



House of Lords
House of Commons
Joint Committee on
Human Rights

Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006

Sixteenth Report of Session 2005–06



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*Report, together with formal minutes and
appendices*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current Membership

HOUSE OF LORDS

Lord Bowness
Lord Campbell of Alloway
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

HOUSE OF COMMONS

Mr Douglas Carswell MP (Conservative, *Harwich*)
Mary Creagh MP (Labour, *Wakefield*)
Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Dan Norris MP (Labour, *Wansdyke*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Jackie Recardo (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

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Summary

A proposal for a draft Marriage Act 1949 (Remedial) Order 2006 was laid before both Houses of Parliament on 16 February 2006.

The terms of reference of the Joint Committee on Human Rights require it to report, in relation to such proposals laid before Parliament under the Human Rights Act 1998 (HRA), its recommendation whether a draft order in the same terms as the proposal should be laid before both Houses. The Committee may also report on any matter arising from its consideration of the proposal.

In this report the Committee discharges the requirement placed upon it by reporting its recommendation that a draft order in the same terms as the proposal for a draft Marriage Act 1949 (Remedial) Order 2006 should be laid before both Houses (paragraph 2).

Chapter 2 of the Report sets out the background to that recommendation, in particular by explaining the reasons for the Committee's conclusions that—

- the judgment of *B and L v UK* satisfies the condition in section 10(1)(b) HRA for a Minister to take remedial action (paragraph 16)
- the reasons relied on by the Minister for proceeding by way of remedial order rather than by Bill are sufficiently compelling to satisfy the condition in section 10(2) HRA (paragraph 19)
- the repeal of the relevant provisions of the Marriage Act effected by Article 2(a) of the proposed draft order would remedy the incompatibility identified by the European Court of Human Rights in *B and L v UK* (paragraph 20)
- the use of the non-urgent procedure rather than the urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay before remedying the incompatibility and the need to afford a proper opportunity for parliamentary scrutiny (paragraph 25)
- the additional provisions made by the proposed draft order are within the scope of the power in paragraph 1(1)(a) of Schedule 2 to the HRA (paragraph 26 and 27).

In Chapter 3 the Committee reports on four matters arising from its consideration of the proposal. It —

- draws to the attention of each House the Government's view that it could not have amended the Civil Partnership Act 2004 by means of this remedial order, while saying that it considers that view to be based on too narrow an interpretation of the power to make additional provision in paragraph 1(1)(a) of Schedule 2 to the HRA (paragraph 31)
- draws to the attention of both Houses the European Court of Human Rights' criticisms of the personal bill procedure as a means of enabling people within prohibited degrees of affinity to marry (paragraph 32)

- commends the Government for their promptness of action in this case and for the clarity of the information which they have provided in relation to the proposed draft order (paragraph 33)
- reports that it can at present see no reason why it would draw the attention of each House to a draft order in the same terms as the proposal on any of the technical grounds, set out in the orders of reference of the Joint Committee on Statutory Instruments, on which it will be required to report should such a draft order subsequently be laid before Parliament (paragraph 34).

1 Recommendation

1. Under the Human Rights Act 1998 (HRA), a draft remedial order may not be laid before Parliament unless the person proposing to make the order has previously laid before Parliament a document which contains a draft of the proposed order and the required information.¹ A proposal for a draft Marriage Act 1949 (Remedial) Order 2006 and the required information was laid before both Houses on 16 February 2006.² At the same time we received an explanatory memorandum from the Department for Constitutional Affairs on the proposal.³ A period of 60 days, beginning with the day on which the proposal was laid, must elapse before a draft remedial order may itself be laid.⁴ Our orders of reference require us to report to each House our recommendation whether a draft order in the same terms as the proposal should be laid before Parliament, and we may also report on any matter arising from our consideration of the proposal.⁵

2. We hereby report to each House our recommendation that a draft order in the same terms as the proposal for a draft Marriage Act 1949 (Remedial) Order 2006 should be laid before both Houses.

3. In the remainder of this Report we explain the factors we have taken into account in arriving at this recommendation. We also report on other matters arising from our consideration.

1 Paragraph 3(1)(a) of Schedule 2 to the HRA 1998. Paragraph 5 of Schedule 2 states that “required information” means—

(a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order

(b) a statement of the reasons for proceeding under section 10 [of the HRA] and for making an order in those terms.

The required information in relation to this proposed draft order is published here as Appendix 1

2 The intention to lay the proposal was announced by written ministerial statement in both Houses on 21 November 2005: HL Deb col. WS110; HC Deb cols. 93–94WS

3 Appendix 2

4 Paragraph 3(1)(b) of Schedule 2 to the HRA. In calculating this period, no account is to be taken of any time during which Parliament is dissolved or prorogued, or both Houses are adjourned for more than four days (paragraph 6 of the Schedule)

5 House of Commons Standing Order No. 152B (3)(a); House of Lords order of appointment, 19 July 2005

2 The background to our recommendation

The proposed draft order

4. This remedial action is being taken under section 10(1)(b) of the Human Rights Act 1998, it appearing to a Minister that, having regard to the finding of the European Court of Human Rights in the case of *B and L v UK*,⁶ certain provisions of the Marriage Act 1949 are incompatible with an obligation of the UK arising from the Convention. In that case the European Court of Human Rights held that the prohibition on the marriage of parents-in-law to children-in-law, contained in the Marriage Act 1949, was in violation of the right to marry in Article 12 ECHR. The proposal for a draft order is laid in accordance with the normal, or non-urgent, procedure set out in paragraphs 2(a) and 3 of Schedule 2 to the HRA.

5. Under section 10(2) of the HRA, the Minister considers that there are “compelling reasons” for proceeding by means of a remedial order making such amendments to the legislation as he considers necessary to remove the incompatibility.

6. The proposed draft order would repeal those provisions of the Marriage Act 1949⁷ which restrict the marriage of a person to the parent of his former spouse and the marriage of a person to the former spouse of his child.⁸ Those provisions provide that a person may not marry the former spouse of his child or the parent of his former spouse except where they are both over the age of 21 and both the former spouses through whom they are connected are dead.

7. A remedial order may contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate.⁹ The power to make such additional provision includes a power to amend primary legislation, including primary legislation other than that which contains the incompatible provision.¹⁰ The proposed draft order makes two types of additional provision pursuant to this power.

8. First, it exempts a Church of England or Church in Wales clergyman from what would otherwise be his obligation to solemnize a marriage between those permitted to marry by the removal of the prohibition on the marriage of parents-in-law and children-in-law.¹¹ Second, the proposed draft order repeals a number of other statutory provisions in consequence of the main repeal.¹²

6 Application No. 36536/02, Judgment of 13 September 2005

7 Marriage Act 1949 s. 1(4) to (8) and Part 3 of Schedule 1

8 Article 2(a) of the proposed draft order

9 Para. 1(1)(a) of Schedule 2 HRA 1998

10 Para. 1(2)(a)

11 Article 2(b) of the proposed draft order

12 Article 3 of the proposed draft order

The Committee's role

9. This is the first remedial order on which we have reported. Our predecessors in the last Parliament reported on the two previous remedial orders which have been made under the HRA: the Mental Health Act 1983 (Remedial) Order 2001¹³ and the Naval Discipline Act 1957 (Remedial) Order 2004.¹⁴ Both were made and laid under the urgent procedure, though the Mental Health Act Order was originally laid under the non-urgent procedure as a proposal for a draft order, then withdrawn following comments made by the previous Committee in correspondence and instead made and laid as an urgent order. As it was required to do, the Committee reported on both orders.¹⁵

10. After its Report on the first order, the previous Committee also agreed a general Report on remedial order procedures arising from its scrutiny experience.¹⁶ In this Report the Committee set out its views on the criteria it thought Ministers should take into account in deciding firstly whether there were “compelling reasons” for proceeding by means of remedial order and secondly whether to choose the non-urgent or urgent route. The Committee proposed, in Annex B to the Report, some minor changes to the statutory procedures and to Commons standing orders relating to remedial orders, which have not been adopted. It also set out, in Annex C, a number of recommendations to Ministers about methods and timescales for remedying incompatibilities and keeping the Committee informed about action they were taking. The Government’s response to those recommendations was published in that Committee’s Nineteenth Report of Session 2004–05.¹⁷

11. In its Report on the Naval Discipline Act (Remedial) Order, the previous Committee described its role in relation to remedial orders as being, first, to act as the “guarantor of the propriety of the use of the power to make remedial orders” under the HRA and, second, to act in the place of the Joint Committee on Statutory Instruments (JCSI) to ensure that the order meets the criteria of formal propriety which normally fall within the purview of that committee.¹⁸ We agree that that is an accurate representation of our role, and in carrying it out we seek to ensure that Ministers have used their powers to make remedial orders in accordance with the provisions of the HRA. We also carry out our functions in the context of two potentially conflicting desiderata: the need to ensure that parliamentary scrutiny of remedial orders is commensurate with the fact that they amend primary legislation, and the need to ensure that breaches of Convention rights are remedied expeditiously.

12. In respect of each remedial order which we examine, the main judgments for us to make are whether the requisite conditions for Ministers to exercise their powers to take remedial action under section 10 and Schedule 2 of the HRA have been met, including:

13 SI 2001 No. 3712

14 SI 2004 No. 66

15 Sixth Report of Session 2001–02, *Mental Health Act 1983 (Remedial) Order 2001*, HL Paper 57, HC 472, and Ninth Report of Session 2003–04, *Naval Discipline Act 1957 (Remedial) Order 2004*, HL Paper 59, HC 477

16 Seventh Report of Session 2001–02, *Making of Remedial Orders*, HL Paper 58, HC 473

17 Nineteenth Report of Session 2004–05, *The Work of the Committee in the 2001–2005 Parliament*, HL Paper 112, HC 552, Appendix 2

18 Ninth Report of Session 2003–04, *op cit.*, para. 11

- whether there are “compelling reasons” for the Government to remedy the incompatibility by remedial order;
- whether the order, draft order or proposed draft order serves to remedy the relevant incompatibility;
- whether the procedure adopted (non-urgent or urgent) is appropriate;
- whether any additional provision contained in the order, draft order, or proposed draft order by virtue of paragraph 1 of Schedule 2 to the HRA is appropriate and *intra vires*; and
- whether, in relation to draft orders and orders, the criteria of technical propriety applied by the JCSI are satisfied insofar as they apply to remedial orders.

13. In relation to our power under our orders of reference to report our views to each House on any matter arising from our consideration of proposals, draft orders or orders, the following matters appear likely to us to require our attention in relation to most, if not all, proposals, draft orders or orders which are laid before Parliament—

- whether the order omits additional provision which it should have contained
- whether there are any other issues arising from the incompatibility, or the relevant judgment of the UK court or the European Court of Human Rights, which are significant enough to draw to the attention of both Houses
- whether the Government has acted promptly and has kept us and Parliament as a whole informed of its intentions.

In addition, while we are not required to report on the technical propriety of proposed draft orders in terms of the criteria applied by the JCSI to other statutory instruments, when we consider and report on such proposals we will seek to draw attention to any matters arising on these grounds in order to alert each House, the Government and others in advance of the laying of any subsequent draft order and our formal report on it.

Our consideration of this proposed draft order

14. In the case of the proposed draft order currently under consideration, we have not thought it necessary to seek any further clarification from the Government on any of the above points beyond the information they have already supplied to us. Nor have we thought it necessary to issue a call for evidence on the proposed draft order from outside organisations and individuals.

15. Under the statutory procedure applicable to non-urgent remedial orders, representations may be made to the Government during the 60-day period when a proposed draft order is before Parliament. If the dates of forthcoming parliamentary recesses remain as currently scheduled, that 60-day period will expire at midnight on Sunday 14 May 2006. After that date, if the Government decides to lay a draft order, it must be accompanied by a summary of representations received and details of any changes

made to the proposed order as a result of those representations.¹⁹ A second 60-day period commences with the day on which the draft order is laid, and no motion to approve the draft order may be made until this period has ended.²⁰ During this second 60-day period we are required by our orders of reference to report our recommendation whether the draft order should be approved. In our consideration of draft orders we are also required to consider whether the special attention of each House should be drawn to them on any of the grounds set out in each House's orders relating to the JCSI, and we are also permitted to report our views on any matter arising from our consideration of the draft order. Should any representations be received by the Government during the first 60-day period, we will take them into account in our report on the draft order itself when and if that is laid before Parliament.

Use of the power to take remedial action

16. Section 10(1)(b) of the HRA provides that a Minister may take remedial action if it appears to him that “having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention”. The Government's Explanatory Memorandum states that Ministers believe that this condition is satisfied having regard to the finding contained in the judgment *B and L v UK*. **We agree with the Government that the condition contained in s.10(1)(b) HRA for use of the power to take remedial action is satisfied in this case.**

Compelling reasons

17. Once one of the triggers in section 10(1) HRA has been activated, under section 10(2) a Minister may only proceed to take remedial action if he considers that there are “compelling reasons” so to do. In its Report on the Making of Remedial Orders, the previous Committee expressed the view that, as a matter of general constitutional principle, it was desirable for amendments to primary legislation to be made by way of a bill, to maximize the opportunities for detailed parliamentary scrutiny of the proposed amendments, and to allow amendments to be made to the Government's proposals.²¹ It gave as examples of the sorts of factors militating in favour of using the remedial order procedure the need to avoid undue delay in remedying Convention incompatibilities, the impact on particular individuals and the fact that the legislative timetable might be fully occupied by other important legislation.²²

18. The Minister's reasons for proceeding by way of remedial order are set out in the statement of required information which accompanies the proposed draft order. In short, they are that it would be undesirable for undue delay to occur before the incompatibility is remedied, bearing in mind that what is at stake involves the personal status of the individuals concerned, and there is little prospect of parliamentary time being found for a

19 Paragraph 3(2) of Schedule 2 to the HRA

20 Paragraph 2(a) of Schedule 2 to the HRA

21 *op cit.* at para. 32

22 *ibid.* at para. 33

Bill remedying the incompatibility in the foreseeable future given the heavy legislative programme currently being taken forward by the Government.²³

19. The reasons relied on by the Minister for proceeding by way of remedial order rather than by Bill are clearly capable in principle of being “compelling reasons” for the purposes of section 10(2) of the Human Rights Act 1998. We consider that they are sufficiently “compelling” to make the proposed draft order *intra vires* .

Remedying the incompatibility

20. In our view the repeal of the relevant provisions of the Marriage Act 1949 effected by Article 2(a) of the proposed draft order²⁴ would remedy the incompatibility with Article 12 ECHR identified by the European Court of Human Rights in *B and L v UK*.

Use of the non-urgent procedure

21. The previous Committee, in its Report on Making Remedial Orders, set out some of the considerations which it believed to be relevant when a Minister, having decided to remedy an incompatibility by way of a remedial order, was deciding whether to do so by the urgent or the non-urgent procedure.²⁵ It considered that the decisive factor should be the current and foreseeable impact of the incompatibility on anyone who might be affected by it. The type of considerations identified by that Committee as likely to be relevant included the significance of the rights which were, or might be, affected by the incompatibility, the seriousness of the consequences for identifiable individuals or groups from allowing the continuance of an incompatibility, the adequacy of compensation arrangements as a way of mitigating the effects of an incompatibility, the number of people affected, and alternative ways of mitigating the effect of an incompatibility pending amendment to primary legislation. In respect of the seriousness of the consequences of identifiable individuals or groups from the continuance of an incompatibility, the Committee specifically cited interference with a person’s right to marry or found a family as an example of an incompatibility having serious consequences for an important aspect of a person’s life, which should militate in favour of the use of the urgent procedure to remove the incompatibility.²⁶

22. The Minister’s reasons for proceeding by way of the non-urgent procedure in this case are set out in the Explanatory Memorandum accompanying the proposed draft order.²⁷ This explains that Ministers have concluded that the urgent procedure would not be appropriate in this instance because the personal liberty of the citizen is not at stake, no criminal sanctions apply to the relationships that form the subject of the order and, given the importance of marriage as a fundamental social institution, it is appropriate for the proposed draft order to be subject to parliamentary scrutiny before coming into effect.

23 Appendix 1

24 Sections 1(4) to (8) and Part 3 of Schedule 1 of the Marriage Act 1949

25 *op cit.* at paras. 36–37

26 *ibid.* at para. 37

27 Appendix 2, para. 11

23. The Explanatory Memorandum addresses the previous Committee's comments about interference with the right to marry being sufficiently serious to militate in favour of the urgent procedure, saying that Ministers have noted those comments but believe that the non-urgent procedure should be used so that the order will be subject to parliamentary scrutiny before being brought into force, given the sensitive nature of the moral and public policy issues associated with any amendment to the prohibited degrees of affinity.

24. The Minister's reasons for proceeding by way of the non-urgent rather than the urgent procedure for remedial orders are in our view capable in principle of justifying that choice of procedure. Affording a proper opportunity for parliamentary scrutiny of a change in the law concerning marriage is certainly a very important consideration. At the same time, as the statement of required information acknowledges, the incompatibility involves the personal status of those affected, and as long as the law remains unchanged those affected by it will remain unable to marry. As well as involving personal status, and a person's sense of moral integrity, this may also have financial consequences: for example, certain benefits and exemptions are still only available to married and not unmarried couples.²⁸ The successful applicants in the case itself, and others in a similar position, will therefore continue to suffer the various consequences of being unable to marry, some of which may have serious financial effects for which compensation may not be available for so long as the incompatibility is not remedied. Employment of the non-urgent procedure instead of the urgent procedure in this case will in practice delay the remedying of the incompatibility for a period which could last for between 5 and 8 months, possibly longer, depending on dates of laying and approval of the draft order, and dates of parliamentary recesses. On the other hand, the number of people affected by the incompatibility seems unlikely to be large.

25. In our view, proceeding in this case to remedy the incompatibility by way of a non-urgent order, rather than an urgent order, strikes a reasonable balance between the competing considerations of the need to avoid undue delay before remedying the incompatibility and the need to afford a proper opportunity for parliamentary scrutiny.

Additional provision

26. Article 2(b) of the proposed draft order contains additional provision exempting a Church of England or Church in Wales clergyman from what would otherwise be his obligation to solemnize a marriage between those permitted to marry by the removal of the prohibition on the marriage of parent-in-law and children-in-law. As the Explanatory Memorandum accompanying the proposed draft order explains,²⁹ such clergymen have a legal obligation to solemnize the marriage of a person resident in his parish or entered on the church electoral roll of his parish. When the prohibited degrees of affinity within the Marriage Act 1949 were amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, a "conscience clause" was inserted into the 1949 Act to exempt any clergyman from this obligation where the people proposing to marry would have been, before the 1986 Act, within the prohibited degrees of affinity to each other.³⁰ The proposed draft

28 For example, the "spouse exemption" from inheritance tax

29 Appendix 2, para. 14

30 Section 5A Marriage Act 1949

order extends the exemption from the obligation to those who will be permitted to marry by the draft order itself. **In our view, this is within the scope of the wide power to make additional provision in para. 1(1)(a) of Schedule 2 to the HRA.**

27. We also consider that the consequential repeals of other statutory provisions, contained in Article 3 of the proposed draft order, are necessary and appropriate and therefore within the scope of the power in paragraph 1(1)(a) of Schedule 2 to the HRA.

3 Matters arising

28. Pursuant to our power in our orders of reference to report to each House on any matter arising from our consideration of proposals for a draft order, we report on four such matters.

Scope of the power to make incidental, supplemental or consequential provision

29. The proposed draft order does not make provision to repeal the provisions in the Civil Partnership Act 2004 which restrict civil partnerships between former parents-in-law and children-in-law,³¹ and are therefore equivalent to those in the Marriage Act 1949 which are being repealed. The reasons for this are given in the Explanatory Memorandum accompanying the proposed draft order.³²

30. It explains that the 2004 Act creates prohibited degrees of relationship for civil partnerships similar to the prohibited degrees of relationship for marriage, reflecting the policy of the 2004 Act that the law of marriage and of civil partnership should, so far as possible, be similar. However, it goes on to explain, there is a long standing principle of law and public policy that marriage, both in domestic law and under the Convention, is the union between one man and one woman, and the Government therefore does not accept that the right to marry in Article 12 ECHR extends to same sex relationships. For that reason, the Government does not believe that the prohibited degrees of civil partnership in the 2004 Act could be amended by remedial order. The relevant provisions of that Act have not, however, been commenced since the intention of Parliament was that the prohibited degrees should be the same for civil partnerships as for marriage. The Government therefore proposes not to bring these provisions into force³³ and to invite Parliament to repeal them when a suitable legislative opportunity arises.

31. In the circumstances of this case, because the relevant provisions of the Civil Partnership Act have not been commenced, no practical consequences arise from the Government's view that it would not have been possible to amend that Act by remedial order. However, had the relevant provisions of the Civil Partnership Act 2004 already been in force, omitting their repeal from the proposed remedial order would in our view have given rise to a new risk of incompatibility with Convention rights because it would have introduced a difference of treatment between marriage and civil partnership which would require justification. It is quite possible that other similar issues may arise in the future in relation to other remedial orders. **While we draw to the attention of each House the Government's view that it could not have amended the Civil Partnership Act by means of this remedial order, we consider that view to be based on too narrow an interpretation of the power to make incidental, supplemental or consequential**

31 Civil Partnership Act 2004, s. 3(1) and Schedule 1

32 Appendix 2, paras. 7–8

33 In the written ministerial statements made on 21 November 2005 the Minister said "The parallel provisions in the Civil Partnership Act 2004 ... will not be commenced so that same-sex couples that wish to form a civil partnership will have parity of treatment in this regard."

provision in paragraph 1(1)(a) of Schedule 2 to the Human Rights Act 1998, which is expressed in very broad terms.

Personal bills

32. Part of the Government’s case before the ECtHR in *B and L v UK* was based on the argument that the prohibition on marriage between parents-in-law and children-in-law was not absolute because permission could be granted for such marriages in individual cases by means of private Acts of Parliament. Such personal bills are rare following the enactment of the Marriage (Prohibited Degrees of Relationship) Act 1986, none having been introduced since 1987. In its judgment the European Court of Human Rights was critical of the personal bill procedure, commenting that there was no indication of “any detailed investigation into family circumstances” which would support the Government’s claim that personal Acts allowed exceptions to be made in cases where no harm would ensue. The Court also observed that the procedure consisted of a “cumbersome and expensive vetting process” which would not appear to offer a “practically accessible or effective mechanism for individuals to vindicate their rights”.³⁴ **We draw to the attention of both Houses the views of the European Court of Human Rights in this case concerning use of the personal bill procedure to enable people within prohibited degrees of affinity to marry.**

Promptness of action and keeping Parliament informed

33. The judgment of the European Court of Human Rights was delivered on 13 September 2005. The Government made a written ministerial statement in both Houses on 21 November 2005 indicating that the Government accepted the judgment and intended to implement it by amending the Marriage Act 1949 by way of a remedial order. The judgment became final on 13 December 2005.³⁵ In the last Committee’s Report on Making of Remedial Orders that Committee was of the view that, within three months of the date of a judgment holding that the UK had violated a person’s rights, the Government should inform it of any steps it intended to take to avoid similar violations occurring in the future.³⁶ The Committee also recommended that final decisions about how to remedy incompatibilities should be made no later than six months after the end of legal proceedings.³⁷ The Government has clearly acted well within both these recommended periods of time. In addition, the Explanatory Memorandum and statement of required information accompanying the proposed draft order contain full explanations of the background to the introduction of the order and of the incompatibility which it is necessary to remove. **We commend the Government for their promptness of action in this case and for the clarity of the information which they have provided to us and to Parliament in relation to the proposed draft order.**

34 App. No. 36536/02, para. 40

35 Under the ECHR the State Party has 3 months from the date of a Chamber judgment to refer the case to the Grand Chamber if it so wishes.

36 Seventh Report of Session 2001–02, op cit., para. 26

37 *ibid.*, para. 36

Technical propriety

34. As noted above (paragraphs 12 and 13), our terms of reference require us to consider, in respect of draft orders and orders, whether the special attention of each House should be drawn to them on any of the grounds on which the Joint Committee on Statutory Instruments may so report in relation to most other statutory instruments. When we report on proposals for draft orders, we will normally indicate whether we would be likely to draw the attention of each House to a draft order on any of those grounds if one were to be laid in the same terms as the proposal. In this case we can at present see no reason why we would do so. If and when a draft order is laid, whether in the terms of the proposal or in different terms, we will make our formal report on this matter.

Formal Minutes

Monday 27 March 2006

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Campbell of Alloway

Lord Judd

Lord Lester of Herne Hill

Baroness Stern

Mary Creagh MP

Dr Evan Harris MP

Mr Richard Shepherd MP

Draft Report [Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 34 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Sixteenth Report of the Committee to each House.

Several Papers were ordered to be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and Baroness Stern do make the Report to the House of Lords.

[Adjourned till Wednesday 19 April at 4pm.]

Appendices

Appendix 1: Required Information (Paragraph 4(1) of Schedule 2 to the Human Rights Act 1998)

1. EXPLANATION OF THE INCOMPATIBILITY WHICH THE PROPOSED DRAFT MARRIAGE ACT 1949 (REMEDIAL) ORDER SEEKS TO REMOVE, INCLUDING PARTICULARS OF THE RELEVANT DECLARATION, FINDING OR ORDER.

In its judgment of 13th September 2005 in the case of *B and L v United Kingdom* (Application No. 3653/02), the European Court of Human Rights held that there had been a violation of Article 12 of the European Convention on Human Rights in that the prohibition on the right of a person to marry the former spouse of his child or a person to marry the parent of his former spouse amounted to a substantive interference with the right to marry.

2. REASONS FOR PROCEEDING UNDER SECTION 10 AND FOR MAKING AN ORDER IN THOSE TERMS

The issues raised by the finding of the European Court of Human Rights in this case involve the personal status of the individuals concerned. As long as the law remains in its current state, those affected by this finding will remain unable to marry. It would, therefore, be undesirable for undue delay to occur before the incompatibility is remedied. Given the heavy legislative programme presently being taken forward by the Government, there is little prospect of parliamentary time being found for a Bill for the purpose of remedying the incompatibility within the foreseeable future. Proceeding by way of a remedial order is likely to achieve a change in the law more quickly than proceeding by way of primary legislation.

The proposed draft Marriage Act 1949 (Remedial) Order seeks to abolish the prohibition on former parents and children-in-law marrying so that the law of marriage in England and Wales is no longer incompatible with article 12 of the European Convention on Human Rights. At the same time, it extends the exemption which has historically been provided to Church of England and Church in Wales clergy from what would otherwise be their legal obligation to solemnize marriages between certain persons related by affinity, where the law on such persons being permitted to marry has been relaxed. It also makes some further, consequential, repeals.

Appendix 2: Explanatory memorandum from the Department for Constitutional Affairs to the Proposed Draft Marriage Act 1949 (Remedial) Order 2006

1. The Department for Constitutional Affairs provides this explanatory memorandum to assist the Joint Committee on Human Rights.
2. As a result of the judgment of the European Court of Human Rights on 13th September 2005 in the case of *B and L v UK* (application no. 3653/02) the Department for Constitutional Affairs proposes to amend the Marriage Act 1949 (c.76) (“the 1949 Act”) by way of a remedial order using the powers contained in section 10 of, and paragraph 1(1)(a) of Schedule 2 to, the Human Rights Act 1998 (c.42) (“the 1998 Act”).

DESCRIPTION

3. This proposed draft remedial order makes provision to remove the prohibitions on marriages between former parents and children-in-law contained in the Marriage Act 1949. It also makes further changes which are consequential and incidental to that change.

POLICY BACKGROUND

Judgment of the European Court of Human Rights in B and L v UK

4. The second applicant in this case had been married to the son of the first applicant and had a child by him. After the second applicant and the son had separated (the first applicant having long been divorced from the mother of his son) the applicants began to cohabit, together with the second applicant’s child (i.e. the first applicant’s grandchild). The applicants wished to marry but could not do so because of the provisions of section 1(4) of and Part III of Schedule 1 to the 1949 Act.

5. The applicants argued that the prohibition on their marrying denied them the very essence of the right to marry in breach of article 12 of the European Convention on Human Rights and that this was disproportionate and unjustified. The Court found that the exceptions to the prohibition through death or private Act of Parliament were so slight as to mean that the applicants should be regarded as unable to marry. The Court noted that there were no criminal provisions which prohibited the sexual relationship between the applicants. Furthermore, a report by a group appointed by the Archbishop of Canterbury¹ had concluded that there was no justification for the ban which was, in any event, not absolute in light of the availability of sanction through Parliament (which could be obtained without any detailed investigation of the personal circumstances of the parties or the propriety of their marriage). In the circumstances, there had been a violation of article 12 of the Convention.

6. The Government has decided not to ask for the judgment to be referred to the Grand Chamber of the Court and it, therefore, became final on 13 December 2005.

Civil Partnership Act 2004

7. The Civil Partnership Act 2004 (“the 2004 Act”) creates a new legal status for same sex couples with similar rights and obligations to those created by marriage for opposite sex couples. Section 3(1) of, and Schedule 1 to that Act create prohibited degrees of civil partnership similar to the prohibited degrees of marriage, including a prohibition on civil partnerships between former parents and children-in-law. This reflects the policy of the

1 “No just Cause: Affinity: Suggestions for Change” 1984

2004 Act that the law of marriage and of civil partnership should, so far as possible, be similar.

8. However, there is a long standing principle of law and public policy that marriage, both in domestic law and under the Convention, is the union between one man and one woman. As a consequence, the Government does not accept that the right to marry (article 12 of the Convention) extends to same sex relationships. For that reason, we do not believe that the prohibited degrees of civil partnership could be amended by remedial order. Part 3 of Schedule 1 to the 2004 Act has not, however, been commenced since the intention of Parliament was that the prohibited degrees should be the same for civil partnership as for marriage. Parliament will be invited to repeal these provisions when a suitable legislative opportunity arises.

LEGISLATIVE BACKGROUND

Human Rights Act 1998

9. As the Committee will be aware, section 10(1)(b) of the 1998 Act permits a Minister of the Crown to make an order amending legislation ("a remedial order") if "it appears to a Minister of the Crown ... that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention" (subsection (1)(b)). Ministers in the Department believe that this condition is satisfied having regard to the finding contained in the judgment in *B and L v UK* (see above).

10. The Minister is also required to consider under section 10(2) whether there are compelling reasons for making a remedial order rather than proceeding by way of primary legislation. This is dealt with in the statement of required information with which the **proposed** draft order was laid before Parliament.

11. Ministers have also considered the case for making an order under the urgent procedure (paragraph 4 of Schedule 2). However, Ministers have concluded that the urgent procedure would not be appropriate in this instance. This is because: the personal liberty of the citizen is not at stake; no criminal sanctions apply to the relationships that form the subject of this order, and; given the importance of marriage as a fundamental social institution, it is appropriate for the proposed draft order to be subject to parliamentary scrutiny before coming into effect. Ministers have noted the Committee's comments at paragraph 37 of its Seventh Report (Making of Remedial Orders) where it is suggested that a violation of the right to marry constitutes such a serious interference with Convention rights that it may justify the use of the urgent procedure. However, given the sensitive nature of the moral and public policy issues associated with any amendment to the prohibited degrees of affinity, Ministers believe that the order should be subject to parliamentary scrutiny before being brought into force, under the non-urgent procedure.

Marriage Act 1949

12. Part 1 of the 1949 Act, as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986 (c. 16) ("the 1986 Act") sets out restrictions on marriage. The prohibition on former parents and children-in-law marrying each other is set out in section 1(4) to (8) of, and Part 3 of Schedule 1 to, the 1949 Act. They provide that a person may not marry the former spouse of his child or the parent of his former spouse except (**subsection (5)**) where they are both over the age of 21 and both the former spouses through whom they are connected are dead.

13. Where a couple who are within the prohibition set out. In section 1(4) propose to marry on the basis that they satisfy the provisions of section 1 (5) then, in the case of marriage in church by common licence under Part 2 of the Act or a marriage by Superintendent Registrar’s Certificate under part 3 of the Act, additional evidence must be produced by virtue of (respectively) section 16(IB) and section 27B.

14. A Church of England clergyman has a legal obligation to solemnize the marriage of a person resident in his parish or entered on the church electoral roll of his parish. Section 5A was inserted into the 1949 Act by the 1986 Act as a “conscience clause” to exempt any clergyman from this obligation where the people proposing to marry would have been, before the 1986 Act within the prohibited degrees of affinity to each other.

EXTENT

15. This Order applies to England and Wales.

IMPACT

16. A full Regulatory Impact Assessment has not been produced for this statutory instrument as it has no impact on the costs of business, charities or voluntary bodes; neither does it have significant financial impact on any pubic bodies.

CONTACT

17. The lead official responsible for dealing with enquiries on this Memorandum is Alexander Clark who can be contacted on 0207 210 1475 or at alexanderr.clark@dca.gsi.gov.uk

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989