Delegated Powers and Law Reform Committee

64th Report, 2014 (Session 4)

Subordinate Legislation

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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:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

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Delegated Powers and Law Reform Committee

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The Committee reports to the Parliament as follows—

1. At its meeting on 11 November 2014, the Committee agreed to draw the attention of the Parliament to the following instrument—

   Marriage Between Civil Partners (Procedure for Change and Fees) (Scotland) Regulations 2014 [draft]

2. The Committee’s recommendations in relation to the above instrument are set out below.

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at the end of this report.
POINTS RAISED: INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

**Marriage Between Civil Partners (Procedure for Change and Fees) (Scotland) Regulations 2014 [draft]** *(Equal Opportunities Committee)*

4. These Regulations establish the administrative procedure for changing an existing “qualifying civil partnership” into a marriage, under section 10 of the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”). The procedure is set out in regulations 3 to 6. If approved by Parliament, the Regulations will come into force on the day after the day they are made/signed.

5. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at the Annex.

6. The Scottish Government has confirmed in the correspondence that the policy intention is that regulations 3 to 6 apply where the parties wish to change their civil partnership which was registered outside the UK under an Order in Council made under Chapter 1 of Part 5 of the Civil Partnership Act 2004, where the parties to the civil partnership elected Scotland as the relevant part of the UK under the Order - in addition to applying where the civil partnership was registered in Scotland. That policy intention is explained in the explanatory note (which is not part of the Regulations), but there is no express provision to that effect in the Regulations.

7. Regulation 3(1) and (3) refer to the parties to a “qualifying civil partnership”. Regulations 3 to 6 set out the procedure to change a “qualifying civil partnership” into a marriage, the date of change to the marriage which applies, the fee for an application, and the circumstances in which no fee is payable. The definition of “qualifying civil partnership” is therefore central to regulations 3 to 6.

8. The Committee considers that the Regulations could be clearer in implementing the policy intention described above, if “qualifying civil partnership” was expressly and suitably defined within the Regulations. The Committee disagrees with the Scottish Government’s view that the Regulations are clear enough in that respect.

9. In summary, the Scottish Government contends that the policy intention in relation to civil partnerships which have been registered outside the UK is clearly implemented by the Regulations, because section 5(7) of the Marriage (Scotland) Act 1977 (as inserted by section 8 of the 2014 Act) operates to extend the definition of “qualifying civil partnership” for the purposes of the Regulations. The Scottish Government contends that this expanded definition is by implication imported into the Regulations by virtue of section 24 of the Interpretation and Legislative Reform (Scotland) Act 2010. Section 24 provides that a word or expression used in a Scottish instrument has the same meaning as it has in the Act of the Scottish Parliament by virtue of which the instrument is made.

10. Section 10(7) of the 2014 Act provides that “qualifying civil partnership” has the meaning given by section 5(6) of the Marriage (Scotland) Act 1977 (inserted by section 8(3)(b) of the 2014 Act). The definition in section 5(6) alone is restricted-
“For the purposes of subsection (4)(b), a “qualifying civil partnership” is a civil partnership which-

(a) was registered in Scotland; and

(b) has not been dissolved, annulled or ended by death.”

11. Section 5(7) of the 1977 Act (which has also been inserted by section 8(3) of the 2014 Act) provides-

“A civil partnership which was registered outside the UK under an Order in Council under Chapter 1 of Part 5 of the Civil Partnership Act 2004 is to be treated for the purposes of section 5(6)(a) as having been registered in Scotland if-

(a) the parties to the civil partnership elected Scotland as the relevant part of the UK under the Order; and

(b) details of the civil partnership have been sent to the Registrar General of Births, Deaths and Marriages for Scotland.”

12. In the absence of a suitable definition of “qualifying civil partnership” within the Regulations, the Committee considers that there is doubt whether the expression can (by virtue of relying on the rule of interpretation in section 24 of the Interpretation and Legislative Reform (Scotland) Act 2010) be read as including the provision in section 5(7) of the 1977 Act. Section 10(7) of the 2014 Act provides that the expression has the meaning given by section 5(6) of the 1977 Act. Further, the provisions in section 5(6) and (7) of the 1977 Act define the expression for the purposes of section 5(4)(b) of the 1977 Act. That sub-paragraph (b) provides, for the purposes of section 5 of the 1977 Act which concerns the raising of objections to a marriage, that there is a legal impediment to marriage where one of the parties is, or both are, already married or in civil partnership. The underlying statutory provisions are therefore complex, and it would be clearer to define “qualifying civil partnership” in the Regulations appropriately.

13. The Committee therefore draws the Regulations to the attention of the Parliament on the reporting ground (h). The meaning of regulation 3(1) and (3) could be clearer in the following respect.

14. The policy intention is that regulations 3 to 6 apply where the parties wish to change their civil partnership into a marriage, where either the civil partnership was registered in Scotland, or where it was registered outside the UK under an Order in Council made under Chapter 1, Part 5 of the Civil Partnership Act 2004, the parties to the civil partnership elected Scotland as the relevant part of the UK, and details of the civil partnership were sent to the Registrar General of Births, Deaths and Marriages for Scotland.

15. The meaning of regulation 3(1) and (3), which refer to “qualifying civil partnership”, could be clearer in implementing that policy intention. The Committee considers that it is doubtful (in the absence of a suitable, express definition of “qualifying civil partnership” in the Regulations) whether regulations 3 to 6 apply to those civil partnerships which were registered
outside the UK. The definition of “qualifying civil partnership” provided for in section 10 of the Marriage and Civil Partnership (Scotland) Act 2014 (under which section these Regulations are made) is that given by section 5(6) of the Marriage (Scotland) Act 1977. In terms, that definition is limited to a civil partnership which was registered in Scotland.

16. While the Committee accepts the Scottish Government’s view that the powers in the 2014 Act enable regulations 3 to 6 to extend also to those civil partnerships registered outside the UK, the Committee considers that the meaning of the provisions could be clearer, if “qualifying civil partnership” was expressly defined in the Regulations.
NO POINTS RAISED

17. At its meeting on 11 November 2014, the Committee considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Equal Opportunities**

Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2014 [draft];


**Economy**

Land Registration etc. (Scotland) Act 2012 (Amendment and Transitional) Order 2014 [draft]

**Finance**

Budget (Scotland) Act 2014 Amendment Order 2014 [draft];

Revenue Scotland and Tax Powers Act 2014 (Commencement No. 1) Order 2014 (SSI 2014/278 (C.26)).

**Health and Sport**

Public Bodies (Joint Working) (Local Authority Officers) (Scotland) Regulations 2014 (SSI 2014/282);

Public Bodies (Joint Working) (Prescribed Consultees) (Scotland) Regulations 2014 (SSI 2014/283);

Public Bodies (Joint Working) (Prescribed Days) (Scotland) Regulations 2014 (SSI 2014/284).

**Justice**

Criminal Legal Aid (Fixed Payments and Assistance by Way of Representation) (Scotland) (Miscellaneous Amendments) Regulations 2014 [draft].
Marriage Between Civil Partners (Procedure for Change and Fees) (Scotland) Regulations 2014

On 31 October 2014, the Scottish Government was asked:

“1.(a) Please clarify whether it is the intention of the Scottish Government that regulations 3 to 6 apply where the parties wish to change their civil partnership which was registered outside the UK under an Order in Council made under Chapter 1 of Part 5 of the Civil Partnership Act 2004, where the parties to the civil partnership elected Scotland as the relevant part of the UK under the Order, in addition to applying where the civil partnership was registered in Scotland? (This intention is indicated by the third sentence of the explanatory note.)

(b) The instrument does not define “qualifying civil partnership” as mentioned in regulation 3(1) and (3). It appears that section 24 of the Interpretation and Legislative Reform (Scotland) Act 2010 is being relied upon, with the effect that that expression has the same meaning as it has in the Marriage and Civil Partnership (Scotland) Act 2014. Section 10 (under which the instrument is made) defines that expression in subsection (7) as having the meaning given by section 5(6) of the Marriage (Scotland) Act 1977 (specifically).

That definition does not include reference to section 5(7) of the 1977 Act (as inserted by section 8(3)(b) of the 2014 Act), which provides for the expansion of the definition of “qualifying civil partnership” to include those so registered outside the UK. Further, section 5(6) and (7) of the 1977 Act treats such a civil partnership as having been registered in Scotland for the purposes specifically of section 5(4)(b) of the 1977 Act (objection to marriage where there is a legal impediment). Accordingly-

(i) is there an error- or at least could the meaning of the provisions be made clearer- in respect that the instrument omits an appropriate definition of “qualifying civil partnership”? Otherwise please explain why it is considered that the provisions properly implement the policy intention.

(ii) If there is an error or lack of clarity, would the Scottish Government propose to take corrective action?

(2) Section 10(3)(b) of the 2014 Act enables the regulations to confer functions on persons relating to the issuing of certified copies of any information recorded relating to qualifying civil partnerships changing into marriages.

As these regulations are plainly intended to be the “section 10 regulations” (per the definition in regulation 7(7)), and section 10 envisages that the regulations might confer those functions on persons as to the issue of certified copies, please explain whether there is any omission from the regulations in that respect, or otherwise please clarify how provision is, or will be, made to enable such copies to be issued by any district registrar or other persons?”
The Scottish Government responded as follows:

1(a): In response to question 1(a), we confirm that it is the policy intention of the Scottish Government that the Regulations apply where the parties wish to change into a marriage their civil partnership which was registered outside the UK under an Order in Council made under Chapter 1 of Part 5 of the Civil Partnership Act 2004, the parties to the civil partnership elected Scotland as the relevant part of the UK, and details of the civil partnership were sent to the Registrar General of Births, Deaths and Marriages for Scotland. In any event, given the definition of “qualifying civil partnership” in section 10(7) of the Marriage and Civil Partnership (Scotland) Act 2014 (“2014 Act”), for the reasons set out below in our response to question 1(b) we consider that any regulations under section 10 require to apply to these circumstances.

1(b): In response to question 1(b)(i), we consider that the meaning of “qualifying civil partnership” is clear without the inclusion of an express definition.

The power in section 10(1) of the 2014 Act to make regulations applies in relation to the parties to a “qualifying civil partnership”. Section 10(7) of the 2014 Act defines “qualifying civil partnership” as having the “meaning given by section 5(6) of the 1977 Act”. Section 5(6) defines “qualifying civil partnership” as a civil partnership which “was registered in Scotland” and has not been dissolved, annulled or ended by death. Section 5(7) of the 1977 Act provides that a civil partnership which was registered outside the United Kingdom under an Order in Council made under Chapter 1 of Part 5 of the Civil Partnership Act 2004 is to be treated for the purposes of section 5(6)(a) as having been registered in Scotland if the conditions in section 5(7)(a) and (b) apply.

We consider that there is no doubt that the definition of “qualifying civil partnership” in section 5(6) as applied by section 10(7) incorporates the circumstances set out in section 5(7) of the 1977 Act given the clear reference in section 5(7) to the relevant civil partnership being treated “for the purposes of section 5(6)(a) as having been registered in Scotland”. As the power in the Regulations can only be used with reference to a “qualifying civil partnership” as defined in section 10(7), we do not consider that it was necessary to include a separate definition in the Regulations. In order to assist the user, the explanatory note explains what the reference to “qualifying civil partnership” means for the purposes of the Regulations.

Consequently, in response to question 1(b)(ii), we consider that no corrective action is necessary.

2: In response to question 2, we consider that there is no omission from the Regulations. The practical result of the change from a civil partnership into a marriage is that a marriage will be formed for all purposes and an entry made in the marriage register under regulation 3(3)(b). Any relevant legislation in relation to a marriage will apply to that marriage in the same way that it applies to any other marriage, subject to any modifications that might be necessary. (For example, the Regulations modify a number of provisions of the 1977 Act to ensure
that they work appropriately for the change procedure.) The issue of an extract from the marriage register is covered by section 37 of the Registration of Births, Deaths, and Marriages (Scotland) Act 1965 (with the appropriate fees prescribed by the Registrar General in the Registration Services (Fees, etc.) (Scotland) Regulations 2006). No reference therefore requires to be made in the Regulations to the procedure for obtaining an extract as this is covered by section 37.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.