

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee (“the DPLRC”) in its consideration of the Marriage and Civil Partnership (Scotland) Bill (“the Bill”). This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum (“the DPM”) on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 4(8) to (9) – meaning of marriage and related expressions in enactments and documents. (Amended power).

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative procedure, unless amendments are made to primary legislation in which case the affirmative procedure applies

Provision

2. Section 4(1) to (6) makes provision on how references to terms such as marriage in existing legislation and at common law should be interpreted. The provisions give the result that such terms will be interpreted to include same sex marriages. The power at subsection (8) gives the Scottish Ministers an order-making power to provide that the subsections have effect in a different way or do not apply in specified cases. Such an order can, under subsection (9), include provisions which are consequential, supplementary, incidental, transitional, transitory or saving.

3. The power was amended at Stage 2, for two purposes. First of all, subsection (9) was amended so that any order made under subsection (8) may make different provision for different purposes. Secondly, subsection (9) was amended so that any order made under subsection (8) may amend primary and secondary legislation.

4. In addition, subsection (6) was amended so that the provision on references to marriage in common law also covers purported marriages. In particular, this reflected that the provisions of

section 3(3) and (4) of the Family Law (Scotland) Act 2006 (and the associated common law rule), on recognition in Scotland of certain marriages by cohabitation with habit and repute following a purported marriage outwith the United Kingdom, should extend to same sex relationships as well as opposite sex relationships.

Reason for taking power

5. The reason for taking the power at section 4(8) and (9) remains as stated in paragraphs 7 to 9 of the DPM. In brief, the general intention is that, in future, references to “marriage” and to married couples will be interpreted as including both same sex and opposite sex couples. However, there may be a small number of exceptions, reflecting that rights and responsibilities may not be exactly the same.

6. The reason for the amendment to allow different provision for different purposes is that the Government has become aware that in certain circumstances differential provision may be needed. For example, the DPM made reference to public sector pension schemes and transgender people. If provision is made so that in public sector pension schemes same sex married couples are treated in the same way as civil partners, differential provision may be needed to protect the rights of the spouses of transgender people, to ensure that they do not lose any pension rights as a consequence of their spouse acquiring a new gender.

7. As noted above, the power at subsection (8) will allow the Scottish Ministers to list specified cases (e.g. an enactment) to which section 4(1) to (6) is not to apply. There may also be a few cases where the Scottish Ministers may need to amend the enactment in question to produce a result other than the one which would be delivered by section 4(1) to (6), which is why subsection (9) has been amended to allow primary and secondary legislation to be amended.

Reason for choice of procedure

8. The amendments made at Stage 2 mean that an order under section 4 may modify primary legislation. Amendments were also made at Stage 2 so that, in line with normal practice, orders will follow the affirmative procedure when they are amending primary legislation: see the insertion of subsection (9A) into section 4. Otherwise, the negative procedure will apply which offers an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for provisions of this nature.

Section 7A – power to modify meaning of “qualifying civil partnership”. (New power).

Power conferred on: the Scottish Ministers, consulting the Registrar General for Scotland and such other persons as the Scottish Ministers consider appropriate

Power exercisable by: order

Parliamentary procedure: affirmative procedure

Provision

9. Under the Bill, persons in a “qualifying civil partnership” may change their civil partnership to a marriage.

10. “Qualifying civil partnership” is defined to refer to a civil partnership registered in Scotland (including civil partnerships registered overseas through the UK armed forces or through UK consuls where the couple elected Scotland and details of the civil partnership have been sent to the Registrar General of Births, Deaths and Marriages for Scotland (“the Registrar General”)).

11. This power allows ministers by order to modify the meaning of “qualifying civil partnership” so as to include civil partnerships registered outside Scotland.

Reason for taking power

12. The Equal Opportunities Committee took evidence on this issue at Stage 1. In particular, there could be couples resident in Scotland and in a civil partnership registered outwith Scotland who might not be able to change their civil partnership to a marriage in the jurisdiction where the civil partnership was registered without dissolving the civil partnership beforehand. The evidence indicated that it would be strange to dissolve the civil partnership when the relationship had not actually broken down.

13. In responding to this evidence, the Government acknowledged the validity of the point but also noted that there was a risk of couples having two civil statuses – married and in a civil partnership – given that the jurisdiction of Scotland does not have control on the registration of civil partnerships in other jurisdictions.

14. Therefore, the Government lodged an amendment to take an order-making power. This will enable the Scottish Government to consider the issue with other relevant jurisdictions and to consult in Scotland on what provision should be made to allow persons in a civil partnership registered outwith Scotland to change the civil partnership in Scotland to a marriage.

15. The order-making power includes the ability to make different provision for different purposes.

16. Different provision might be made in respect of some civil partnerships registered outwith Scotland. For example, section 9 of the Marriage (Same Sex Couples) Act 2013, passed at Westminster, makes provision on the parties to a civil partnership registered in England and Wales being able to convert their partnership to a marriage in England and Wales. Therefore, it may be that no provision is required in Scotland in respect of such civil partners.

17. In addition, the ability to make different provision for different purposes may be used to make different provision in respect of, on the one hand, persons in a civil partnership registered outwith Scotland who are now resident here and, on the other hand, persons in a civil partnership registered outwith Scotland who are not resident here.

18. The provision includes the power to make consequential, supplementary, incidental, transitional, transitory or saving provision. This may be required, for example, if specific

provision is needed on the rights and responsibilities of persons in a non-Scottish civil partnership who change their civil partnership to a marriage in Scotland. It also might be required if any specific provision is needed to protect the rights and responsibilities of persons in a non-Scottish civil partnership acquired whilst in their civil partnership and before they changed their civil partnership to a marriage in Scotland.

19. The provision includes the power to modify any enactment. This might be needed, for example, to amend section 8 of the Bill, particularly section 8(7) which defines “qualifying civil partnership” for the purposes of section 8.

20. Section 8 relates to changing a civil partnership to a marriage through an administrative route. The Government expects that this route will not be available to civil partners who registered their civil partnership outwith Scotland, as the original paperwork in relation to the registration of the civil partnership would not be held in Scotland. As a result, a couple in a civil partnership registered outwith Scotland seeking to change their civil partnership to a marriage here would need to have a marriage ceremony (as envisaged by section 7 of the Bill) and section 8 may need to be amended accordingly.

21. Amendments may also be needed to section 9. In particular, as the jurisdiction of Scotland has no control over the registration of civil partnerships in other jurisdictions, provision may be helpful for the avoidance of doubt to make it clear that changing a civil partnership registered outwith Scotland to a marriage in Scotland has no effect on how the civil partnership may be treated in the original jurisdiction. In addition, civil partnerships were only introduced in Scotland in 2005, after the Civil Partnership Act 2004. Some jurisdictions provided legal recognition to same sex relationships before Scotland. Therefore, provision may be needed to make it clear that persons in a civil partnership registered outwith Scotland who change their civil partnership to a marriage here could not obtain any rights or responsibilities in Scotland which pre-date the introduction of civil partnerships here.

Reason for choice of procedure

22 This order-making power relates to the change of civil status. The DPLRC noted in its report on the Bill as introduced that this is a significant matter. The Government agrees and, therefore, affirmative procedure appears appropriate.

23. As the order may make significant provision, the power provides that the Scottish Government must consult on a proposed draft order. Given the Registrar General’s role in relation to the solemnisation of marriage and the registration of civil partnership, the power provides that Scottish Ministers must consult the Registrar General before laying any order. The power also provides that the Scottish Ministers must consult other persons as the Scottish Ministers consider appropriate. The Government envisages that the consultation would be public and bodies representing LGBT people and bodies representing the legal profession would be consulted.

Section 8(1) – change of qualifying civil partnership (Amended power and removed power).

Power conferred on: the Scottish Ministers, consulting the Registrar General
Power exercisable by: order
Parliamentary procedure: negative procedure, unless amendments are made to primary legislation in which case the affirmative procedure applies

Provision

24 As outlined in the DPM, this provision relates to procedures by which qualifying civil partnerships can change their civil partnership to marriage by means of an administrative process.

25. Two amendments were made at Stage 2. The first amendment reflects points made by the DPLRC in its report. The DPLRC asked the Scottish Government to consider if section 8(2)(g) of the Bill was necessary. Section 8(2)(g) allowed the regulations to make provision on the effect of changing a civil partnership to a marriage. Following consideration, the Government concluded that it was not necessary given that, as the DPLRC suggested, section 9 of the Bill could be extended. Section 9 of the Bill makes provision on the effect of changing a civil partnership to a marriage. As introduced, section 9 only applied where the couple changed their civil partnership to a marriage through having a ceremony.

26. Following the report by the DPLRC, the Government lodged amendments at Stage 2 to remove section 8(2)(g) and to extend section 9 so that it covers those who change through the administrative route as well as those who change through having a marriage ceremony.

27. The second amendment ensures that regulations on the procedures for the administrative route for changing civil partnerships may make different provision for different purposes.

Reason for taking power

28. The reasons for taking the power are as outlined in paragraphs 13 to 18 in the DPM, except that paragraph 16 no longer applies following the removal of section 8(2)(g) and the consequential changes to section 9 following the DPLRC's report.

29. On the amendment to allow regulations to make different provision for different purposes, this may be required, for example, as different procedures may be needed for a couple in a civil partnership registered in Scotland but who now live outwith Scotland (as compared with a couple who live in Scotland).

30. It may be that the arrangements for checking the identity of the couple (to avoid fraud and to ensure that both parties do wish to change their relationship to a marriage) will have to be different if the couple do not live here. If the couple live in Scotland, the regulations may provide that any checks could be carried out by the local registrar. If the couple live outwith

Scotland, they may need to arrange for a notary public to confirm their identity and that both have confirmed that they wish the relationship to change to a marriage.

Reason for choice of procedure

31. In line with usual practice, the regulations will be subject to affirmative procedure if they amend any primary legislation. Given the likelihood, as mentioned in paragraphs 17 and 18 of the DPM, that there will be a need to amend provisions in the Gender Recognition Act 2004 (“the 2004 Act”), the Government considers it likely that an order under these powers would be used to amend primary legislation and, therefore, affirmative procedure would apply. If any order should not amend primary legislation, it would appear appropriate for negative procedure to apply, given that the provisions are detailed and technical and deal with procedural matters.

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

Power conferred on: the Scottish Ministers, consulting the Registrar General
Power exercisable by: regulations
Parliamentary procedure: negative procedure, unless amendments are made to primary legislation in which case the affirmative procedure applies.

Provision

32. This provision relates to a married person or person in a civil partnership who has obtained a full Gender Recognition Certificate being able to have a renewal marriage or civil partnership ceremony, to reflect the acquired gender.

Reason for taking power

33. The reasons for taking the power are as outlined in paragraphs 75 to 80 of the DPM except that no provision is now made on the effect of entering into a renewed marriage or renewed civil partnership. The DPLRC, in its report on the Bill, invited the Scottish Government to consider whether the power at section 28(2)(h) should be removed. The power at section 28(2)(h) related to the legal effect of entering into a renewed marriage or civil partnership. Following the DPLRC report, the Government agreed that the power could be removed given that a renewed marriage or civil partnership ceremony is not intended to have a distinct legal effect. Therefore, the Government lodged an amendment at Stage 2 to remove section 28(2)(h).

Reason for choice of procedure

34. The reasons for the choice of procedure are as outlined in paragraph 81 of the DPM.

Section 29A – form of register of marriages (Amending power in existing legislation)

Power conferred on: the Registrar General, with the approval of the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: laid before Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

35. Section 54 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 empowers the Registrar General, with the approval of the Scottish Ministers, to make regulations on matters such as the form of registers for births, marriages and deaths. Section 29A of the Bill amends section 54 of the 1965 Act so that regulations prescribing the form of a register of marriages may make different provision for different cases or circumstances.

Reason for taking power

36. Different provision might be needed if, for example, different descriptions are needed in the marriage register for the parties of a same sex marriage when compared with the parties to an opposite sex marriage. This is in line with section 16(2)(a) of the Bill, which allows regulations prescribing the form of the marriage schedule to make different provision for different cases or circumstances. The powers at section 16(2)(a) of the Bill are described at paragraphs 63 to 65 of the DPM.

Reason for choice of procedure

37. This provision amends existing powers in the 1965 Act. The approach taken in the 1965 Act is that regulations made by the Registrar General are not subject to negative or affirmative Parliamentary procedures (unless they set fees, when they are subject to the negative procedure). Having no negative or affirmative Parliamentary procedure for this amended power is consistent with the 1965 Act generally. The default position applies under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, so that the regulations are laid before Parliament.

Section 31 – ancillary provision (Amended power)

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative procedure, unless amendments are made to primary legislation in which case the affirmative procedure applies.

Provision

38. Section 31(1) allows ministers to make by order such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, or full giving full effect to, any provision of the Bill.

Reason for taking power

39. The reasons for taking the power are as outlined in paragraphs 83 to 85 of the DPM. The powers were amended at Stage 2. This amendment allows an order under section 31 to make different provision for different purposes. This might be needed, for example, in respect of amending devolved pensions legislation to reflect the introduction of same sex marriage: separate provision may be needed for transgender people and their spouses.

Reason for choice of procedure

40. The reasons for the choice of procedure are as outlined in paragraph 86 of the DPM.

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

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

Provision

41. Schedule 2 to the Bill makes provision on gender recognition. Paragraph 6 of schedule 2 inserts section 5D into the 2004 Act. Section 5D allows an order to be made to introduce a more streamlined process for civil partners to change their civil partnership to a marriage and obtain the full Gender Recognition Certificate. Following the report by the DPLRC, the Government lodged amendments so that all orders under section 5D are subject to affirmative procedure.

42. In addition, the amendments lay down a more detailed consultation procedure. In the Bill as introduced, the Scottish Ministers just had to consult the Registrar General before making an order. Following the amendments, the Scottish Ministers will have to consult on a draft of any proposed order and will have to consult the Registrar General, the Gender Recognition Panel and such other persons as Ministers consider appropriate.

Reason for taking power

43. The reasons for taking the power are as outlined in paragraphs 99 and 100 of the DPM.

Reason for choice of procedure

44. The Government lodged amendments to the Bill following the comments made by the DPLRC in its report.

45. As a result of these amendments, all orders made under the power, and not just those amending primary legislation, will be subject to affirmative procedure and will be subject to a more detailed consultation procedure.

Schedule 2 (paragraph 8) – change of gender of married persons or civil partners (Amended power)

Power conferred on: the Registrar General, with the approval of the Scottish Ministers

Power exercisable by: order

Parliamentary procedure: negative procedure

Provision

46. Paragraph 8 of schedule 2 contains provision amending the 2004 Act to allow the Registrar General, with the approval of the Scottish Ministers, to make regulations on the registration of marriages and civil partnerships following gender recognition.

Reason for taking powers

47. These powers enable the Registrar General to make regulations on the registration of marriages and civil partnerships following gender recognition.

48. The powers were amended at Stage 2 to make it clear that fees could be charged to applicants in respect of registration. Fees are generally charged for registration purposes.

49. The powers were also amended at Stage 2 to enable different provision to be made for different cases or circumstances. Different provision might be needed where the person receiving the full Gender Recognition Certificate was married in Scotland or entered a civil partnership in Scotland but was not born here or where the couple married here or entered a civil partnership here but no longer live in Scotland.

50. The powers were also amended by a non-Government amendment. This lays down that regulations under these powers must provide that where a full gender recognition certificate has been issued to a person after an application to the sheriff following the issue of an interim Gender Recognition Certificate, the marriage must not be registered unless the person's spouse consents in writing to that registration in the form prescribed by the regulations.

51. An amendment was also made to correct a drafting point in paragraph 12 of schedule 2 to the Bill. As introduced, the Bill provided that regulations made under "paragraph 20A" are subject to the negative procedure. The amendment makes it clear that this is a reference to paragraph 20A of Schedule 3 to the 2004 Act.

Reason for choice of procedure

52. The reason for negative procedure remains as outlined in paragraph 106 of the DPM.

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

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

Provision

53. Part 2 of schedule 2 makes provision on applications to the Gender Recognition Panel (“the GRP”) by certain people who transitioned some time ago to an acquired gender.

54. The provisions allow such persons to supply alternative evidence to the GRP instead of the usual requirements, which are based around a diagnosis of gender dysphoria¹. This alternative procedure will be available to persons who are or have been in a marriage or civil partnership registered in Scotland; were living in the acquired gender 6 years before the commencement of section 27 of the Bill and have or have had gender dysphoria or surgery or other treatment to modify sexual characteristics as may be laid down by order made by the Scottish Ministers.

Reason for taking powers

55. The alternative grounds allow the applicant to the GRP to provide evidence that he or she has had surgery for the purposes of modifying sexual characteristics. However, it has been suggested that in some cases long-term transitioned people may not have had surgery but may have had other treatment. Reasons for this include

- Surgical treatment may not have been available.
- There may have been medical reasons why the applicant could not have had surgery.

56. There is also a need to ensure that any treatment other than surgery which the applicant may have had provides sufficient evidence that the applicant has transitioned to an acquired gender.

57. Therefore, the new procedure contains an order-making power. This will allow Ministers to consult on exactly what types of treatment other than surgery for the purposes of modifying sexual characteristics should be accepted by the GRP.

58. Under the powers, Ministers must consult the GRP. This reflects that the GRP will have to follow the new procedures and may wish to offer a view on what treatment to modify sexual characteristics other than surgery should be accepted. Ministers will also have to consult other persons as appropriate. The Government expects that this would include bodies representing

¹ **Gender dysphoria** is a widely recognised medical condition variously described as gender dysphoria, gender identity disorder and transsexualism. It is a drive to live in the opposite gender to that which a person has been registered at birth.

transgender persons, bodies representing the legal professional and some medical practitioners with expertise in this area.

59. The consultation will be on a draft of the proposed order given that the details of what is proposed may be particularly important.

60. The order may make different provision for different cases or circumstances. This reflects that transgender people may have varied needs and, as a result, treatments may vary depending on the precise needs.

61. The order may amend any enactment made at Westminster (or originally made at Westminster and subsequently amended by the Scottish Parliament). Any such amendments are expected to relate to the 2004 Act itself. For example, there may be a need to add more detail to section 3D(4) (inserted by Part 2 of schedule 2 to the Bill), on the report covering treatment to modify sexual characteristics.

Reason for choice of procedure

62. The order is subject to affirmative procedure. This reflects that the provisions impact on an individual's personal status and, as such, are significant.

Schedule 2, paragraph 11E – new section 3D(6)(b) - alternative grounds for granting applications: Scotland (New power)

Power conferred on: the Scottish Ministers

Power exercisable by: order

Parliamentary procedure: negative procedure

Provision

63. Part 2 of schedule 2 makes provision on applications to the GRP by certain people who transitioned some time ago to an acquired gender.

64. Part 2 of schedule 2 inserts new section 3D into the 2004 Act. Amongst other provisions, it lays down that applications must include any other information or evidence required by an order made by the Scottish Ministers.

Reason for taking powers

65. Part 2 of schedule 2 lays down what information or evidence applicants under this alternative procedure have to supply to the GRP. It is standard practice in this area to give ministers the power to lay down further information or evidence.

66. This may be used if, for example, the GRP or medical practitioners advise ministers that it would be helpful for all applicants under the alternative procedure to supply a specific piece of information or evidence. The new provision, again in line with standard practice, allow the applicant to supply additional information or evidence, if he or she so wishes, and also allows the GRP to require additional information or evidence in a specific case (if doing this, the GRP must give reasons for doing so).

Reason for choice of procedure

67. Negative procedure seems appropriate in respect of a procedural matter of this nature. The power relates to the detailed information which an applicant may have to provide to the Gender Recognition Panel, which is the type of power where negative procedure seems appropriate. It would not be an effective use of Parliament's time to make this power subject to affirmative procedure.

**Scottish Government
January 2014**

*This document relates to the Marriage and Civil Partnership (Scotland) Bill as amended at
Stage 2 (SP Bill 36A)*

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