how we envisage the delegated powers would be exercised. The regulations will need to deal with issues - for opposite-sex couples - such as parental responsibility, the effect of a legal change of gender, the financial consequences of a partnership and any conversion entitlements. The amendments also now include a power to make consequential changes. Regulations made in the exercise of all of these powers would be subject to the affirmative resolution procedure, and therefore to Parliamentary debate and approval.

Clause 4—Power to amend the Coroners and Justice Act 2009

The Committee suggests, at paragraph 39 of their Report that the Government's justification for conferring the clause 4(4) powers is weak because "any legislation is unlikely to be regarded by Ministers as a priority in view of the lengthy deadline imposed by subsection 6." I would like to reassure the Committee that the Government is committed to reducing the rate of still-births in England and Wales, and has confirmed to me that should the clause 4 report conclude that coroners' investigations of stillbirths should be introduced, it will act, with as short a delay as possible.

In line with that commitment, I understand that the Government intends to launch a public consultation on proposals to introduce coronial investigations into stillbirth cases. This consultation will contribute towards the report for which arrangements are to be made by the Secretary of State under clause 4(1), and will follow an extensive series of meetings that have been held between key stakeholders and officials in both the Ministry of Justice and the Department of Health and Social Care, including with Members of Parliament. I understand that these meetings have helped officials to develop proposals for consultation

and have ensured that these are duly informed. The Government will continue to engage with interested MPs and Peers during the consultation period.

If the clause 4 report were to conclude that coroners' investigations of stillbirths should be introduced, clause 4(4) will ensure that the Government can do so with a shorter delay than by a Government Bill, but only if approved by a resolution of each House of Parliament. Any such change to legislation would be done within the tight framework defined in clauses 4(4)(a) to 4(4)(b), which clearly limit this power to introducing coronial investigations of stillbirth cases, specifying the circumstances and purpose of such investigations, as well as making provisions for coronial investigations of still-births equivalent to those relating to investigations into deaths.

The Committee also expresses a view, at paragraph 41 of the Report that "issues to which clause 4 gives rise argues for greater parliamentary involvement than that provided for by affirmative resolution procedure regulations." I have considered the Committee's recommendation to remove clause 4(4) from the Bill, but on balance, I consider it necessary to maintain these provisions. This power is limited to providing for coroners to investigate stillbirths in circumstances similar to those under which coroners investigate deaths. This Bill also requires the Secretary of State to report on the issue before any regulations can be made. I believe this is

an appropriate use of this power with sufficient safeguards in place to constrain its use.

Finally, paragraph 40 of the Report, queries why the Bill includes a power to implement the findings of the clause 4 report but similar powers are not included to implement the findings of the clause 3 report on registration of pregnancy losses. The primary reason for this difference is that the powers contained within clause 4(4) of the Bill, and the range of outcomes arising from the use of that power, are very narrow in scope. In particular, the power only enables regulations to be made that would amend Part 1 of the Coroners and Justice Act 2009 to confer new functions on coroners. By contrast, the range of potential outcomes of the clause 3 report is much broader and may, for instance, recommend the creation of statutory new bodies or officers or amendments to many different items of primary legislation. This difference would necessitate a much broader Henry VII power that may not be acceptable to the Committee.

12 February 2019

APPENDIX 2: 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 20 February 2019, Members declared the following interests:

Lord Lisvane

Married to a Church of England priest who solemnises marriages

Attendance

The meeting on the 20 February 2019 was attended by Baroness Andrews, Lord Flight, Lord Jones, Lord Lisvane, Lord Rowlands, Lord Thomas of Gresford and Lord Thurlow.