



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

51st Report, 2013 (Session 4)

Marriage and Civil Partnership (Scotland) Bill

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

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Marriage and Civil Partnership (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 3 and 10 September and 1 October 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Marriage and Civil Partnership (Scotland) Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government on 26 June 2013. The Equal Opportunities Committee is the lead Committee.
4. The Bill makes changes to the law on the solemnisation of marriage and civil partnerships. It makes changes to the law on gender recognition, matrimonial proceedings and other matters as a result of the changes which are made to marriage and civil partnership. The primary change which the Bill makes is to introduce same sex marriage. It does so through amendments to the Marriage (Scotland) Act 1977 (“the 1977 Act”). The Bill also makes provision for the registration of religious civil partnerships and belief civil partnerships by amendment to the Civil Partnership Act 2004 (“the 2004 Act”); but it does not introduce opposite sex civil partnership.

¹ Marriage and Civil Partnership (Scotland) Bill [as introduced] available here: [http://www.scottish.parliament.uk/S4_Bills/Marriage%20and%20Civil%20Partnership%20\(Scotland\)%20Bill/b36s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Marriage%20and%20Civil%20Partnership%20(Scotland)%20Bill/b36s4-introd.pdf)

² Marriage and Civil Partnership (Scotland) Bill Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/Marriage_and_Civil_Partnership_DPM.pdf

DELEGATED POWERS PROVISIONS

5. The Committee considered each of the delegated powers in the Bill.
6. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 4(8) & (9) – meaning of marriage and related expressions in enactments & documents

Section 9(4) & (5) – effect of marriage between civil partners in a qualifying civil partnership

Section 10(2)(a)(ii) (new section 8(1)(a)(ii) of the 1977 Act) – persons who may solemnise marriage: power to prescribe religious or belief bodies whose celebrants are authorised to solemnise opposite sex marriage

Section 10(2)(b) (new section 8(1B)(a)(i) of the 1977 Act) – persons who may solemnise marriage: power to prescribe religious or belief bodies whose celebrants are authorised to solemnise same sex marriage

Section 10(2)(b) (new section 8(1E) of the 1977 Act) – Persons who may solemnise marriage: power in relation to qualifying requirements for bodies to meet before they can be prescribed so their celebrants are authorised to solemnise marriage

Section 11(2)(e) (new section 9(2A) of the 1977 Act) – Registration of nominated persons as celebrants: power in relation to qualifying requirements for nominating bodies to meet when putting forward persons to the Registrar General to be empowered to solemnise marriage

Section 12(2)(b) (new section 12(1D) of the 1977 Act) – Temporary authorisation of celebrants: power on qualifying requirements in relation to temporary celebrants

Section 16(2) – the marriage schedule

Section 22(13) (new section 94A(1)(a)(i) of the 2004 Act) – Registration of civil partnership: power to prescribe religious or belief bodies whose celebrants are authorised to register civil partnerships

Section 22(13) (new section 94A(5) of the 2004 Act) – Registration of civil partnership: power to specify qualifying requirements for bodies to meet before they can be prescribed so their celebrants are authorised to register civil partnerships

Section 22(13) (new section 94B(3) of the 2004 Act) – Registration of civil partnership: power to specify qualifying requirements for nominating bodies to meet when putting forward persons to the Registrar General to be empowered to register civil partnership

Section 22(13) (new section 94E(4) of the 2004 Act) – Registration of civil partnership: power to specify qualifying requirements in relation to temporary authorisations to register civil partnerships

Section 22(15) (new section 95ZA(1) of the 2004 Act) – Registration of civil partnership: prescribed forms requiring delivery of civil partnership schedule
Section 31 – ancillary provision

Section 32(2) – commencement

Schedule 1 paragraph 1(4) (new Schedule 1B paragraph 2 of the Domicile and Matrimonial Proceedings Act 1973) – jurisdiction in proceedings relating to same sex marriages

Schedule 2 paragraph 8 (new paragraph 20A of Schedule 3 to the Gender Recognition Act 2004) – registration: change of gender of married persons or civil partners.

7. The Committee also determined that it did not need to draw the attention of the Parliament to the following powers to issue guidance:

Section 15(2) (new section 3(4C) of the 1977 Act) – power of district registrar to require evidence of nationality: marriage

Section 23 (new section 88(10) of the 2004 Act) – power of district registrar to require evidence of nationality: civil partnership

8. At its meeting on 3 September the Committee agreed to take oral evidence on the Bill from Scottish Government officials.

9. The Committee's comments and, where appropriate, recommendations on the delegated powers in the Bill which were considered in the oral evidence session on 10 September³ are detailed below. The first power concerns the proposed administrative procedure for the conversion of civil partnerships to marriage. The remaining powers concern changes to the law on the effect of a change of gender on marriage or civil partnership.

CONVERTING CIVIL PARTNERSHIP TO MARRIAGE

Section 8(1) – change of qualifying civil partnership to marriage

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative procedure unless textually amending primary legislation when affirmative procedure

³ [Scottish Parliament Delegated Powers and Law Reform Committee, Official Report, 10 September 2013.](#)

10. Persons who are in a “qualifying” civil partnership are to be able to marry each other by going through a marriage ceremony under the 1977 Act as amended by the Bill. Section 9 sets out the effect of such a marriage. It provides that the civil partnership ends on the date of the marriage and the parties are to be treated as having been married from the date of registration of the civil partnership.

11. Section 8 proposes that there should be an alternative mechanism for converting qualifying civil partnerships to marriage in the form of an administrative process rather than through the full solemnisation of the marriage. It confers power on the Scottish Ministers to make regulations about this procedure. Regulations can include provision about the application process, the information or evidence to be provided in support of an application and can confer functions in relation to applications and charge fees.

12. Before making regulations under this section the Scottish Ministers must consult the Registrar General. The power includes the power to make ancillary provision and to textually amend primary legislation. Where the power is used to amend primary legislation then it is subject to the affirmative procedure. Otherwise it is subject to the negative procedure.

13. The Committee was concerned that section 8(2)(g) allows the Scottish Ministers to make provision about the **effect** of a qualifying civil partnership changing into a marriage through this procedure. Given that the Bill itself sets out the effect of converting to marriage through a marriage ceremony the Committee was unclear why Ministers required power to make provision about the effect of an “administrative conversion” and why it was not the same.

14. The Committee probed what was meant by **effect** in these circumstances. The Scottish Government officials clarified that the effect which could be prescribed was not the effect of being married but the effect of the process of changing from the state of being in a civil partnership to the state of being married.

15. The Committee welcomed this clarification and then sought re-assurance that there would be no difference between the effect of converting a qualifying civil partnership to marriage through a full marriage ceremony or through the proposed administrative route. It also sought an explanation as to why the provisions in section 9 of the Bill could not simply apply regardless of the manner of the conversion.

16. Simon Stockwell, Team Leader, Family Law and Property, Scottish Government responded:

“In essence, the policy intention is that there should be no difference in effect. It is intended that when changing a civil partnership to a marriage under the administrative route that is established under section 8, the effect will be exactly the same as a marriage ceremony under section 9... there will be no difference. It will not matter whether you marry through an administrative

route or in a ceremony; once you are in the marriage, the effect will be exactly the same.”⁴

17. Given this response and the narrow policy intention the Committee questioned why the power in section 8(2)(g) was drawn so widely. Simon Stockwell explained that the power was drawn widely so as to ensure that Ministers were able to do everything they need to do. He further explained that provision may need to be made for specific circumstances such as the treatment of matrimonial property. The Committee notes from the DPM that it is intended that the power in section 9(4) would be used to deal with such situations in relation to solemnised marriages. But the power in section 9(4) can only disapply or modify the general effect of section 9. So that power is more limited in scope than the power in section 8(2)(g) which is not limited by any connection to section 9; despite that being the stated policy intention.

18. Given that the power in section 8(2)(g) is framed widely enough to permit a different approach to section 9 the Committee queried the justification given for the choice of procedure. Such regulations will be subject to the negative procedure if they do not textually amend primary legislation. The Committee asked whether the affirmative procedure had been considered. Simon Stockwell explained:

“Obviously, we considered the possibility of using the affirmative procedure – we considered all the potential procedures – but we concluded that, on the whole, because the process is reasonably straightforward and is mirrored in provisions in the bill, negative procedure would be appropriate except for when we are amending primary legislation. However, I accept that arguments could be made the other way.”⁵

19. The Committee welcomes the Scottish Government’s assurances that the power in section 8(2)(g) is intended to be used to replicate the provision made by section 9 of the Bill (including any delegated legislation under that section). It notes that the Scottish Government therefore intends that persons converting their civil partnership to marriage through the administrative mechanism will be treated in the same manner as those who go through a marriage ceremony under the 1977 Act.

20. Nevertheless, the Committee’s role is to consider the whole range of powers sought and not just the manner in which the Government of the day intends to use them. Here the Scottish Government is clear as to the policy that is to be achieved. There is no suggestion that the policy requires some inherent flexibility beyond being able to deliver that policy fully and effectively.

21. The Committee considers that in such cases powers should be drawn no more widely than necessary, while taking into account the possibility that additional provision may be required to ensure the proposed regulations work appropriately within the framework of the law on marriage and civil partnership. The Committee is also not clear why section 9 could not simply be applied to any

⁴ [Scottish Parliament Delegated Powers and Law Reform Committee, Official Report, 10 September 2013, Col 1044.](#)

⁵ [Scottish Parliament Delegated Powers and Law Reform Committee, Official Report, 10 September 2013, Col 1046.](#)

procedure established under section 8 if the intention is that there should be no difference between the effect of either route to marriage.

22. The Committee therefore invites the Scottish Government to reconsider whether the power in section 8(2)(g) is necessary or is broader than required to deliver the intended policy of replicating the effect of section 9.

23. If the Scottish Government considers that the power in section 8(2)(g) remains necessary then the Committee is of the view that the higher level of scrutiny afforded by the affirmative procedure is merited given the scope of the power and the potential for it to make different effect to that contained in section 9.

EFFECT OF CHANGE OF GENDER ON MARRIAGE OR CIVIL PARTNERSHIP

24. Part 4 of the Bill concerns the effect of a change in the gender of a party to a Scottish marriage or a Scottish civil partnership. The Gender Recognition Act 2004 sets out how persons may have a change in gender legally recognised. This is a two stage process. Where an interim gender recognition certificate is issued the status of the applicant's gender is not affected but the issue of the certificate triggers other effects. One such effect is to entitle the holder of the certificate or their spouse or civil partner to obtain a divorce or to dissolve the civil partnership. A person's change in gender is only legally recognised when a full gender recognition certificate is issued.

25. It is not currently possible for a married person or for a party to a civil partnership to remain in that legal relationship if they change gender and their spouse or partner does not. That is because the nature of the relationship would then be incompatible with the nature of marriage or civil partnership. The Gender Recognition Act 2004 therefore only allows a full recognition certificate to be issued to persons who are not in a legal relationship or where both parties to the relationship change gender at the same time. With the introduction of same sex marriage the change in gender of one of the parties to a marriage would no longer be an obstacle to the legal relationship continuing should both parties agree since a marriage could comprise spouses of the same or opposite gender. Civil partners could not remain in a civil partnership in such circumstances since they would then be of opposite genders. However, it would be possible for them to marry, as indeed it would be as at present.

26. The Scottish Government's policy is that where only one party to a legally recognised relationship changes gender the couple should be able to remain in a legally recognised relationship if they wish to do so. The Bill makes provision for the possibility of the conversion of civil partnerships to marriage in such circumstances or for the recognition that a marriage has changed from an opposite sex marriage to a same sex marriage or *vice versa*.

Section 28(1) – renewed marriage or civil partnership following issue of full gender recognition certificate

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure unless textually amending primary legislation when affirmative procedure

27. Section 28 confers power on the Scottish Ministers to make provision about the solemnisation of a “renewed marriage” or the registration of a “renewed civil partnership” following on from the issue of a full gender recognition certificate to one or both of the parties to a marriage or both parties to a civil partnership. Before making regulations the Scottish Ministers must consult the Registrar General. Section 28(2)(h) allows the Scottish Ministers to make provision about the effect of entering into a renewed marriage or a renewed civil partnership.

28. The regulations may include ancillary provision, may apply the 1977 or the 2004 Acts with or without modifications and can amend any legislation. Unless the regulations amend primary legislation (when they are subject to the affirmative procedure) they are subject to the negative procedure.

29. The Committee was not clear what the effect of a “renewed marriage” or a “renewed civil partnership” was to be. As it appeared that the marriage or civil partnership would continue unaffected the Committee was not clear what any change in effect there would be and therefore why there was a need to make provision about the effect of any change.

30. The Scottish Government confirmed that there was to be no change in effect in these circumstances. As Simon Stockwell explained:

“The legal status is that a couple would be regarded as married or in a civil partnership but would not need to go through the marriage or the civil partnership ceremony to achieve that status. The bill already has a provision that states that when a couple undergo gender recognition, their marriage or civil partnership will continue. The legal effect of section 28 is simply to allow them to have a ceremony to reflect their newly acquired genders; it is not meant to change the legal status of their marriage or civil partnership.”⁶

31. The Scottish Government explained that it was important to provide a means by which persons who change gender can obtain legal recognition of their newly acquired gender within their existing relationship. It was also important not to inadvertently disclose that a person has changed gender through the terms of their marriage or civil partnership certificate.

32. The Committee respects and supports these principles, however it does not accept that the Scottish Government has made out a satisfactory case for the power in section 28(2)(h). By contrast with the similar power in section 8(2)(g) discussed above, as the Government points out there is no change in status.

⁶ [Scottish Parliament Delegated Powers and Law Reform Committee, Official Report, 10 September 2013, Col 1047.](#)

Paragraphs 9 and 10 of schedule 2 to the bill already provide for the continuity of a marriage or a civil partnership in such circumstances.

33. It was suggested that when regulations are made under section 28 it may be considered necessary to make express provision for the continuation of the marriage or civil partnership in those circumstances for the avoidance of doubt.⁷ If doubt as to the effect is a real possibility then the Committee considers that is a matter of principle which should be addressed directly in the Bill.

34. The question of whether persons should be offered the opportunity to re-register their marriage or civil partnership through the formal route of a ceremony in addition to the administrative mechanism proposed by the power in paragraph 8 of schedule 2 to the bill is a matter of policy for the Parliament and not the Committee. However, it is clear from the Government's evidence that the ceremony is not intended to have any distinct legal effect. The parties remain in the same legal relationship. This can be distinguished from marriage ceremonies under section 20 of the 1977 Act where persons who have entered into a marriage abroad are treated for the purposes of the new Scottish ceremony "*as if they had not already gone through a marriage ceremony with one another*".

35. The Committee therefore is not clear that the need for the power in section 28(2)(h) is justified and invites the Government to reflect on whether it should be removed. If further clarification is required as to the continuation of renewed marriages or renewed civil partnerships then it should be provided in the Bill itself. If amendments to the 1977 or 2004 Act are required to enable those Acts to operate properly then the Committee would be happy to consider those powers further but it remains unclear what further provision about effect is required.

36. If further justification for provision about effect can be given then, in line with its consideration of the power in section 8(2)(g) the Committee considers such a power should be subject to the affirmative procedure.

Schedule 2 (paragraph 6) (new section 5D of the Gender Recognition Act 2004) – change of gender of married person or civil partners: additional circumstances

Power conferred on:	the Scottish Ministers
Power exercisable by:	order
Parliamentary procedure:	negative procedure unless textually amending primary legislation when affirmative procedure

Provision

37. As noted above, it is not currently possible for parties to a civil partnership to remain in that partnership where one of them changes gender. Sections 4(2)(c) and 5C of the Gender Recognition Act provide that a full gender recognition certificate can only be issued to a person in a civil partnership where both parties

⁷ [Scottish Parliament Delegated Powers and Law Reform Committee, Official Report, 10 September 2013, Col 1048.](#)

qualify for recognition of their change in gender at the same time. This will remain the position once the Bill is in force.

38. However, the Bill provides a route by which civil partners may stay in a legally recognised relationship after one of the parties changes gender. If the civil partners convert their civil partnership to a marriage (either before or after the issue of an interim gender recognition certificate) then new section 4C of the Gender Recognition Act provides that a full gender recognition certificate can be issued to the party changing gender provided their spouse consents to the marriage continuing.

39. The Scottish Government intends to provide an alternative procedure to such couples through an administrative route. This is provided in new section 5D of the Gender Recognition Act 2004 which is inserted by paragraph 6 of schedule 2 to the Bill. This section confers power on the Scottish Ministers “to provide for the issue of a full gender recognition certificate in additional circumstances to those specified in section 4(2)(c) or 5C”. The power includes the ability to make provision about the effect of issuing a full gender recognition certificate to the applicant. Subsection (4) specifically explains that this can include provision for changing the civil partnership into a marriage. The power also permits Ministers to modify any legislation. It is proposed that it is subject to the negative procedure unless it amends primary legislation when it is subject to the affirmative procedure.

40. The Committee always considers carefully whether the subject matter of powers is appropriate for subordinate legislation. In relation to new section 5D the Government explains in the DPM that the more streamlined procedures envisaged “may be detailed and so it is appropriate for them to be included in an order rather than on the face of the Bill”. The Committee accepts that detailed technical provisions or administrative procedures are generally suitable for delegation to subordinate legislation. However, the Committee considers that the power in section 5D is not just procedural. It permits Ministers to specify when a full gender recognition certificate can be issued to persons who are in a civil partnership. The route to that may be procedural but the underlying question of when such a certificate can be issued is a significant legal issue.

41. The Committee questioned why the power was available to permit the issuing of a full gender recognition certificate in **any** “additional circumstances” and whether examples of what was envisaged could be given. In response the Scottish Government indicated that:

“We are struggling with that at the moment...What we are wondering with this power is whether there are simpler ways to allow a civil partner to obtain gender recognition and change to a marriage at the same time.”⁸

42. It was clear from the evidence that the difficulties which the Government is currently seeking to resolve result from recognition that the desire for a simpler administrative procedure should not be permitted to undermine the current policy underpinning the Gender Recognition Act 2004. The Scottish Government is

⁸ [Scottish Parliament Delegated Powers and Law Reform Committee, Official Report, 10 September 2013, Col 1051.](#)

considering a number of possible means by which this simpler process could be achieved but has not yet identified its preferred solution.

43. The Committee has concerns as to whether a valid case for the delegation of power in the terms set out in section 5D has been met. The Committee notes that the power only has application to circumstances in which one member of a protected Scottish civil partnership is changing gender and the partners wish to remain in a legally recognised relationship. The circumstances in which the power can be used are therefore very specific. Nevertheless, the power allows the Scottish Ministers to set out additional circumstances in which a full gender recognition certificate can be issued. The intention may be that the circumstances are completion of an administrative process which results in converting the civil partnership to a marriage but the power is not restricted to that alone.

44. The Committee considers that the issue of a full gender recognition certificate is such a sensitive and significant matter that it should be regulated by the Parliament in primary legislation. The Committee notes that this remains the case at present and the Scottish Ministers do not currently have executive power to amend those circumstances. The proposed power is therefore unusual.

45. The Committee questions whether it is appropriate for the Scottish Ministers to be given power to specify any additional circumstances in which a full gender recognition certificate may be issued and would prefer that matter to be set out on the face of the Bill. The Committee therefore recommends that the Government bring forward amendments to address this issue during the passage of the Bill.

46. It may be that a way could be found to allow the Scottish Ministers the flexibility to prescribe the steps involved in the administrative process in subordinate legislation but to enshrine the principle that a full gender recognition certificate can be issued following conversion of civil partnership to marriage through the prescribed administrative process in primary legislation. This may address the Committee's concerns.

47. The Committee recognises of course that the question of whether the powers sought by Ministers should be granted is a matter for the Parliament as a whole to decide. If the Parliament wishes to proceed on this basis notwithstanding the Committee's concerns, the Committee recommends that the power should be subject to the affirmative procedure as a minimum level of scrutiny. Given that it was clear from the Scottish Government's evidence there are a number of possible different options available, the Committee considers that a requirement for consultation on a draft laid before the Parliament would also be appropriate.

48. The Committee notes that as presently drafted the Bill proposes that the affirmative procedure should apply where the exercise of the power in section 5D makes amendment to "primary legislation". We understand this to mean that the affirmative procedure is to apply where amendments are made either to Acts of Scottish Parliament ("ASPs") or to Acts of the UK Parliament. However, the current drafting does not achieve this effect since "Act" in the context of the Gender Recognition Act 2004 does not include

ASPs. If the Government is not minded to accept either of the Committee's recommendations in paragraphs 45 or 47 then the Committee considers that the Government requires to modify paragraph 12 of schedule 2 to the Bill to apply the affirmative procedure to regulations which make amendments to ASPs. The Committee understands that the Government accepts this would be necessary to deliver the policy intention.

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