



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

## **8th Report, 2014 (Session 4)**

### **Marriage and Civil Partnership (Scotland) Bill as amended at stage 2**

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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:**

**Clerk to the Committee**

Euan Donald

**Assistant Clerk**

Elizabeth White

**Support Manager**

Daren Pratt



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## Delegated Powers and Law Reform Committee

### 8th Report, 2014 (Session 4)

#### Marriage and Civil Partnership (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

#### INTRODUCTION

1. At its meeting on 28 January 2014, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Marriage and Civil Partnership (Scotland) Bill as amended at Stage 2 (“the Bill”)<sup>1</sup>. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. 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.

3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”<sup>2</sup>).

4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its [51<sup>st</sup> report of 2013](#).

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<sup>1</sup> Marriage and Civil Partnership (Scotland) Bill as amended at Stage 2 available at: [http://www.scottish.parliament.uk/S4\\_Bills/Marriage%20and%20Civil%20Partnership%20\(Scotland\)%20Bill/b36as4-stage2-amend.pdf](http://www.scottish.parliament.uk/S4_Bills/Marriage%20and%20Civil%20Partnership%20(Scotland)%20Bill/b36as4-stage2-amend.pdf)

<sup>2</sup> Marriage and Civil Partnership (Scotland) Bill Supplementary Delegated Powers Memorandum available at: [http://www.scottish.parliament.uk/S4\\_Bills/MCP\\_SDPM\\_.pdf](http://www.scottish.parliament.uk/S4_Bills/MCP_SDPM_.pdf)

## DELEGATED POWERS PROVISIONS

5. The Committee considered each of the new or substantially amended delegated powers provisions in the Bill after Stage 2.

**6. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the new or substantially amended delegated powers provisions listed below and that it is content with the Parliamentary procedure to which they are subject:**

- Section 4(8) to (9) – meaning of marriage and related expressions in enactment and documents (Amended power);
- Section 7A – power to modify meaning of “qualifying civil partnership” (New power);
- Section 8(1) – change of qualifying civil partnership (Amended power and removed power);
- Section 28(1) - renewed marriage or civil partnership following issue of full gender recognition certificate (Removed power);
- Section 29A – form of register of marriages (Amending power in existing legislation)
- Section 31 – ancillary provision (Amended power)
- Schedule 2 (paragraph 8) – change of gender of married persons or civil partners (Amended power)
- Schedule 2, paragraph 11E – new section 3D(6)(b) - alternative grounds for granting applications: Scotland (New power)

7. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

**Schedule 2 (paragraph 6) – change of gender of married persons or civil partners (Amended power)**

|                                 |   |
|---------------------------------|---|
| <b>Power conferred on:</b>      | <b>the Scottish Ministers, consulting the Registrar General, the Gender Recognition Panel and such other persons as the Scottish Ministers consider appropriate</b> |
| <b>Power exercisable by:</b>    | <b>order</b>  |
| <b>Parliamentary procedure:</b> | <b>affirmative procedure</b>  |

8. Paragraph 6 of schedule 2 of the Bill inserts section 5D into the Gender Recognition Act 2004 (“the 2004 Act”). Section 5D confers power on the Scottish Ministers to introduce a more streamlined process for civil partners to change their civil partnership to a marriage and obtain the full Gender Recognition Certificate.

9. In its stage 1 report, the Committee recommended that this matter should be provided for on the face of the Bill but if this was not possible then orders made under this power should be laid in draft before the Parliament for consultation and then subject to the affirmative procedure.

10. Amendments made at stage 2 provide for consultation on a draft order but do not require the order to be laid before the Parliament at that stage. Following the consultation period, the orders are subject to the affirmative procedure. This falls short of the Committee's recommendation and would not formally intimate the consultation to the Parliament.

11. The Scottish Government has not explained why it has chosen not to bring forward an amendment implementing the Committee's recommendation that the draft orders on which the Government consults should be laid before the Parliament.

**12. The Committee welcomes the amendments made to the Bill at stage 2 which provide that orders made under section 5D of the Gender Recognition Act 2004 will now be subject to the affirmative procedure and that the Scottish Ministers are required to consult on a draft of any proposed order with the Registrar General, the Gender Recognition Panel and such other persons as they consider appropriate.**

**13. However, the Committee asks the Scottish Government to explain why it has chosen not to implement the Committee's recommendation that the Bill should be amended to require a consultation draft to be laid before the Parliament.**

**Schedule 2, paragraph 11C – new section 3C(5)(b)(ii) – alternative grounds for granting applications: Scotland. (New power)**

|                                 |  |
|---------------------------------|--|
| <b>Power conferred on:</b>      | <b>the Scottish Ministers, consulting the Gender Recognition Panel and such other persons as the Scottish Ministers consider appropriate</b> |
| <b>Power exercisable by:</b>    | <b>order</b>   |
| <b>Parliamentary procedure:</b> | <b>affirmative procedure</b>   |

14. Part 2 of schedule 2 makes provision about applications to the Gender Recognition Panel ("the GRP") by certain people who transitioned some time ago to an acquired gender.

15. The provisions allow such persons to have their change in gender legally recognised through the issue of a gender recognition certificate if they meet certain conditions. One condition is that the person has undergone a prescribed treatment for the purpose of modifying their sexual characteristics. New section 3C(5)(b)(ii) of the 2004 Act therefore gives power to the Scottish Ministers to determine which treatment to modify sexual characteristics will qualify as part of the criteria for recognition of a change of gender.

16. The Committee considers that this is a significant matter and engages the question of whether the criteria for change in gender should be determined through delegated powers as opposed to requiring primary legislation. The Committee observes that until now the conditions under which a gender recognition certificate could be granted has been left as a matter for the Parliament rather than Ministers.

17. However, in recognition of the significance of the power, the Government has imposed a requirement for consultation with the GRP and such other persons as the Ministers consider appropriate on a draft order. The affirmative procedure applies to its exercise.

18. This power was newly inserted into the Bill at stage 2 and therefore prior to now, the Committee has not had the opportunity to comment on it. However, the power raises a similar issue to that discussed above in relation to inserted section 5D of the 2004 Act as the exercise of this power involves consultation on a draft order before the subsequent laying of a draft order subject to affirmative procedure. And, like the power under inserted section 5D, this power does not engage the Parliament at that stage.

**19. Given the similar concerns the Committee raised at stage 1 in relation to inserted section 5D of the 2004 Act, the Committee asks the Scottish Government to explain why it is considered appropriate that the Bill does not require draft orders made under new section 3C(5)(b)(ii) of the 2004 Act to be laid before the Parliament at the point at which they are consulted on.**

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