

*These documents relate to the Marriage and Civil Partnership (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 26 June 2013*

# **MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL**

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## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

### **CONTENTS**

As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Marriage and Civil Partnership (Scotland) Bill introduced in the Scottish Parliament on 26 June 2013:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 36–PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

3. The draft Bill proposes a number of amendments to the Marriage (Scotland) Act 1977 and the Civil Partnership Act 2004. These Acts are referred to in these Explanatory Notes as “the 1977 Act” and “the 2004 Act”.

### **Summary and background**

4. Key matters covered by the Bill are:
  - the introduction of same sex marriage, so that same sex couples can marry each other;
  - putting belief celebrants on the same footing as religious celebrants;
  - the arrangements for authorising celebrants to solemnise opposite sex and same sex marriage;
  - civil partnerships changing to marriage;
  - the authorisation of Church of Scotland deacons to solemnise opposite sex marriage;
  - allowing civil marriage ceremonies to take place anywhere, other than religious premises, agreed between the couple and the registrar;
  - allowing the religious and belief registration of civil partnerships. At the moment, ceremonies to register civil partnerships can only be civil in nature (although it is possible to have a religious or belief ceremony to mark the partnership, any such ceremony would not be recognised by the state);
  - allowing transgender persons to stay married when obtaining the full Gender Recognition Certificate, which provides legal recognition in the acquired gender.

## COMMENTARY

### Part 1 – Marriage

#### Chapter 1 – Same sex marriage

##### *Overview*

5. This Chapter makes a number of changes to marriage law. In particular, it amends the 1977 Act, in relation to the “forbidden degrees” (about people who are too closely related to each other to get married) to reflect the introduction of same sex marriage; it deals with existing references to marriage and related expressions in legislation and private documents, such as wills; and it clarifies how certain common law rules will operate in the context of a same sex marriage.

##### *Section 1: marriage of related persons*

6. This section makes a number of amendments to the 1977 Act, in relation to the “forbidden degrees”. Provision is made about the forbidden degrees in section 2 of, and Schedule 1 to, the 1977 Act. Section 2 of the 1977 Act makes various provisions about how the forbidden degrees are to operate and be interpreted. Some of these provisions refer at present to a husband and wife or make other indirect references to opposite sex marriage. Due to the introduction of same sex marriage, these provisions are amended by section 1 of the Bill so that they can apply to opposite sex and same sex marriage. Section 1(2)(c) makes provision so that “spouse” means either a wife of a husband or a husband of a wife or a same sex spouse.

7. Section 1 introduces a new Schedule 1 to the 1977 Act, replacing the current Schedule 1. Section 1(2)(d) deletes the word “former” from section 2(7) of the 1977 Act. The word “former” is not needed as the new Schedule 1 to the 1977 Act refers to “former spouse” and “spouse” is defined as outlined in paragraph 6 above. The new Schedule 1 is a simplified version of the existing table of forbidden degrees in the 1977 Act. No changes are made in respect of the types of relationships which mean that a couple cannot marry. Instead, the change relates to how the relationships are described. The table below demonstrates this:

<u>Current table (Column 1)</u>	<u>Current table (Column 2)</u>	<u>Proposed table</u>
<i>Relationships by consanguinity</i>		
Mother	Father	Parent
Daughter	Son	Child
Father’s mother	Father’s father	Grandparent
Mother’s mother	Mother’s father	Grandparent
Son’s daughter	Son’s son	Grandchild
Daughter’s daughter	Daughter’s son	Grandchild
Sister	Brother	Sibling
Father’s sister	Father’s brother	Aunt or uncle
Mother’s sister	Mother’s brother	Aunt or uncle
Brother’s daughter	Brother’s son	Niece or nephew
Sister’s daughter	Sister’s son	Niece or nephew
Father’s father’s mother	Father’s father’s father	Great-grandparent
Father’s mother’s mother	Father’s mother’s father	Great-grandparent

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<u>Current table (Column 1)</u>	<u>Current table (Column 2)</u>	<u>Proposed table</u>
<i>Relationships by consanguinity</i>		
Mother's father's mother	Mother's mother's father	Great-grandparent
Mother's mother's mother	Mother's mother's father	Great-grandparent
Son's son's daughter	Son's son's son	Great-grandchild
Son's daughter's daughter	Son's daughter's son	Great-grandchild
Daughter's son daughter	Daughter's son's son	Great-grandchild
Daughter's daughter's daughter	Daughter's son son	Great-grandchild
<i>Relationships by affinity referred to in section 2(1A)</i>		
Daughter of former wife	Son of former husband	Child of former spouse
Daughter of former civil partner	Son of former civil partner	Child of former civil partner
Former wife of father	Former husband of mother	Former spouse of parent
Former civil partner of mother	Former civil partner of father	Former civil partner of parent
Former wife of father's father	Former husband of father's mother	Former spouse of grandparent
Former civil partner of mother's mother	Former civil partner of mother's father	Former civil partner of grandparent
Former wife of mother's father	Former husband of mother's mother	Former spouse of grandparent
Former civil partner of father's mother	Former civil partner of father's father	Former civil partner of grandparent
Daughter of son of former wife	Son of son of former husband	Grandchild of former spouse
Daughter of son of former civil partner	Son of son of former civil partner	Grandchild of former civil partner
Daughter of daughter of former wife	Son of daughter of former husband	Grandchild of former spouse
Daughter of daughter of former civil partner	Son of daughter of former civil partner	Grandchild of former civil partner
<i>Relationships by adoption</i>		
Adoptive mother or former adoptive mother	Adoptive father or former adoptive father	Adoptive parent or former adoptive parent
Adopted daughter or former adopted daughter	Adopted son or former adopted son	Adopted child or former adopted child

*Section 2: Objections to marriage*

8. Section 5 of the 1977 Act currently provides for situations where there is an objection to a marriage proceeding. Section 5(4) lists the legal impediments to a marriage. These include where one or both parties are already married; where both parties are of the same sex or where one or both parties are not domiciled in Scotland and marriage would be void according to the law of the party's domicile.

9. Section 2 of the Bill repeals the legal impediment of both parties being of the same sex, so that marriages between two people of the same sex can take place in Scotland, once the Bill is commenced.

10. Section 2 of the Bill also amends section 5(4) of the 1977 Act in relation to cases where one or both of the parties are not domiciled in Scotland.

11. The amendment makes it clear that even if a same sex marriage would be void according to the law of the domicile of one (or both) of the parties, that is not a barrier to the parties entering into a same sex marriage in Scotland.

### *Section 3: Preliminaries to marriage*

12. This section makes some amendments to section 3 of the 1977 Act. Section 3 of the 1977 Act makes provision about the procedures a couple must go through when they want to marry. They must submit to a district registrar a notice of intention to marry, with the prescribed fee, their birth certificates and certain other documents, which are specified in section 3 of the 1977 Act.

13. Subsection (2) substitutes a new paragraph (b) in section 3(1) of the 1977 Act, to remove terms like “widow”, “widower” and “spouse”. The new paragraph instead refers to “the other party” to the marriage. Despite the change in terminology, the effect of the provision remains the same. When a marriage has ended because one of the parties has died, a person who is marrying again has to provide the death certificate of the deceased party.

14. Section 3(1) of the 1977 Act is also amended so that any person who wants to get married who has a civil partner who has died is required to submit the relevant death certificate. Section 7 of the Bill amends section 3 of the 1977 Act so that if a person who wants to get married is changing from a civil partnership to a marriage, that person must submit a relevant extract from the civil partnership register.

15. Section 3(2) of the 1977 Act makes provision in cases where someone intending to get married cannot supply his or her birth certificate or some of the other documents required by section 3(1). In essence, a person in this position has to supply the district registrar with a declaration on why the documents cannot be submitted.

16. The obligation in section 3(2) of the 1977 Act is extended by subsection (2) so that it also applies to the additional documents required as set out in paragraph 14 above. For more information on the process of changing from a civil partnership to a marriage, see the explanatory notes on sections 7 and 8.

17. Section 3(5) of the 1977 Act makes provision where one or both of the parties to the marriage is not domiciled in Scotland. Under section 3(5), such a party is required, if practicable, to submit a certificate issued by his or her home jurisdiction which confirms that there is no legal bar to him or her marrying in terms of the law of the home jurisdiction.

18. There are some exceptions in section 3(5) to the need to supply such a certificate. Subsection (2) of the Bill amends section 3(5) to provide that a certificate is not required if it would not be issued just because the parties to the marriage are of the same sex.

19. Section 7 of the 1977 Act allows a person who wants to marry outwith Scotland to apply to a district registrar in Scotland for a certificate in respect of a person's capacity to marry. When applying, the person must submit certain documents to the registrar.

20. Subsection (3) of the Bill amends section 7(1) so it refers also to the death certificate when a civil partnership has ended by death and an extract from the entry in the civil partnership register where civil partners are changing their civil partnership to a marriage.

*Section 4: Meaning of marriage and related expressions in enactments and documents*

21. Section 4 makes provision on how the term "marriage" and other expressions should be interpreted in enactments (legislation) generally, the 1977 Act specifically, the common law and private documents (such as wills). The provisions of section 4 only apply to devolved legislation – legislation that is within the legislative competence of the Scottish Parliament.

22. Subsection (1) provides that references in enactments to "marriage" and people who are or were married should be read as referring to both opposite and same sex marriage and married couples. This would, for example, apply to terms in those enactments such as "husband", "wife", "man and wife" and "spouse".

23. Subsections (2) and (3) make provision in respect of references in legislation to cohabitants, so it is clear they apply to same sex cohabitants too.

24. Subsection (4) removes references in legislation to two persons of the same sex who are (or were) living together as if they are or were in a civil partnership (i.e. cohabitants). Once the Bill is enacted, such references will be unnecessary as same sex cohabitants will be covered by the references caught by the provisions made in subsections (2) and (3).

25. Subsection (5) makes it clear that subsections (1) to (4) only apply to enactments, other than private Acts, passed or made before section 4 is commenced. (As outlined below, subsection (14) makes changes to the Interpretation and Legislative Reform (Scotland) Act 2010 in respect of future legislation). Subsection (5) also makes it clear that subsections (1) to (4) do not apply if the enactment or any other enactment provides otherwise. For example, this Bill makes separate provision in relation to the solemnisation of, on the one hand, opposite sex marriage and, on the other hand, same sex marriage. Therefore, the general provisions at subsection (1) do not apply to the legislation on solemnising marriage.

26. Subsection (6) ensures that references to being married (or having been married) in the common law are to be read as applying equally to opposite sex and same sex marriage.

27. Subsection (8) empowers the Scottish Ministers to make an Order, subject to the negative resolution procedure, to disapply or modify the effect of subsections (1) to (6).

28. For private documents which are executed after section 4 comes into force, subsection (10) provides that references in them to “marriage” or people being (or having been) married should be read as referring to both opposite and same sex marriage and married couples. This would, for example, apply to terms in private documents such as “husband”, “wife”, “man and wife” and “spouse”. Subsection (11) makes provision about the interpretation of “widow” and “widower” in any documents executed after section 4 comes into force.

29. By virtue of subsection (12), subsections (10) and (11) do not apply to documents where the document provides otherwise. Therefore, if a document executed after section 4 comes into force refers to a person being in an opposite sex marriage, subsection (10) would not enable that reference to be read as meaning a same sex marriage as well.

30. Subsection (13) adds a definition of “marriage” to the 1977 Act, referring to both opposite sex and same sex marriage. Section 26 of the 1977 Act, which contains a number of definitions, makes it clear that the definitions are to apply in the 1977 Act “except where the context otherwise requires”. An example would be the separate provisions of the 1977 Act, as amended or inserted by this Bill, on solemnising opposite sex and same sex marriage.

31. Subsection (14) adds definitions of “marriage”, “widow” and “widower” to the Interpretation and Legislative Reform (Scotland) Act 2010. The 2010 Act makes provision on how Acts of the Scottish Parliament and Scottish Statutory Instruments are to be interpreted. Therefore, adding a definition of “marriage” to the 2010 Act means that any references to marriage and married couples in any future Scottish Parliament legislation will cover both opposite sex and same sex marriage and spouses, unless specific provision is made so that this is not the case. The new definitions of “widow” and “widower” make it clear that in future legislation “widow” will include the female spouse of a deceased woman and “widower” the male spouse of a deceased man, unless contrary provision is made.

#### *Section 5: Same sex marriage: further provision*

32. This section makes provision relating to the introduction of same sex marriage and its effect on certain aspects of Scots law.

33. Subsection (1) makes provision in respect of the crime of reset. It is a crime to receive goods stolen by another. There is a defence to the crime where the person accused of reset is the wife, and the goods were stolen by her husband. Subsection (1) provides that any such defence does not extend to a female spouse in a same sex marriage.

34. Subsection (2) makes provision in respect of permanent and incurable impotency. In Scotland, a marriage is voidable (ie a court action may be raised to challenge and end the marriage) if one of the parties is at the time of the marriage permanently and incurably impotent in relation to the other spouse. Subsection (2) provides that this rule of law only applies to opposite sex marriages.

35. Subsection (3) amends section 1 of the Divorce (Scotland) Act 1976 (“the 1976 Act”). Under the 1976 Act, there are two grounds of divorce in Scotland:-

- (a) ir retrievable breakdown of the marriage;

- (b) the issue, after the date of marriage, to either party of an interim gender recognition certificate under the Gender Recognition Act 2004.

36. Section 1(2) of the 1976 Act provides a number of ways in which the irretrievable breakdown of a marriage can be established. One of those ways is adultery. Adultery means in the common law sexual intercourse between a man and a woman.

37. Subsection (3) provides that “adultery” has the same meaning for the purposes of the 1976 Act for same sex marriage as it does for opposite sex marriage in that it relates to heterosexual intercourse only. This means that a spouse in a same sex marriage could, like a spouse in an opposite sex marriage, raise an action for divorce saying that the marriage has broken down irretrievably because the other spouse in the marriage has committed adultery (i.e. had sexual intercourse with a person of the opposite sex).

38. However, subsection (3) does not extend adultery to cover sexual activity between people of the same sex. Therefore, the ways of establishing irretrievable breakdown of a marriage remain unchanged. Neither an opposite sex spouse nor a same sex spouse can raise an action for divorce saying that the marriage has broken down irretrievably because the other party in the marriage has had sexual intercourse with a person of the same sex. Instead, the divorce action would have to put forward other reasons for irretrievable breakdown, such as unreasonable behaviour.

#### *Section 6: Jurisdiction in proceedings relating to same sex marriages*

39. This section introduces schedule 1 on the jurisdiction of the Scottish courts in proceedings relating to same sex marriages. This schedule is explained at paragraphs 209 to 233 of these Explanatory Notes.

## **Chapter 2 – Marriage between civil partners in qualifying civil partnerships**

### *Overview*

40. This Chapter relates to changing a civil partnership to a marriage and the legal effect of doing so.

### *Section 7: Marriage between civil partners in qualifying civil partnerships*

41. Section 7 makes provision allowing civil partners, if they are in “a qualifying civil partnership”, to change their civil partnership to a marriage.

42. “A qualifying civil partnership” is defined by the amendment made by subsection (3)(b), which inserts new subsections (6) and (7) into section 3 of the 1977 Act. The definition is that to be “a qualifying civil partnership”, the civil partnership must have been registered in Scotland. In addition, the civil partnership must not have been dissolved, annulled or ended by death.

43. Subsection (3) also adds provisions to section 5 of the 1977 Act about civil partnerships registered at British consulates overseas and civil partnerships registered by British armed forces personnel.

44. Such civil partnerships are to be treated as having been registered in Scotland for the purposes of determining if they are a “qualifying civil partnership”, so long as:

- (a) the parties to the civil partnership elected Scotland as the relevant part of the United Kingdom when they entered into the civil partnership; and
- (b) details of the civil partnership have been sent to the Registrar General for Scotland.

45. Subsection (2) amends section 3 of the 1977 Act so that when a couple change their civil partnership to a marriage they have to provide to the district registrar an extract from the entry in the civil partnership register relating to the civil partnership.

46. Subsection (3) amends section 5(4)(b) of the 1977 Act about legal impediments to marriage. The current impediment in section 5(4)(b) is that “one of the parties is, or both are, already married or in civil partnership”. Subsection (3)(a) amends this so that being in a “qualifying civil partnership” with each other is not a legal impediment to marriage.

*Section 8: Change of qualifying civil partnership into marriage*

47. Section 8 makes provision so that qualifying civil partnerships can be changed to a marriage in accordance with an administrative procedure which may be prescribed by the Scottish Ministers in regulations.

48. By virtue of section 8(7), “qualifying civil partnership” in this section means a civil partnership registered in Scotland which has not been dissolved, annulled or ended by death (see section 5(6) of the 1977 Act, inserted by section 7(3) of this Bill). The definition also includes certain overseas civil partnerships treated as having been registered in Scotland (see section 5(7) of the 1977 Act, inserted by section 7(3) of this Bill).

49. Subsection (2) provides that regulations may in particular make provision on:

- the application process (subsection (2)(a));
- the information required from the applicants (subsection (2)(b));
- evidence to support the application (subsection (2)(c));
- any requirement to attend at a particular place or appear before a particular person (subsection (2)(d));
- conferring functions on persons (such as, for example, the Registrar General) (subsection (2)(e)). (Subsection (3) makes provision on particular functions which may be conferred);
- fees (subsection (2)(f));
- the effects of changing a qualifying civil partnership into a marriage (subsection (2)(g)). (Provision could be similar to the provision at section 9 of the Bill, on the effect of marriage between civil partners in a qualifying civil partnership).

50. Subsections (4) to (6) make provision on procedures in relation to any regulations made by the Scottish Ministers. Under subsection (4), the Scottish Ministers must consult the Registrar General before making any regulations. Under subsections (5) and (6), any regulations are subject to negative Parliamentary procedures unless they amend primary legislation, in which case they are subject to the affirmative procedure.

*Section 9: Effect of marriage between civil partners in a qualifying civil partnership*

51. This section makes provision on the effect of civil partners changing their relationship to a marriage by undergoing a marriage ceremony in accordance with the 1977 Act.

52. Subsection (1)(a) provides that the qualifying civil partnership ends when the marriage is solemnised and subsection (1)(b) that the civil partners are to be treated as having been married to each other since the date on which the qualifying civil partnership was registered.

53. Subsection (1)(a) ensures that the couple do not have two civil statuses (married and in a civil partnership) at the same time. Subsection (1)(b) ensures that their time in the civil partnership is treated as if they had been married. For example, this means that provisions in the Family Law (Scotland) Act 1985, which covers matters such as financial provision during marriage and on divorce, applies to property acquired during and for the civil partnership as well as to property acquired during and for the marriage.

54. Subsection (2) defines what is meant by “registered” for the purposes of subsection (1)(b) in relation to civil partnerships originally registered at British consulates overseas or by British armed forces personnel. Civil partnerships at consulates are treated as registered when they are entered in the Register Book. Civil partnerships through the armed forces are treated as registered when the register is signed.

55. Subsection (3) makes provision so that subsection (1)(b) is subject to any contrary provision and any order made under subsection (4). For example, provision may be needed in relation to civil partnerships which turn out to be void but are changed into marriage before it is realised they are void so the marriage is not backdated to when the civil partnership first started. In addition, there may be a need to recognise any court decrees from outwith Scotland which relate specifically to civil partnerships. The scope of any order and its Parliamentary procedure are set out in subsection (5).

56. Subsection (6) provides that any decree of aliment requiring one civil partner to make payments to the other which is in force when a civil partnership ends because it has been changed into a marriage continues to have effect. This ensures that any reference in the decree to the civil partnership does not stop the decree from continuing to have effect.

57. Subsection (7) provides that orders under section 103(3) or (4) of the 2004 Act, which relate to the regulation by the court of rights of occupancy of the family home, which were in force during the civil partnership continue to have effect once the couple are married.

58. Subsection (8) makes consequential amendments to section 1 of the 2004 Act, which contains provision on the circumstances in which a civil partnership ends.

### **Chapter 3 – Solemnisation of marriage**

#### *Overview*

59. This Chapter makes provision on who may be authorised to solemnise marriage in Scotland.

60. Currently, for opposite sex marriage, Church of Scotland ministers are authorised by way of the Church of Scotland being named specifically in section 8 of the 1977 Act. Other religious bodies are prescribed by Statutory Instrument so that their celebrants are authorised to solemnise marriage. Other religious bodies can nominate persons to be registered by the Registrar General for Scotland as celebrants under section 9 of the 1977 Act. And the Registrar General may grant temporary authorisation to individuals to solemnise a marriage or marriages under section 12 of the 1977 Act.

61. In addition, civil registrars are authorised to solemnise marriage.

62. The Bill retains this system but makes provision for belief bodies to be authorised as well.

#### *Section 10: Persons who may solemnise marriage*

63. Section 10 of the Bill makes amendments for several different purposes.

64. Firstly, section 8 of the 1977 Act makes provision on who is authorised to solemnise marriage. This is amended so its current provisions apply to authorisations for opposite sex marriage only.

65. Secondly, section 10 of the Bill amends section 8 of the 1977 Act to allow celebrants from belief bodies to be authorised to solemnise marriages. Subsection (4) amends the existing definition of “religious body” in section 26 of the 1977 Act so that it covers belief bodies as well. The relevant aspects of the amended definition in relation to belief bodies are “an organised group of people ...the principal object (or one of the principal objects) of which is to uphold or promote philosophical beliefs and which meets regularly for that purpose.”

66. Religious bodies can be prescribed under section 8 of the 1977 Act. The section is amended so that religious or belief bodies can be prescribed under this section. The effect of prescribing religious or belief bodies is that their celebrants and other persons recognised by them as entitled to solemnise opposite sex marriage can solemnise opposite sex marriages recognised by the state.

67. Thirdly, the new section 8(1A) of the 1977 Act, inserted by subsection (2)(b), provides that the Scottish Ministers may only prescribe a religious or belief body so that its celebrants are authorised to solemnise opposite sex marriage if the body requests this and if Ministers are satisfied that the body meets the “qualifying requirements”. Qualifying requirements are those set out in regulations made by the Scottish Ministers. These regulations are subject to the negative parliamentary procedure (new section 8(1G) refers).

68. Fourthly, section 10 of the Bill adds a number of provisions to section 8 of the 1977 Act to allow celebrants (of religious and belief bodies) to be authorised to solemnise same sex marriage. The new section 8(1B) of the 1977 Act, inserted by subsection (2)(b), provides who may solemnise a same sex marriage. The new section 8(1C) provides that the Scottish Ministers may only prescribe a religious or belief body so that its celebrants are authorised to solemnise same sex marriage if the body requests this and if Ministers are satisfied that the body meets the “qualifying requirements”.

69. Fifthly, the new section 8(1D) provides that nothing in subsection (1B) or (1C):
- (a) imposes a duty on any religious or belief body to request (under section 8(1C)(a)) to be prescribed so that their celebrants can solemnise same sex marriage;
  - (b) imposes a duty on any religious or belief body to nominate members under section 9 of the 1977 Act to be empowered to solemnise same sex marriage;
  - (c) imposes a duty on any person to apply for temporary authorisation under section 12 to solemnise same sex marriage;
  - (d) imposes a duty on a celebrant approved to solemnise same sex marriages to solemnise such marriages.

*Section 11: Registration of nominated persons as celebrants*

70. Section 11 makes a number of amendments to section 9 of the 1977 Act, which relates to the registration of nominated persons as celebrants. Section 9 of the 1977 Act permits the authorisation of celebrants of bodies who have not been prescribed by regulations or are not, in the case of opposite sex marriage, the Church of Scotland.

71. Subsection (2)(a) amends section 9(1) of the 1977 Act so that it just relates to opposite sex marriages. This means that section 9(1) as amended provides that a religious or belief body, other than the Church of Scotland or a body prescribed by regulations to solemnise opposite sex marriage, may nominate to the Registrar General members so that that they can solemnise opposite sex marriages.

72. Subsection (2)(b) to (l) then inserts new subsections into section 9 of the 1977 Act. The new section 9(1A), inserted by subsection (2)(b), provides that a religious or belief body who has not been prescribed by regulations to solemnise same sex marriage may nominate celebrants to the Registrar General so that they can be authorised to solemnise same sex marriage.

73. A number of amendments are made to section 9 of the 1977 Act, which provides for when the Registrar General must reject a nomination; what happens when a nomination is accepted; the register of authorised celebrants and their bodies; and for appeals. The amendments are made because of the introduction of same sex marriage and the authorisation of belief bodies and their celebrants.

74. Under section 9(2) of the 1977 Act, the Registrar General must reject a nomination on various grounds including if he or she considers the nominating body has sufficient celebrants to meet its needs. The amendment in subsection (2)(c) amends the grounds to reflect the changes made to subsection (1) and the new subsection (1A). The amendments reflect that bodies may

have different needs in relation to celebrants solemnising same sex marriage when compared with opposite sex marriage.

75. A new ground of not meeting the qualifying requirements is added to section 9(2)(e) by subsection (2)(d) to the circumstances in which the Registrar General must reject a nomination.

76. Section 9(3) of the 1977 Act sets out the declarations which must be included in a marriage ceremony to ensure it is of an appropriate form. Subsection (2)(f) amends the provision so that the current provision applies to opposite sex marriage only and subsection (2)(g) inserts provisions about the declarations for same sex ceremonies.

77. Subsection (2)(h) makes amendments to section 9(4) of the 1977 Act, which deals with cases where the Registrar General accepts the nomination. The Registrar General must currently decide how long the period of authorisation for the nominee should be, and may decide which area the nominee may solemnise marriages in. The amendments give the Registrar General the power to restrict any nominee to solemnising marriages in specific places.

78. Subsections (3), (4) and (5) make several amendments to sections 10, 14 and 24 of the 1977 Act. Section 10 makes provision about when a celebrant's name may be removed from the register of bodies and celebrants who are authorised to solemnise marriage. Section 14 is about the form of ceremony to be used by a celebrant. Section 24 is about offences under the 1977 Act.

79. The amendments made by subsections (3), (4) and (5) are consequential, as a result of changes made to other provisions of the 1977 Act about authorisation of belief bodies; maintaining separate registers for same sex and opposite sex marriages; creating separate declarations for same sex and opposite sex marriage ceremonies; and enabling the Registrar General to authorise a nominee celebrant for a particular place only.

#### *Section 12: Temporary authorisation of celebrants*

80. Section 12 of the 1977 Act allows the Registrar General to grant temporary authorisation to solemnise marriage to a person.

81. Subsection (2)(a) amends the Registrar General's power to clarify that he or she may grant temporary authorisations only to members of religious or belief bodies.

82. Subsection (2)(b) inserts new subsections into section 12 of the 1977 Act to provide that the Registrar General may grant an authorisation only if the religious or belief body meets the "qualifying requirements". The "qualifying requirements" are those set out in regulations made by the Scottish Ministers (new section 12(1D)). These regulations are subject to the negative parliamentary procedure (new section 12(1F)).

83. Under section 12(1B), as inserted, temporary authorisation may be granted for opposite sex marriage only, for same sex marriage only or for both.

84. Under section 12(1C), as inserted, the Registrar General can only grant a temporary authorisation under section 12(1)(b) to solemnise same sex marriages if the relevant religious or belief body is prescribed by regulations so that its celebrants can solemnise same sex marriage or has put forward persons to be nominated as celebrants to solemnise same sex marriage.

85. Subsection (3) clarifies the existing offence under section 24(2)(c) of the 1977 Act of solemnising a marriage not covered by a temporary authorisation. The amendments made by subsection (3) have the effect that it is an offence to solemnise a marriage:

- (a) where not specified in a temporary authorisation;
- (b) where outwith the period of the temporary authorisation;
- (c) otherwise than in accordance with any terms and conditions in the temporary authorisation.

*Section 13: Religious or belief marriage: further provision*

86. Sections 10, 11 and 12 of this Bill make provision for celebrants of belief bodies to solemnise marriage. Section 13 makes a number of consequential amendments to sections 6, 11, 13, 14 and 15 of the 1977 Act, as a result of these provisions, to reflect the authorisation of belief bodies and their celebrants.

**Chapter 4 – Same sex marriage: protection of freedom of expression etc.**

*Section 14: Same sex marriage: protection of freedom of expression etc.*

87. This section provides that the introduction of same sex marriage does not affect:

- (a) the exercise of rights of anyone to freedom of thought, conscience, religion and freedom of expression which have been conferred by the European Convention of Human Rights; and
- (b) the exercise of any equivalent rights conferred on anyone by the common law.

**Chapter 5 – Other changes to marriage procedure**

*Overview*

88. This Chapter makes a variety of changes to marriage law.

89. These include the introduction of powers for district registrars to require evidence of nationality from people wishing to get married; provisions on the timing of the issue of the marriage schedule; providing information to the district registrar on the ending of any civil partnership when a person is marrying outwith Scotland and is seeking a certificate about his or her legal capacity to do so; the automatic authorisation of Church of Scotland deacons to marry opposite sex couples and allowing civil marriage ceremonies to take place anywhere agreed by the couple and the registrar, other than religious premises.

*Section 15: Power of district registrar to require evidence of nationality: marriage*

90. This section makes amendments to sections 3 and 7 of the 1977 Act.

91. Section 3 of the 1977 Act makes provision on documents which people wishing to enter into an opposite sex or same sex marriage have to supply to the district registrar.

92. Subsection (2) adds new subsections to section 3 of the 1977 Act so that a district registrar may require “specified nationality evidence” in relation to the intended parties to a marriage. Guidance can be issued by the Registrar General about what evidence is required.

93. Subsection (3) amends section 7 of the 1977 Act. This amendment means that where a person wants to marry outwith Scotland and seeks a certificate about legal capacity from the district registrar, that person may be required to provide evidence of nationality.

#### *Section 16: The Marriage Schedule*

94. This section amends the 1977 Act in relation to the power to prescribe the form of the marriage schedule and makes a number of changes to how quickly the marriage schedule and a certificate of no impediment should be issued after notice of intention to marry has been submitted by the parties to an intended marriage.

95. Subsection (2) amends section 6 of the 1977 Act so that regulations prescribing the form of the marriage schedule may make different provision for different cases or circumstances. This would, for example, allow the marriage schedule to take one form for opposite sex marriage and another for same sex marriage.

96. Section 6(4)(a) of the 1977 Act provides that a district registrar shall not issue a marriage schedule within 14 days of receiving a marriage notice. A schedule may be issued earlier, on a specified date, where there is a written request and the Registrar General authorises the registrar to issue the schedule on the specified date. The amendment at subsection (2)(b) changes the 14 day period to 28 days.

97. Section 7 of the 1977 Act relates to the issue of a certificate of no impediment to marry where a person residing in Scotland intends to marry outwith Scotland. Section 7(2) currently provides that the certificate shall not be issued earlier than 14 days after receiving the marriage notice. The amendment at subsection (3) changes the 14 day period to 28 days.

98. Section 19 of the 1977 Act provides that an authorised registrar shall not solemnise a marriage within 14 days of receiving a marriage notice. The amendment at subsection (4) changes this period to 28 days. An exception in section 19(1) allows the marriage to be solemnised earlier, on a specified date, where there is a written request and the Registrar General authorises the registrar to solemnise the marriage on the specified date.

#### *Section 17: Marriage outside Scotland: evidence of dissolution of former civil partnership*

99. This section amends section 7 of the 1977 Act. The effect of the amendment is that where a person wants to marry outwith Scotland and seeks a certificate about his or her legal capacity from the district registrar the person must provide a copy of the decree of dissolution or annulment of any civil partnership which the person has previously been in.

*Section 18: Religious marriages: solemnisation by Church of Scotland deacons*

100. This section amends the provisions of section 8(1)(a)(i) of the 1977 Act about automatic authorisation of ministers of the Church of Scotland in respect of opposite sex marriage. The effect is that Church of Scotland deacons, like Church of Scotland ministers, are automatically authorised to solemnise opposite sex marriage.

*Section 19: Places at which civil marriages may be solemnised*

101. This section makes amendments, principally to section 18 of the 1977 Act, so that civil marriage ceremonies can take place anywhere, other than in religious premises, agreed by the couple and the registrar, rather than at “approved places” (places approved by the local authority). This section applies to both opposite sex and same sex marriages. The section provides definitions for “appropriate place”, “local registration authority” and “religious premises”.

102. Specifically, these amendments mean that a civil marriage ceremony can take place in either:

- the registration office of the authorised registrar; or
- at an appropriate place in the registration district of the authorised registrar; or
- with the approval of the Registrar General, at the registration office of another authorised registrar; or
- with the approval of the Registrar General, at an appropriate place in the registration district of another authorised registrar; or
- with the approval of the Registrar General, at an appropriate place in Scottish waters.

103. As a result of the above, some amendments are necessary to the 1977 Act to section 19, on the marriage ceremony and registration, and section 26, on interpretation and definitions, where those provisions refer to the place where a marriage has taken place. Those amendments are made in subsections (4) and (5).

*Section 20: Second marriage ceremony: form of endorsement*

104. This is a minor amendment to section 20 of the 1977 Act. This makes provision for a couple to go through a second marriage ceremony in Scotland if they have already married outwith the United Kingdom but there is some doubt about the validity of the overseas ceremony. The second marriage ceremony in Scotland must be civil in nature.

105. Section 20 of the 1977 Act prescribes some forms. At the moment, section 20 provides that the year in these forms should start with the figures “19”. This reflects the twentieth century and is no longer appropriate. As a result, the amendment repeals the figures “19”.

## **Chapter 6 – Sheriff court jurisdiction in relation to declarator of marriage**

### *Section 21: Sheriff court jurisdiction in relation to declarator of marriage*

106. A declarator of marriage is a court judgment that a valid marriage exists, or existed, between two parties.

107. Section 21 clarifies the jurisdiction of the sheriff court in relation to declarators of marriage. It does so by amending section 8 of the Domicile and Matrimonial Proceedings Act 1973 (“the 1973 Act”).

108. The amendments made by section 21 of the Bill to the 1973 Act only relate to opposite sex marriage. Paragraph 1(2) of schedule 1 to this Bill disapplies section 8 (and section 7) of the 1973 Act in relation to same sex marriage. Schedule 1 to the Bill makes provision on the jurisdiction of the Scottish courts in relation to same sex matrimonial court actions, including declarators of marriage.

109. By virtue of the amendments made by section 21(2), the sheriff court has jurisdiction in declarator of marriage cases when either party to the marriage (a) is domiciled in Scotland when the action is raised or (b) was habitually resident in Scotland for a year before the action is raised or (c) died before the date when the action is raised and at death was domiciled in Scotland or had been habitually resident in Scotland for a year. In addition, either party to the marriage must have been:

- resident in the sheriffdom for a period of 40 days before the court action is raised; or
- resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and with no known residence in Scotland when the action is raised.

## **Part 2 – Civil partnership**

### *Overview*

110. This Part of the Bill amends legislation in respect of civil partnerships. Currently, only registrars can register civil partnerships. It is possible to have a religious or belief ceremony in relation to the civil partnership but any such ceremony has no legal significance. The Bill amends legislation so that, in future, it will be possible to have a religious or belief ceremony to register the partnership. Civil ceremonies will also remain available.

111. Many of the provisions in this Bill in relation to the authorisation of religious or belief celebrants to register civil partnerships, and on ceremonies, mirror provisions in the 1977 Act, on the solemnisation of marriage.

### *Section 22: Registration of civil partnership*

112. Subsection (2) amends section 85 of the 2004 Act, to reflect the introduction of religious and belief celebrants to register civil partnerships. Section 85 makes provision on when two people are to be regarded as having registered as civil partners of each other and provides that both must sign the civil partnership schedule (“the schedule”).

113. Currently, one of the persons who must be present when the schedule is signed is the authorised registrar. The amendment made by subsection 2(a) changes this so that it may be signed in the presence of the approved celebrant or the authorised registrar. Once the couple have signed the schedule, it must also be signed by the witnesses and the person carrying out the ceremony. The amendment at subsection (2)(b) means that either the approved celebrant or the authorised registrar have to sign the schedule.

114. The amendment at subsection 2(a) also removes a reference to where the civil partnership may take place.

115. Subsection (3) makes a number of changes relating to the table of forbidden degrees. This is about people who are too closely related to each other to form a civil partnership. The opportunity has been taken to simplify the table of forbidden degrees. Subsection (22), explained below, substitutes a new Schedule 10 to the 2004 Act.

116. The amendment at subsection (3)(d) amends section 86(5) of the 2004 Act. Section 86(5) provides at the moment, in respect of people who have acquired a new gender, that references in the forbidden degrees to “former wife” includes “former husband” and references to “former husband” includes “former wife”.

117. The amendment at subsection (3)(d)(i) amends section 86(5) so that it refers to the definition of “spouse” (husband and wife) as added by subsection (3)(c). The amendment at subsection 3(d)(ii) removes the word “former” from section 86(5). The word “former” is not needed in section 86(5) as the new Schedule 10 to the 2004 Act refers to “former spouse” and “spouse” is defined by the amendment at subsection (3)(c).

118. The amendment at subsection (3)(e) reflects the simplification of the table of forbidden degrees. The simplified table now refers to “parent” to cover both mothers and fathers: the amendment as subsection (3)(e)(i) reflects that drafting change. Subsection (3)(e)(ii) deletes a reference to “in either column” as the simplified table of forbidden degrees just has one column.

119. The amendment at subsection (5) provides a definition of “district registrar” for the purposes of section 88 of the 2004 Act. Section 88 makes provision on information which intended civil partners must submit to the district registrar. The definition added at subsection (5) includes provision to cover cases where the civil partnership is to be registered in Scottish waters by an approved religious or belief celebrant.

120. The amendment at subsection (6) provides a definition of “district registrar” for the purposes of certain sections in the 2004 Act: section 89 itself (civil partnership notice book), section 90 (publicisation), section 91 (early registration), section 92 (objections to registration) and section 94 (the civil partnership schedule).

121. This definition is the same as the definition provided for section 88 except that where the civil partnership is to be registered in Scottish waters by an approved religious or belief celebrant, the district registrar is defined as the district registrar to whom the civil partnership notices were submitted (under section 88).

122. Subsection (7) amends section 90 of the 2004 Act. When publicising information about a forthcoming civil partnership, the district registrar and the Registrar General must provide the date when it is intended to register the civil partnership. Currently, this date must be more than 14 days after publicising the information: the amendment makes this 28 days.

123. Section 91 of the 2004 Act allows for early registration of a civil partnership. Subsection (8) amends a reference in section 91 from an authorised registrar to district registrar. A definition of “the district registrar” is inserted into the 2004 Act by subsection (5). Subsection (8) also changes the 14 day period in section 91 to 28 days, in line with the change made by subsection (7).

124. Subsection (8)(c) also amends section 91 so that it is clear that a request for early registration can be made electronically. The amendment creates an equivalent provision to section 6 of the 1977 Act.

125. Subsection (9) makes a number of amendments to section 92 of the 2004 Act, on objections to the proposed registration of a civil partnership.

126. The amendment at subsection (9)(a) makes it clear that the office where any person claiming to have reason to object to a proposed civil partnership can inspect the relevant entry in the civil partnership book is the office of the district registrar (as defined).

127. The amendment at subsection (9)(b)(i) is a consequential amendment required for the substantive amendment at subsection (9)(b)(ii). This amendment relates to a case where the district registrar has received an objection to a civil partnership which is more significant than just a misdescription or inaccuracy in a notice.

128. The new provision requires the district registrar, if the civil partnership schedule has already been issued and the civil partnership is to be registered by an approved religious or belief celebrant, to notify, if possible, the celebrant of the objection and advise the celebrant not to register the civil partnership pending consideration of the objection. This is on similar lines to equivalent provision in section 5 of the 1977 Act, on objections to marriage.

129. The amendment at subsection (9)(c) reflects that registration of civil partnerships in future may be through a religious or belief celebrant.

130. Currently, section 92(5)(a) of the 2004 Act provides that if the Registrar General is satisfied, after considering an objection, that there is a legal impediment to registering a civil partnership, the Registrar General has to direct the district registrar not to register the intended civil partners and to notify them accordingly. The amendment at subsection (9)(c) amends this so that the Registrar General, once satisfied that there is a legal impediment to registering a civil partnership has “to take all reasonable steps to ensure that the registration of the civil partnership does not take place and must notify, or direct the district registrar to notify, the intended civil partners”.

131. Subsection (10) amends section 93 of the 2004 Act so that it only covers cases where the civil partnership is being registered through a civil ceremony.

132. Subsection (10)(a)(ii) makes provision on where a civil ceremony may take place. It may take place at:

- the registration office of the authorised registrar;
- an appropriate place in the registration district of the authorised registrar (“appropriate place” is defined through the next set of amendments);
- with the approval of the Registrar General, the registration office of another authorised registrar;
- with the approval of the Registrar General, an appropriate place in the registration district of another authorised registrar; or
- an appropriate place in Scottish Waters.

133. Subsection (10)(b) provides definitions of “appropriate place”, “local registration authority” and “religious premises”. “Appropriate place” excludes “religious premises” which ensures that civil ceremonies to register civil partnerships cannot take place in religious premises. Similar definitions are inserted into the 1977 Act in relation to marriage by section 19 of this Bill.

134. Subsection (10)(c) repeals sections 93(2) and (3) of the 2004 Act. These are now unnecessary. Section 93(2) made provision on civil partnerships taking place outwith the authorised registrar’s district. This is now covered by the provision outlined above on where a civil ceremony may take place.

135. Section 93(3) of the 2004 Act made provision which banned civil partnerships from taking place in religious premises. The ban on civil ceremonies to register civil partnerships taking place in religious premises remains in place, as outlined above. Subsequent provision is made to establish religious and belief ceremonies to register civil partnerships. Such ceremonies may take place in religious premises.

136. Subsection (11) adds section 93A to the 2004 Act, on the date and place of religious or belief registration of civil partnerships. The procedures outlined in section 93A are in line with procedures contained in section 6 of the 1977 Act, in relation to the solemnisation of marriage.

137. Under section 93A the civil partnership should be registered on the date and at the place specified in the schedule. If this cannot be done and a new date or place is fixed, the district registrar must issue a new schedule or amend the existing one or direct the religious or belief celebrant to amend it.

138. However, special procedures apply if the new date for registration is more than 3 months after the date specified in the original schedule or if the new place for registration is in a different registration district or is in Scottish waters instead of a registration district or is in a registration district instead of Scottish waters.

139. In these cases, the Registrar General may:

- direct the district registrar to issue a new schedule;
- direct the district registrar to amend the existing schedule or direct the religious or belief celebrant to amend it; or
- direct the intended civil partners to send the district registrar a new notice of proposed civil partnership.

140. Subsection (12) amends section 94 of the 2004 Act which concerns the schedule. These amendments reflect the introduction of religious and belief ceremonies to register civil partnerships and changes made to sections 90 and 91 by subsections (7) and (8) about the minimum time period between publicising a civil partnership and it taking place.

141. The amendment at subsection (12)(c) provides that where the civil partnership is to be registered by an approved religious or belief celebrant, the district registrar must issue the completed schedule to one or both of the intended civil partners. The district registrar must not issue the schedule more than seven days before the intended civil partnership, unless authorised to do so by the Registrar General. This provision is on similar lines to section 6(4)(b) of the 1977 Act, in relation to the marriage schedule.

142. Subsection (13) adds sections 94A, 94B, 94C, 94D and 94E to the 2004 Act. These provisions relate to who can register a civil partnership, including religious and belief celebrants, and are based on equivalent provisions in the 1977 Act, on who can solemnise marriage.

143. Section 94A makes provision on who can register civil partnerships.

144. Under section 94A(1), a civil partnership may be registered only by a person who is:

- a celebrant of a religious or belief body prescribed by regulations or, not being a celebrant, is recognised by the body as entitled to register civil partnerships;
- registered as a celebrant under section 94B of the 2004 Act;
- temporarily authorised as a celebrant under section 94E;
- a registrar.

145. Section 94A(2) provides that Ministers may only prescribe a religious or belief body if the body requests them to do so and Ministers are satisfied that the body meets the “qualifying requirements”. The “qualifying requirements” are set out in regulations made by the Scottish Ministers (see section 94A(5)). These regulations are subject to annulment in pursuance of a resolution of the Scottish Parliament (i.e. the negative procedure) by virtue of amendments made by subsection (20).

146. Section 94A(3) makes it clear that nothing in section 94A imposes a duty:

- on any religious or belief body to request to be prescribed;

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- on any such body to nominate members under section 94B to nominate members to register civil partnerships;
- on any person to apply for temporary authorisation under section 94E to register civil partnerships;
- on any approved celebrant for civil partnerships to register civil partnerships.

147. Section 94B(1) provides that a religious or belief body who has not been prescribed under the regulations may nominate members to the Registrar General so that they can register civil partnerships.

148. Section 94B(2) provides that the Registrar General must reject a nomination if the Registrar General considers that the nominating body is not a religious or belief body; or it already has sufficient members registered to meet its need; or it does not meet the “qualifying requirements” set out in regulations made by the Scottish Ministers; or the nominee is not a fit and proper person. These regulations are subject to annulment in pursuance of a resolution of the Parliament (i.e. negative parliamentary procedure) (section 22(20) of the Bill refers).

149. When the Registrar General accepts a nomination, the Registrar General must, under section 94B(4)(a), determine the period during which the nominee can register civil partnerships. This period must not be more than 3 years but section 94B(5) makes it clear that the nominee may be put forward for a further period.

150. Section 94B(4)(b) allows the Registrar General to restrict the nominee to registering civil partnerships in specific areas or places. Section 94B(4)(c) allows the Registrar General to impose such other conditions as the Registrar General thinks fit.

151. When a nomination has been accepted, section 94B(6)(a) provides that the Registrar General must advise the body and the nominee accordingly, specifying the period during which the nominee can register civil partnerships and any conditions which have been imposed.

152. The Registrar General also has to enter the name of the body, the nominee and any other relevant particulars into a register open for public inspection at all reasonable times free of charge.

153. When a nomination is rejected, section 94B(6)(b) provides that the Registrar General must inform the nominating body in writing, giving reasons. Section 94B(7) makes it clear that this may be done electronically. Section 94B(8) gives the nominating body 28 days to appeal to the Scottish Ministers against a rejection.

154. Section 94B(9) provides that on any such appeal the Scottish Ministers may confirm the rejection or direct the Registrar General to accept the nomination. Ministers have to inform the nominating body of their decision and give the reasons for the decision.

155. Section 94B (9) and (10) provides that the Scottish Ministers’ decision is final except that if the reason given by Ministers for confirming the rejection of a nomination is that the

nominating body is not a religious or belief body, the body may appeal to the Court of Session, within 42 days of receiving the Ministers' decision.

156. The appeal can seek the determination of the court that the body is a religious or belief body. Under section 94B(11), if the court determines that the body is a religious or belief body and that the only reason given by Ministers for confirming the rejection was that the body was not a religious or belief body, the Registrar General must then accept the nomination.

157. Section 94C of the 2004 Act makes provision on the removal from the register of a celebrant registered under section 94B. As well as provisions relating to the removal of a celebrant from the register, and on the procedures for doing so, provision is also made for appeals to the Scottish Ministers against decisions made by the Registrar General.

158. Section 94C(1) provides that the Registrar General may remove a person's name from the register when:

- the person has asked to be removed;
- the body which nominated the person no longer wants the person to be registered;
- the person, while registered as an approved celebrant, has been convicted of an offence under this Part of the Bill;
- the person has, for the purpose of profit or gain, been carrying on a business of registering civil partnerships;
- the person is not a fit and proper person to register civil partnerships;
- the person, for any other reason, should not be on the register.

159. Section 94C(2) to (7) makes provision on removals from the register on the grounds outlined in section 94C(1). The Registrar General must give the person at least 21 days' notice of the intention to remove him or her from the register (subsection (2)); must specify the ground of removal; must ask the person to give reasons why he or she should not be removed; and must consider any representations made. Where a person's name has been removed from the register, the person may then appeal to the Scottish Ministers within 28 days of receiving notice of the removal. After a notice is given under subsection (2), the person must not register a civil partnership until he or she is restored to the register or the Registrar General decides not to remove him or her from the register.

160. Section 94D makes provisions on alterations to the register of approved nominated celebrants maintained under section 94B. Provision is made that the body must notify the Registrar General when any of the events listed in section 94D occur and the Registrar General must then alter the register accordingly. The events in section 94D are:

- changes to the name or address of the religious or belief body;
- amalgamation of the religious or belief body;
- death of an approved celebrant;
- any change of name, address or designation of an approved celebrant;

- the cessation of an approved celebrant from exercising the relevant functions.

161. Section 94E makes provision on the temporary authorisation of religious or belief celebrants to register civil partnerships. Under section 94E(1), the Registrar General may grant any member of a religious or belief body temporary written authorisation to register a specific civil partnership or partnerships or to register civil partnerships during a specific period. This authorisation may contain terms and conditions. Section 94E(5) makes it clear that the authorisation can be issued electronically.

162. However, the Registrar General may only grant such temporary written authorisation when the religious or belief body of which the person is a member must meet the “qualifying requirements” (section 94E(2)). The “qualifying requirements” are defined at section 94E(4) as “such requirements as may be set out in regulations made by the Scottish Ministers”. In addition, authorisation under section 94E(1)(b), which relates to authorisation for a period of time, may only be granted if the religious or belief body of which the person is a member is prescribed by regulations made under section 94A, so that its celebrants are authorised to register civil partnerships, or has nominated persons under section 94B to register civil partnerships. (Section 94E(3)). The above regulations are subject to annulment in pursuance of a resolution of the Parliament (i.e. negative parliamentary procedure) (section 22(20) of the Bill refers).

163. Subsection (14) amends section 95 of the 2004 Act, on further provision as to the registration of civil partnerships including in relation to the schedule.

164. The amendment at subsection (14)(a) reflects that with the introduction of religious or belief ceremonies, it may be an approved celebrant, rather than a registrar, who asks the intended civil partners to confirm that, to the best of their knowledge, the particulars set out in the schedule are correct.

165. The amendment at subsection (14)(b) inserts a new subsection into section 95 of the 2004 Act. This provision requires civil partners who have had a religious or belief ceremony to ensure that the signed schedule is delivered to the district registrar within 3 days. (This is in line with section 15(2) of the 1977 Act, on delivering the signed marriage schedule to the district registrar).

166. The new section 95(3A) of the 2004 Act provides that the district registrar must not enter the particulars set out in the schedule for a religious or belief civil partnership in the register, unless and until the district registrar receives a duly signed schedule.

167. The new section 95(3B) empowers the Registrar General to take steps if satisfied that a civil partnership has been properly registered and the schedule has been signed but then lost or destroyed. In these cases, the Registrar General may direct the district registrar to complete an exact copy of the schedule and, so far as practicable, arrange for it be signed again by those who signed the original schedule. The new section 95(3C) provides that once the copy schedule has been signed, the district registrar must arrange for its particulars to be entered into the register.

168. Subsection (15) adds section 95ZA to the 2004 Act, on registrar's power to require delivery of civil partnership schedule. This new provision is in line with section 16 of the 1977 Act, on a registrar's power to require delivery of marriage schedule.

169. Under the new provision, if the district registrar does not receive the schedule within 21 days from the date of registration, the district registrar may serve a notice in the prescribed form on either of the civil partners requiring that the schedule be delivered or sent through the post to the registrar within 8 days. If this notice is not complied with, the district registrar may serve a second notice in the prescribed form requiring the person to attend personally at the registration office within 8 days in order to deliver the schedule. Failure to comply with this second notice is a criminal offence (the offence is added by subsection (19)). Section 126 of the 2004 Act means that regulations prescribing forms under section 95ZA are subject to annulment in pursuance of a resolution of the Scottish Parliament (i.e. negative procedure).

170. Subsection (17) relates to section 96, on civil partnership with former spouse. This follows a divorce on the grounds of the issue of an interim gender recognition certificate.

171. The amendment at (a) is a consequential change, reflecting the amendments to section 91 made by subsection (8), and the amendment at (b) is also a consequential change, reflecting the amendments made to section 94 by subsection (12). (The amendments made by subsection (12) are explained at paragraphs 140 and 141).

172. The amendments at subsection (18) relates to section 97 of the 2004 Act, on the issue of a certificate of no impediment where two people propose to enter into a civil partnership in England and Wales but one of them resides in Scotland. The first amendment changes the period in which the certificate should normally be issued from no earlier than 14 days to no earlier than 28 days. Section 97(5) of the 2004 Act makes provisions for objections in writing to the district registrar against the issue of a certificate. The second amendment makes it clear that any such objection may be submitted electronically.

173. Subsection (19) makes provision in respect of criminal offences and does so by amending section 100 of the 2004 Act.

174. The amendment at (a)(i) extends three offences which currently only apply to authorised registrars (or persons pretending to be authorised registrars) to approved celebrants (or persons pretending to be approved celebrants).

175. Following the amendments, the offences now relates to a person who knowingly:

- “being an approved celebrant or, as the case may be, an authorised registrar, purports to register two people as civil partners of each other before any civil partnership schedule available to him at the time of registration has been duly completed”;
- “not being an approved celebrant or, as the case may be, an authorised registrar, conducts himself in such a way as to lead intended civil partners to believe that he is authorised to register them as civil partners of each other”;

- “being an approved celebrant or, as the case may be, an authorised registrar, purports to register two people as civil partners of each other without both of them being present”.

176. The amendment at (a)(ii) reflects changes to section 93 on place of civil registration of civil partnerships.

177. The amendments at (b) relate to new offences created as a result of the introduction of religious and belief ceremonies and to the penalty when found guilty of one of these new offences. The penalty on summary conviction is a fine not exceeding level 3 on the standard scale.

178. The offences created by (b) are:

- an approved celebrant registering a civil partnership in an area or place where the celebrant is not permitted to register a civil partnership;
- an approved celebrant registering a civil partnership after a notice has been served by the Registrar General indicating that the Registrar General intends to remove the person’s name from the register;
- a celebrant approved on a temporary basis registering a civil partnership not specified in the authorisation;
- a celebrant approved on a temporary basis registering a civil partnership outwith the period specified in the authorisation;
- a celebrant approved on a temporary basis registering a civil partnership contrary to any terms and conditions specified in the authorisation;
- a party to a civil partnership failing to comply with a second notice from the district registrar, requiring the party to appear personally at the registration office to deliver the schedule.

179. The amendment at (c) is a consequential amendment to section 100(4) of the 2004 Act, reflecting the new offences created by (b). Section 100(4) provides that summary proceedings for an offence under section 100 may be commenced within 3 months after sufficient evidence comes to the Lord Advocate’s knowledge or within 12 months after the offence is committed (whichever period last expires).

180. Subsection (20) provides that the new powers to make regulations in respect of prescribing religious or belief bodies whose celebrants are authorised to register civil partnerships on the “qualifying requirements” (for religious and belief bodies to meet) are subject to annulment in pursuance of a resolution of the Parliament (i.e. the negative procedure).

181. Subsection (21) adds definitions to Part 3 of the 2004 Act relating to civil partnerships in Scotland.

182. Subsection (22) introduces a new Schedule 10 to the 2004 Act, replacing the current Schedule. The new Schedule 10 is a simplified version of the existing table of forbidden

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degrees. No changes are made in respect of the types of relationships which mean that a couple cannot enter into a civil partnership. Instead, the change relates to how the relationships are described. The table below demonstrates this:

Table of forbidden degrees

<u>Current table (Column 1)</u>	<u>Current table (Column 2)</u>	<u>Proposed table</u>
<i>Relationships by consanguinity</i>		
Father	Mother	Parent
Son	Daughter	Child
Father's father	Father's mother	Grandparent
Mother's father	Mother's mother	Grandparent
Son's son	Son's daughter	Grandchild
Daughter's son	Daughter's daughter	Grandchild
Brother	Sister	Sibling
Father's brother	Father's sister	Aunt or uncle
Mother's brother	Mother's sister	Aunt or uncle
Brother's son	Brother's daughter	Niece or nephew
Sister's son	Sister's daughter	Niece or nephew
Father's father's father	Father's father's mother	Great-grandparent
Father's mother's father	Father's mother's mother	Great-grandparent
Mother's mother's father	Mother's father's mother	Great-grandparent
Mother's mother's father	Mother's mother's mother	Great-grandparent
Son's son's son	Son's son's daughter	Great-grandchild
Son's daughter's son	Son's daughter's daughter	Great-grandchild
Daughter's son son	Daughter's son's daughter	Great-grandchild
Daughter's daughter's son	Daughter's son daughter	Great-grandchild
<i>Relationships by affinity referred to in section 86(3)</i>		
Son of former wife	Daughter of former husband	Child of former spouse
Son of former civil partner	Daughter of former civil partner	Child of former civil partner
Former husband of mother	Former wife of father	Former spouse of parent
Former civil partner of father	Former civil partner of mother	Former civil partner of parent
Former husband of father's mother	Former wife of father's father	Former spouse of grandparent
Former civil partner of father's father	Former civil partner of father's mother	Former civil partner of grandparent
Former husband of mother's mother	Former wife of mother's father	Former spouse of grandparent
Former civil partner of mother's father	Former civil partner of mother's mother	Former civil partner of grandparent
Son of son of former wife	Daughter of son of former husband	Grandchild of former spouse
Son of son of former civil	Daughter of son of former	Grandchild of former

partner	civil partner	civil partner
Son of daughter of former wife	Daughter of daughter of former husband	Grandchild of former spouse
Son of daughter of former civil partner	Daughter of daughter of former civil partner	Grandchild of former civil partner

*Section 23: Power of district registrar to require evidence of nationality: civil partnership*

183. This section adds provisions to section 88 of the 2004 Act.

184. Section 88 of the 2004 Act makes provision on documents which people wishing to enter into a civil partnership have to supply to the district registrar.

185. The new section 88(8) provides that a district registrar may require “specified nationality evidence” in relation to the intended civil partners. The new section 88(9) outlines when such evidence may be requested. The new section 88(10) defines “specified nationality evidence” in terms of guidance that the Registrar General may issue.

186. Section 15 of this Bill adds similar provision to the 1977 Act, in relation to opposite sex and same sex marriage.

*Section 24: Recognition of overseas relationships*

187. Sections 212 to 218 and Schedule 20 to the 2004 Act makes provision on the recognition in the UK as civil partnerships of overseas same sex registered relationships. Such relationships can be recognised in the UK either by meeting general conditions laid down in section 214 of the 2004 Act or by being specified in Schedule 20. UK Ministers have the power to amend Schedule 20, with the consent of the Scottish Ministers and the Northern Ireland Department of Finance and Personnel.

188. Currently, both overseas same sex marriages and overseas same sex civil unions are recognised in the UK as civil partnerships, so long as they meet the provisions outlined above. Section 24 makes amendments so that, in future, these arrangements only relate to overseas same sex civil unions.

189. Overseas same sex marriages will, in future, be recognised in Scotland as marriages. Section 38 of the Family Law (Scotland) Act 2006 already makes provision on the formal validity of overseas marriages and marriages from elsewhere in the UK. Section 4 of this Bill makes provision so that references to “marriage” in enactments commenced before this Bill means both opposite sex and same sex marriage.

*Section 25: Dissolution of civil partnership: evidence*

190. The Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012 (SSI 2012/111)<sup>1</sup> removed the need for third party evidence in actions to dissolve civil partnerships

<sup>1</sup> This Order can be found at <http://www.legislation.gov.uk/ssi/2012/111/contents/made>

using the simplified procedure. (The simplified procedure can generally be used where there is no dispute about financial matters and no children under 16).<sup>2</sup>

191. Some civil partnerships were dissolved using the simplified procedure and without obtaining third party evidence before the Order came into effect. Section 25 provides that the Order is to be treated as having had effect since 5 December 2005 (when civil partnerships were introduced). The effect of the provision is that decrees of dissolution granted before the Order took effect cannot be challenged on the grounds that no third party evidence was provided.

### **Part 3 – Marriage and civil partnership: other provision**

#### *Section 26: Bigamy*

192. Subsection (1) makes bigamy a statutory offence in relation to both opposite sex and same sex marriage. Subsection (3) abolishes the current common law offence.

193. Subsection (1) amends section 24 of the 1977 Act, on offences, and makes it an offence for a person to purport to enter into a marriage with another person knowing that one or both of them is already in a marriage or civil partnership with somebody else.

194. Subsection (1) provides for the penalties on conviction for bigamy. On conviction on indictment, a person is liable to a maximum of two years in prison or an unlimited fine or both. On summary conviction, a person is liable to a maximum of 12 months in prison or a fine not exceeding the statutory maximum (currently £10,000) or both.

195. Subsection (1) also corrects an existing reference in section 24(1)(ii) of the 1977 Act. The term “prescribed sum” is now out of date and has been replaced in most legislation with “statutory maximum”. A similar amendment is made here, clarifying the penalties which may be imposed following summary conviction in relation to the existing offences in section 24(1) of the 1977 Act.

196. Subsection (2) makes two amendments to the offence provisions at section 100 of the 2004 Act.

197. The first amendment changes an offence from “registers” a civil partnership to “purports to register”. This reflects that under section 86(1)(d) of the 2004 Act two people are not eligible to register a civil partnership if one or either of them is married or already in a civil partnership.

198. The second amendment made by subsection (2) updates a reference to penalties on summary conviction so that section 100(3)(b) of the 2004 Act refers to the statutory maximum rather than level 3 on the standard scale.

199. Subsection (4) amends the Presumption of Death (Scotland) Act 1977 to reflect the introduction of a statutory offence of bigamy under new section 24(A1) and to take account of

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<sup>2</sup> More information on the simplified procedure is at <http://www.scotcourts.gov.uk/taking-action/divorce-and-dissolution-of-civil-partnership>

the offence at section 100 of the 2004 Act of entering into a civil partnership while married or already in a civil partnership. The Presumption of Death (Scotland) Act 1977 contains a defence to bigamy if for seven years the person had no reason to believe his or her spouse was alive. In future, this defence will reflect that bigamy will be a statutory offence and will reflect the offence at section 100 of the 2004 Act.

#### **Part 4 – Change of gender of married persons or civil partners**

##### *Overview*

200. Under the Gender Recognition Act 2004, persons over 18 may apply to the Gender Recognition Panel to obtain full legal recognition of an acquired gender. Currently, married people and people in a civil partnership have to divorce or dissolve before obtaining a full Gender Recognition Certificate. Part 4, and schedule 2, make provision so that married people who wish to stay married do not have to divorce and to enable people in a civil partnership to stay in their relationship.

##### *Section 27: Change of gender of married persons or civil partners*

201. This section introduces schedule 2 to the Bill on applications to the Gender Recognition Panel by married persons or persons in a civil partnership. This schedule is explained at paragraphs 234 to 272 of these Explanatory Notes.

##### *Section 28: Renewed marriage or civil partnership following issue of full gender recognition certificate*

202. Section 28 empowers the Scottish Ministers to make regulations (i) about the solemnisation of a renewed marriage for married persons in a protected Scottish marriage who have obtained a full Gender Recognition Certificate and (ii) about the registration of a renewed civil partnership between the parties to a protected Scottish civil partnership following the issue of full gender recognition certificates to both parties to the partnership. This would enable a new marriage or civil partnership certificate to be issued.

203. By virtue of section 28(7), “full gender recognition certificate” is defined by reference to the existing definition in section 25 of the Gender Recognition Act 2004. “Protected Scottish marriage” is also defined by reference to section 25 of the Gender Recognition Act 2004 as amended by paragraph 2 of schedule 2 to this Bill.

204. Subsection (2) provides that regulations under subsection (1) may in particular make provision on:

- submitting notice of an intention to enter into a renewed marriage (subsection (2)(a));
- submitting notice of an intention to enter into a renewed civil partnership (subsection (2)(b));
- the information required from the applicants (subsection (2)(c));
- evidence to support the application (subsection (2)(d));
- any requirement to attend at a particular place or appear before a particular person (subsection (2)(e));

*These documents relate to the Marriage and Civil Partnership (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 26 June 2013*

- conferring functions on persons (such as, for example, the Registrar General) (subsection (2)(f)). (Subsection (3) makes provision on particular functions which may be conferred);
- fees (subsection (2)(g));
- the effects of entering into a renewed marriage (subsection (2)(h)).

205. Subsections (4) to (6) make provision on procedures in relation to any regulations made by the Scottish Ministers.

206. Under subsection (4), the Scottish Ministers must consult the Registrar General before making any regulations. Under subsections (5) and (6), any regulations are subject to negative Parliamentary procedures unless they amend primary legislation, in which case they are subject to the affirmative procedure.

## **Part 5 – Registration services**

### *Section 29: Provision of certain information to district registrars*

207. This corrects an erroneous cross-reference. Section 39C(1)(a)(i) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 currently refers to “the registers of births, deaths and marriages transmitted to the Registrar General under section 34(3) of this Act”. This reference should be to section 34(4) of the 1965 Act which provides that “The district registrar for a registration district shall, at such time or times as the Registrar General may direct, transmit a relevant register to the Registrar General”. Section 29 provides the correct cross-reference.

## **Part 6 – General provisions**

### *Section 31: Ancillary provision*

208. This section allows Ministers to make ancillary provision, by order. Generally, such an order is subject to negative procedure but any order containing provisions which add to, replace or omit any part of the text of an Act is subject to the affirmative procedure.

## **SCHEDULES**

### **Schedule 1: Jurisdiction in proceedings relating to same sex marriages**

#### *Overview*

209. The Domicile and Matrimonial Proceedings Act 1973 (“the 1973 Act”) makes provision on the jurisdiction of the Scottish courts to deal with court actions on divorce, separation, declarator of nullity of marriage and declarator of marriage and on actions for declarator of recognition or non-recognition of relevant foreign decrees. The 1973 Act has been amended previously to take account of EC Regulation 2201/2003 (known as Brussels IIa) on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility. EC Regulation 2201/2003 deals with opposite sex marriage only.

210. Schedule 1 makes provision on the jurisdiction of the Scottish courts in relation to same sex marriages. The schedule amends the 1973 Act to make provision for court actions in relation to same sex couples. The schedule also enables the Scottish Ministers to make provision corresponding to EC Regulation 2201/2003.

211. In addition, overseas couples who enter into a same sex marriage in Scotland but remain or become habitually resident or domiciled in another country may not be able to end their marriage in that country if it does not recognise the existence of the relationship.

212. The schedule therefore amends the 1973 Act to provide a “jurisdiction of last resort” so that those same sex couples who are unable to divorce or obtain other matrimonial order in the country which would normally have jurisdiction are able have their case heard in the Scottish courts. The Scottish courts will be able to assume jurisdiction if the couple were married in Scotland and it is the interests of justice to do so.

213. Provision of a similar nature was made in respect of civil partnerships under Chapter 3 of Part 5 to the Civil Partnership Act 2004. Part 4 of Schedule 4 to the UK Marriage (Same Sex Couples) Bill makes similar provision in respect of the jurisdiction of the courts in England and Wales in relation to matrimonial actions for same sex couples.

#### *Domicile and Matrimonial Proceedings Act 1973*

214. Paragraph 1(2) amends the 1973 Act to set out which provisions in respect of jurisdiction in matrimonial actions do not apply to marriages of same sex couples, which are instead dealt with in Schedule 1B, inserted by paragraph 1(4). Paragraph 1(3) amends section 10 of the 1973 Act, to reflect that references to EC Regulation 2201/2003 are not relevant for same sex married couples, as the Regulation extends to opposite sex marriage only.

215. Paragraph 1(4) inserts a new Schedule 1B into the 1973 Act. Paragraph 1 of the new Schedule 1B sets out that the Schedule has effect with respect to the jurisdiction of the court to entertain proceedings relating to the ending of a same sex marriage (divorce, separation, nullity) and proceedings relating to a marriage's validity, including whether or not the marriage exists. The paragraph also provides definitions.

#### *Power to make provision corresponding to EC Regulation 2201/2003*

216. Paragraph 2(1)(a) of Schedule 1B enables the Scottish Ministers to make regulations about the jurisdiction of the courts in relevant proceedings in relation to a same sex marriage. “Relevant proceedings” are defined in paragraph 1(2) of Schedule 1B with reference to the proceedings listed in paragraph 1(1): divorce; separation; declarator of marriage; declarator of nullity of marriage and declarator of recognition, or non-recognition, of a decree of divorce, separation or nullity granted outwith a Member State of the EU. Paragraph 2(1)(b) allows the Scottish Ministers to make regulations to provide for the recognition in Scotland of a judgment by a court of another Member State relating to divorce, separation or annulment.

217. The regulations under paragraph 2(1) would apply where one of the couple: is or has been habitually resident in a Member State), or is an EU national, or is domiciled in a part of the UK

or the Republic of Ireland. The regulations may correspond with the terms of EC Regulation 2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters.

218. The provisions in regulations made under paragraph 2(1)(b) on recognition of judgments can apply retrospectively – i.e. where the date of the divorce is earlier than the date on which the paragraph comes into force.

219. A statutory instrument containing these regulations will be subject to the affirmative procedure.

#### *Divorce or separation*

220. Paragraph 3(1) of Schedule 1B provides that the Court of Session is able to deal with divorce or separation cases relating to same sex marriage either (a) where the Scottish courts have jurisdiction because of regulations made under paragraph 2 of the Schedule or (b) when no court has jurisdiction under the regulations and either of the married same sex couple is domiciled in Scotland when the case starts.

221. Under paragraph 3(2), the sheriff court has jurisdiction in these cases when either (a) or (b) above is met and:

- either party to the marriage was resident in the sheriffdom for a period of 40 days before the court action is raised; or
- either party had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.

222. In addition, Edinburgh sheriff court has jurisdiction if the couple married in Scotland, no court has jurisdiction under regulations made under paragraph 2 of Schedule 1B and it appears to the court to be in the interests of justice for it to deal with the case. This is referred to in paragraph 212 above as “jurisdiction of last resort”.

#### *Declarator of marriage*

223. Paragraph 4(1) of Schedule 1B provides that the Court of Session is able to deal with declarator of marriage cases relating to same sex marriage either where either of the parties is (a) domiciled in Scotland when the action is raised or (b) habitually resident in Scotland for a year before the action is raised or (c) dead and at death was domiciled in Scotland or had been habitually resident in Scotland for a year immediately preceding the death.

224. Under paragraph 4(2), the sheriff court has jurisdiction in these cases when either (a) or (b) or (c) above is met and either party to the marriage:

- was resident in the sheriffdom for a period of 40 days before the court action is raised; or
- had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.

*Nullity of marriage*

225. Paragraph 5(1) of Schedule 1B provides that the Court of Session is able to deal with declarators of nullity of a same marriage where (a) the Scottish courts have jurisdiction under regulations made under paragraph 2 of Schedule 1B or (b) no court has jurisdiction under the regulations and either party to the marriage is (i) domiciled in Scotland when the action is raised or (ii) dead and at death had been domiciled in Scotland or had been habitually resident in Scotland for a year immediately preceding the death.

226. Under paragraph 5(2), the sheriff court has jurisdiction in these cases when either (a) or (b) above is met and either party to the marriage:

- was resident in the sheriffdom for a period of 40 days before the court action is raised; or
- had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.

227. In addition, Edinburgh sheriff court has jurisdiction if the couple married in Scotland, no court has jurisdiction under regulations made under paragraph 2 of Schedule 1B and it appears to the court in the interests of justice for it to deal with the case. This is referred to in paragraph 212 above as “jurisdiction of last resort”.

*Recognition, or non-recognition, of foreign decrees*

228. Paragraph 6(1) of Schedule 1B provides that the Court of Session is able to deal with proceedings to recognise or not recognise a court decree from outwith the EU relating to divorce, separation or nullity of a same sex marriage if (a) the Scottish courts have jurisdiction under regulations made under paragraph 2 of Schedule 1B or (b) no court has jurisdiction under the regulations and either party to the marriage is (i) domiciled in Scotland when the action is raised or (ii) dead and at death was domiciled in Scotland or had been habitually resident in Scotland for a year immediately preceding the death.

229. Under paragraph 6(2), the sheriff court has jurisdiction in these cases when either (a) or (b) above is met and either party to the marriage:

- was resident in the sheriffdom for a period of 40 days before the court action is raised; or
- had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.

*Supplementary provision*

230. Paragraph 7(1) of Schedule 1B makes it clear that the provisions in this Schedule on divorce or separation do not affect the Court of Session’s jurisdiction to hear separation proceedings as a matter of urgency.

231. Paragraph 7(2) makes it clear that the provisions in Schedule 1B on divorce, separation and nullity do not affect the sheriff court's jurisdiction to hear such cases remitted to it under any enactment or rule of court, where hearing such cases does not contravene regulations made under paragraph 2.

232. Paragraph 7(3) makes it clear that when hearing a case under paragraphs 3 to 6 of Schedule 1B, the court can also hear other proceedings in respect of the same marriage, even if it would not normally have jurisdiction.

#### *Presumption of Death (Scotland) Act 1977*

233. Paragraph 2 of schedule 1 makes amendments to section 1 of the Presumption of Death (Scotland) Act 1977, which allows actions to be raised so that someone who is missing can be presumed to be dead. The amendment allows Edinburgh sheriff court to hear such actions in relation to a person in a same sex marriage where the marriage took place in Scotland and it appears to the court to be in the interests of justice to assume jurisdiction. This is referred to in paragraph 212 above as "jurisdiction of last resort".

## **Schedule 2: change of gender of married persons or civil partners**

### *Overview*

234. This schedule makes changes to the Gender Recognition Act 2004 ("the Gender Recognition Act").

235. The Gender Recognition Act enables people to change their legal gender by applying for a gender recognition certificate under section 1 of that Act. The Gender Recognition Act extends across the UK but relates largely to devolved matters. The Gender Recognition Panel ("the Panel") deals with applications for a gender recognition certificate and operates across the UK. Schedule 5 to the UK Marriage (Same Sex Couples) Bill makes similar provision to this schedule in respect of people who married in England and Wales or overseas or entered into a civil partnership in England and Wales.

236. The issue of a full gender recognition certificate enables recipients to be recognised in law for all purposes in their new gender ("the acquired gender"). At present people who are married or in a civil partnership must end their marriage or civil partnership before a full gender recognition certificate can be issued. This is achieved by the Panel issuing an interim gender recognition certificate to married applicants and applicants in civil partnerships. The issue of an interim gender recognition certificate is, in Scotland, a ground for divorce or dissolution of a civil partnership. Applicants then have six months from the date of issue of the interim gender recognition certificate to apply to the court to end their marriage or civil partnership. Once a marriage or civil partnership has been ended the court can issue a full gender recognition certificate.

237. This schedule amends the Gender Recognition Act to enable a marriage solemnised in Scotland (a "protected Scottish marriage", defined by amendments made in paragraph 2 of the schedule) to continue where one or both parties change their gender and both parties wish to remain married. It also amends that Act to enable a civil partnership registered in Scotland

(“protected Scottish civil partnership”, defined by amendments made in paragraph 2) to continue where both parties change their gender simultaneously and wish to remain in their civil partnership.

*Paragraph 2 – interpretation*

238. Paragraph 2 inserts definitions of the terms “protected Scottish civil partnership”, “protected Scottish marriage” and “statutory declaration of consent” into section 25 of the Gender Recognition Act (interpretation).

239. Paragraph 2(d) makes provision in relation to civil partnerships and marriages carried out overseas by UK consular staff and through the UK armed forces. Such civil partnerships and marriages are to be treated as protected Scottish civil partnerships and marriages so long as the parties identified with Scotland at the time and details have been sent to the Registrar General for Scotland.

*Paragraph 3 – evidence*

240. Paragraph 3 inserts new subsections (6D), (6E) and (6F) into section 3 of the Gender Recognition Act to amend the evidence requirements for an application to the Panel.

241. At present, section 3(6)(a) of that Act requires people who apply to the Panel for a gender recognition certificate to submit a statutory declaration as to whether they are married or in a civil partnership. Submission of this evidence enables the Panel to determine whether to issue a full gender recognition certificate (for people who are not married or in a civil partnership) or an interim certificate (for people who are married or in a civil partnership).

242. New subsection (6D) requires applicants who are party to a protected Scottish marriage to include in their statutory declaration an additional declaration that they wish the marriage to continue after the issue of a full gender recognition certificate (if that is the case). It also requires the applicant to include information on where the marriage was solemnised and provide either a “statutory declaration of consent” by the applicant’s spouse (which is defined by amendments made in paragraph 2 as a declaration that he or she consents to the marriage continuing after the issue of a full gender recognition certificate), or a statutory declaration by the applicant that his or her spouse has not made a statutory declaration of consent or that the applicant does not know if such a declaration has been made.

243. If an application to the Panel contains a statutory declaration of consent by the applicant’s spouse, new subsection (6E) requires the Panel to inform the spouse that an application has been made.

244. New subsection (6F) provides that applicants in a protected Scottish civil partnership must provide a statutory declaration as to where the civil partnership was registered.

*Paragraph 4 – successful applications*

245. Paragraph 4 replaces existing subsections (2) and (3) of section 4 of the Gender Recognition Act (which provides for the issue of interim and full gender recognition certificates

following an application). The effect of these amendments is to enable a full certificate to be issued:

- to single applicants (new subsection (2)(a));
- to applicants who are party to a protected Scottish marriage and both parties to the marriage consent to the marriage continuing (new subsection (2)(b)); and
- to applicants who are party to a protected Scottish civil partnership and the Panel has decided to issue the other party to the civil partnership with a full gender recognition certificate (new subsection (2)(c)).

246. Interim gender recognition certificates will be issued:

- to applicants in protected Scottish marriages if either party to the marriage has not consented to the marriage continuing (new subsection (3)(a));
- to applicants not in a protected Scottish marriage (new subsection (3)(b));
- to applicants in protected Scottish civil partnerships where the other party to the civil partnership has not made an application for a gender recognition certificate at the same time as the applicant or the other party has made such an application but the Panel has decided not to issue a full gender recognition certificate to him or her (new subsections (3)(c) and (3)(d); and
- to applicants not in a protected Scottish civil partnership (new subsection (3)(e)).

247. New subsection (3A) requires the Panel to notify an applicant's spouse where it issues a full gender recognition certificate to the applicant.

248. New subsection (3B) provides that section 4(2)(c) of the Gender Recognition Act is subject to new section 5C (inserted into that Act by paragraph 6 of this schedule).

*Paragraph 5 – issue of full gender recognition certificate after interim certificate: applicant married*

249. Paragraph 5 inserts new sections 4C and 4D into the Gender Recognition Act.

250. New section 4C provides for two situations (“Case A” and “Case B”) when a Gender Recognition Panel must issue a full gender recognition certificate.

251. Case A is the situation where an applicant is in a protected Scottish marriage but his or her spouse has not issued a statutory declaration of consent. If the applicant's spouse changes his or her mind before the marriage is ended and wishes the marriage to continue, subsection (2) provides that the applicant can apply to the Panel for a full gender recognition certificate. The Panel can only issue a full gender recognition certificate to the applicant following such an application if it is satisfied that the following conditions are met:

- an interim gender recognition certificate has been issued to the applicant (subsection (2)(a));

- the applicant was a party to a protected Scottish marriage at the time the interim gender recognition certificate was issued (subsection (2)(b));
- the applicant is in a protected Scottish marriage (subsection (2)(c)); and
- the applicant's spouse consents to the marriage continuing (subsection (2)(d)).

252. If these conditions are not met, the Panel will reject an application for a full gender recognition certificate (subsection (4)). Subsection (5) sets a time limit for an application under Case A. The time limit is six months from the date on which the interim certificate was issued.

253. Case B is the situation where an application is made by a civil partner in a protected Scottish civil partnership, an interim gender recognition certificate is issued and the couple subsequently decide to change their civil partnership into a marriage under section 3 of the 1977 Act, as amended by this Bill. Subsection (3) provides that once the civil partnership has become a marriage, such applicants can apply for a full gender recognition certificate.

254. The Panel can only issue a full gender recognition certificate to the applicant if it is satisfied that the following conditions are met:

- an interim gender recognition certificate has been issued to the applicant (subsection (3)(a));
- the applicant was a party to a civil partnership at the time the interim gender recognition certificate was issued (subsection (3)(b));
- the notice of intention to marry must have been given within six months of the date of issue of the interim gender recognition certificate being issued (subsection 3(c));
- the civil partnership must have become a marriage (subsection (3)(d));
- the applicant is a party to that marriage (subsection (3)(e)); and
- the applicant's spouse consents to the marriage continuing (subsection (3)(f)).

255. If these conditions are not met, the Panel will reject an application for a full gender recognition certificate (subsection (4)).

256. Subsection (6) sets a time limit for conversion of an interim certificate to a full certificate under this section. The time limit is six months from the date when the civil partnership becomes a marriage.

257. Applications under Case A and Case B require the applicant's spouse to issue a statutory declaration of consent (subsection (7)). Applications under Case B must additionally include evidence of the date on which notice of intention to marry was given and evidence that the civil partnership has become a marriage (subsection (8)).

258. Where the Panel receives an application to issue a full gender recognition certificate in either Case A or Case B, subsection (9) requires them to notify the applicant's spouse both of the application and also of the issue of the full gender recognition certificate (if the Panel grants the application).

259. New section 4D provides for the situation where an applicant has made an application for a full gender recognition certificate under new section 4C but before that application can be determined the applicant's spouse dies.

260. At present if the applicant's spouse dies within six months of the interim gender recognition certificate being issued, the applicant can apply for a full gender recognition certificate within six months of the date the death (section 5(2)(b) of the Gender Recognition Act). This section may not be available to applicants who have applied under new section 4C if the application has not been determined within the time limit in new section 4C(5) and (6). New section 4D provides that in such cases the applicant can still rely on the existing section 5(2)(b) to apply for a full gender recognition certificate.

#### *Applications by both civil partners*

261. Paragraph 6 inserts new section 5C into the Gender Recognition Act. If both parties to a protected Scottish civil partnership make successful applications to the Panel, section 4(2)(c) of the Gender Recognition Act as amended by the Bill, applies, and both parties will be entitled to full gender recognition certificates. In such cases, the new section 5C enables the Panel to issue full gender recognition certificates to both parties simultaneously, ensuring that the continuity of the civil partnership is not affected by the changes in law to the gender of both parties.

262. Paragraph 6 also inserts new section 5D into the Gender Recognition Act. This empowers the Scottish Ministers to make provision by order on other procedures which could be established to enable the Panel to issue full gender recognition certificates to applicants in a protected Scottish civil partnership. By virtue of paragraph 12, any such orders are subject to the negative procedure unless they amend primary legislation in which case they are subject to the affirmative procedure.

#### *Appeals etc.*

263. Paragraph 7 makes consequential amendments to section 8 (appeals etc.) of the Gender Recognition Act to reflect the insertion of section 4C of the Act by this Bill

264. Paragraph 7 also inserts new subsection (5B) into section 8 of the Gender Recognition Act and makes a consequential amendment to section 8(6) of that Act. New subsection (5B) enables an applicant's spouse to apply to the Court of Session where he or she considers that a full gender recognition certificate has been obtained by his or her spouse fraudulently.

#### *Registration*

265. Paragraph 8(1) amends section 10 of the Gender Recognition Act. New subsection (1B) provides that if the Panel issue full gender recognition certificates to one or both parties in a protected Scottish marriage or protected Scottish civil partnership, the Panel must send a copy of the full gender recognition certificate(s) to the Registrar General for Scotland.

266. Paragraph 8(2) makes some consequential amendments to Part 2 of Schedule 3 to the Gender Recognition Act which concerns registration matters in Scotland. In addition, paragraph 8(2) inserts a new paragraph 20A into Schedule 3 to that Act. It provides the Registrar General

with a power to make regulations, with the consent of the Scottish Ministers, about the registration of qualifying Scottish marriages and Scottish civil partnerships (defined as marriages and civil partnerships in Scotland where one or both parties (both parties in relation to civil partnerships) have been issued with full gender recognition certificates). Such regulations could make provision for the administrative issue of new marriage and civil partnership certificates.

267. In accordance with the amendments made by paragraph 12 of this schedule to the Gender Recognition Act, any regulations under the new paragraph 20A would be subject to negative procedure.

*Continuity of marriage*

268. Paragraph 9 inserts a new section 11C into the Gender Recognition Act. Section 11C provides that the continuity of a protected Scottish marriage is not affected by the issuing of full gender recognition certificates to one or both of the parties to the marriage.

*Continuity of civil partnership*

269. Paragraph 10 inserts a new section 11D into the Gender Recognition Act. Section 11D provides that the continuity of a protected Scottish civil partnership is not affected by the issuing of full gender recognition certificates to both of the parties to the civil partnership under section 4(2)(c) of that Act.

*Foreign gender change and marriage*

270. Paragraph 11 repeals section 21(2) to (5) of the Gender Recognition Act (foreign gender change and marriage).

271. Section 21(2) to (5) of that Act currently provides for the situation where a person claims to have changed gender in their country of origin and married a person of the opposite sex to their acquired gender in that country or another country outside the UK. At present, these marriages have no standing under Scots law until a full gender recognition certificate has been issued by the Panel because Scots law regards the parties as having not been respectively male and female when the marriage was solemnised. As marriages in Scotland will now be available to same sex couples these sections can be repealed for the purposes of Scots law.

*Consequential amendments*

272. Paragraph 12 makes consequential amendment to the Gender Recognition Act reflecting the substantive amendments made in the other paragraphs of schedule 2 to the Bill.

## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Marriage and Civil Partnership (Scotland) Bill introduced in the Scottish Parliament on 26 June 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The Bill will introduce same sex marriage and the registration of civil partnership through religious or belief ceremonies whilst putting in place protections for religious freedom and freedom of speech. The Bill also makes a number of changes to general Scottish marriage law (e.g. on allowing civil marriage ceremonies to take place anywhere and clarifying the role of Church of Scotland deacons) which have been under consideration for some time. The Scottish Government has undertaken two consultation exercises on the introduction of same sex marriage in Scotland, the second of which sought views on a partial Business Regulatory Impact Assessment (BRIA)<sup>3</sup>. As part of the BRIA process, the Scottish Government engaged with businesses and stakeholders about the costs and benefits of the proposed legislation.

### **PROVISIONS IN THE BILL**

#### **Provisions not expected to give rise to costs**

3. There are a number of provisions in the Bill which are not expected to give rise to any costs, such as:

- simplifications to the forbidden degrees on persons who are too closely related to marry or enter a civil partnership (sections 1 and 22);
- changes on the preliminaries to marriage (section 3);
- provision on the meaning of marriage and related expressions (section 4);
- provision on the implications of same sex marriage for the crime of reset and for impotence and adultery (section 5);
- provision on the jurisdiction of the Scottish courts on actions relating to same sex marriages (section 6 and schedule 1);
- effect of marriage between civil partners in a qualifying civil partnership (section 9);
- persons who may solemnise marriage or register civil partnership (sections 10 and 22);
- registration of nominated persons as celebrants (sections 11 and 22);
- temporary authorisation of celebrants (sections 12 and 22);

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<sup>3</sup> This partial BRIA can be found at <http://www.scotland.gov.uk/Resource/0041/00410331.pdf>

- putting belief (e.g. humanist) celebrants and bodies on the same footing as religious bodies in relation to the solemnisation of marriage in Scotland (sections 10, 11 and 12)<sup>4</sup>;
- making it clear that the introduction of same sex marriage has no impact on existing rights to freedom of speech (section 14);
- giving a power to the district registrar to require evidence of nationality of both parties to the marriage or civil partnership (section 15 and 23);
- extending the time period for issuing a marriage or civil partnership schedule from 14 days to 28 days (sections 16 and 22);
- provision on information on the dissolution of a former civil partnership when seeking to marry outwith Scotland (section 17);
- authorising Church of Scotland deacons to solemnise opposite sex marriage (section 18);
- allowing civil marriage ceremonies to take place anywhere agreed by the registrar and the couple, other than religious premises (section 19);
- updating a form (section 20);
- clarifying the jurisdiction of the sheriff court in relation to declarators of opposite sex marriage (section 21);
- making bigamy a statutory offence in relation to both opposite sex and same sex marriage (section 26);
- provision amending the Civil Partnership Act 2004 so that, in future, overseas same sex marriages are recognised as same sex marriages in Scotland rather than as civil partnerships (section 24);
- clarification of the effect of an SSI which removed the need for third party evidence in actions to dissolve civil partnerships using the simplified procedure (section 25);
- the provisions in Parts 5 and 6.

4. Although the Bill clarifies the position of belief celebrants in relation to marriage, it is unlikely to lead to any significant increase in the number of marriages. Humanist celebrants are already permitted to solemnise opposite sex marriage by virtue of temporary authorisation under section 12 of the Marriage (Scotland) 1977 Act.

5. Allowing civil marriage ceremonies to take place anywhere as agreed by the registrar and the couple could lead to an increase in demand for such ceremonies. However, any increase in costs to the local authority would be covered by a fee payable by the couple in relation to such ceremonies.

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<sup>4</sup> Church of Scotland celebrants will continue to be authorised automatically for opposite sex marriage through the Church of Scotland being named on the face of the Marriage (Scotland) Act 1977.

6. Although extending the period for the issue of the marriage or civil partnership schedule to 28 days could imply that more work may be involved for district registrars, this amendment reflects the reality of the amount of work which is already ongoing.

7. Sections 10, 11 and 22 of the Bill, which contain provisions allowing the Scottish Ministers to make regulations on “qualifying requirements” for religious and belief bodies to meet before their celebrants could be authorised to solemnise marriage or register civil partnership, could lead to suggestions there would be an additional cost on religious and belief bodies in relation to training for their celebrants. In practice, however, the Scottish Government and National Records of Scotland would work closely with religious and belief bodies to organise any further training that might be required: this should ensure costs are minimal. In addition, there will be full consultation on proposed regulations in this area. This will include discussions with religious and belief bodies on how to keep costs to a minimum.

### **Provisions likely to give rise to costs**

8. The provisions in the Bill which are likely to give rise to some costs are:

- introducing same sex marriage and the religious and belief registration of civil partnership (Part 1 and section 22);
- allowing civil partners who registered their civil partnership in Scotland to change their civil partnership to a marriage (sections 7 and 8);
- removing the requirement on transgender people to divorce before obtaining a full Gender Recognition Certificate (section 27 and schedule 2); and
- having a renewed marriage or civil partnership following issue of a full gender recognition certificate (section 28).

### **COSTS GENERALLY**

9. The main associated costs in this area arose following the introduction of the Civil Partnership Act 2004, which gave rights to a couple in a civil partnership<sup>5</sup>. Costs this time are modest as civil partners have almost exactly the same rights as married couples. The difference therefore is predominantly around being able to marry rather than about financial issues.

10. The majority of costs are in relation to updating IT systems and forms.

### **POTENTIAL INCREASES IN NUMBER OF SAME SEX UNIONS**

11. Costs may also arise if the introduction of same sex marriage in Scotland results in an increase in the total number of registered same sex unions. It could be the case that some same sex couples may not have entered into a civil partnership because they prefer marriage or because they would wish to enter into a religious or belief civil partnership (at the moment, civil partnership registration ceremonies can only be civil in nature).

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<sup>5</sup> The final Regulatory Impact Assessment prepared by the UK Department of Trade and Industry for the Civil Partnership Act 2004 is at <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file23829.pdf>

12. From 2005 to 2012, 4,435 civil partnerships were registered in Scotland<sup>6</sup>. There was an initial spike in demand following the introduction of the Civil Partnership Act 2004. Following 2006, the numbers entering into a civil partnership in Scotland each year fell until 2011 when numbers started to increase.

13. There will be demand from couples who are in an existing civil partnership and choose to change the civil partnership to a marriage. From a survey undertaken by the Equality Network in 2009/10, 54% of 103 respondents said that they would wish to change their civil partnership to a marriage.<sup>7</sup>

14. In addition, there may be a modest pent-up demand from same sex couples who decided not to enter a civil partnership but would enter a marriage. However, we do not expect this pent-up demand for same sex marriage to be at the same level as the pent-up demand for civil partnership in 2005 and 2006. The numbers in 2005 and 2006 reflected that before then same sex couples could not enter into a union where they could obtain legal responsibilities and rights.

15. There is considerable uncertainty on exactly what the pent-up demand for new same sex unions might be after the introduction of same sex marriage. Looking at US states which have introduced civil unions and same sex marriage, states which allowed same sex marriage saw higher rates of formation (30% of existing same sex couples got married in the first year this was available) than States which introduced civil union (18% of same sex couples entered a civil union in the first year this was available)<sup>8</sup>.

16. This figure might suggest that there could be a increase of 66% in registered same sex unions when same sex marriage is first introduced [ $30 - 18 = 12$ .  $12 \div 18 = 66\%$ ]. However, this is not like for like data, since civil partnership has been available in Scotland since 2005. Given though that using any other figures would be even more speculative, this figure will be used in this Memorandum to estimate a potential increase in the number of same sex unions in the first year following the introduction of same sex marriage.

17. The UK Government, in their Impact Assessment for the Marriage (Same Sex Couples) Bill considered evidence and conclusions from a number of different countries. It concluded that England and Wales should expect to see a short-term increase in demand for same sex marriage in the year that it is introduced.<sup>9</sup>

18. Given that Scotland is in a similar position to England and Wales, in that civil partnerships have been available for several years, we would expect that there will be a short term increase in demand in Scotland for a same sex marriage in the first year. The UK

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<sup>6</sup> National Records of Scotland: <http://www.gro-scotland.gov.uk/files2/stats/births-marriages-deaths-preliminary/bdve-2012-preliminary-tablep1b.pdf>

<sup>7</sup> Information on this survey can be found at page 40 of the response by the Equality Network to the first consultation by the Government on same sex marriage and the religious registration of civil partnerships: <http://equalmarriage.org.uk/wp-content/uploads/2011/12/consultationresponse.pdf>

<sup>8</sup>Badgett & Herman (2011) "Patterns of Relationship Recognition by Same Sex Couples in the United States" The Williams Institute: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf>

<sup>9</sup> The UK Government's Impact Assessment :<http://www.parliament.uk/documents/impact-assessments/IA13-004.pdf>

Government's Impact Assessment also noted that there is not enough evidence available to suggest if any other countries have seen a long-term change in demand for marriage compared to previous demand for civil unions.

19. Therefore, in this Memorandum, we have taken the approach that there might be an additional 330 new same sex unions entered into in the first year. This is based on 500 civil partnerships taking place each year in Scotland and an increase of 66% on that figure, using the American figures quoted in paragraphs 15 and 16 above. As indicated, this is a broad estimate reflecting modest pent-up demand and available data from other jurisdictions.

20. In addition, this Memorandum assumes that there is no discernible increase after the first year in the number of new same sex unions being entered into. That is in line with the UK Government's Impact Assessment that there is not enough evidence to suggest an increase in long-term demand. In practice, the assumption that some people have chosen not to enter a civil partnership in the past but would enter a same sex marriage indicates that the number of new same sex unions might increase on a permanent basis. However, any such increase would be expected to be low and could be counter-balanced by the fluctuations which are seen each year in any event in the number of marriages and civil partnerships.

## **RELATIONSHIP WITH UK POSITION**

21. The UK Government introduced its Marriage (Same Sex Couples) Bill to the UK Parliament on 24 January 2013<sup>10</sup>. This Bill proposes the introduction of same sex marriage in England and Wales and some other changes. As a result of the proposed introduction of same sex marriage across England, Wales and Scotland, there will be modest administrative costs in relation to IT, forms and guidance for UK Government departments including departments which operate in Scotland such as HM Revenue and Customs and the Department for Work and Pensions. This has no financial impact on the Scottish Government.

22. As a consequence of the changes made by the Scottish Bill, there may, as outlined above, be an increase in the number of same sex unions. This could have an impact on the UK Government, particularly in relation to pension schemes which are not devolved. However, the Scottish Government would expect any such costs to be modest, given the low number of additional same sex unions that are expected.

23. The Scottish Government would not expect the changes made by the Scottish Bill to give rise to a claim by the UK Government for its costs under the Statement of Funding Policy. The Statement of Funding Policy relates to additional costs. As indicated above, changes to IT, forms and guidance will be needed anyway as a consequence of the UK Bill. Clearly, if the UK Bill should not pass, this situation would change and the Scottish Government would need to discuss the implications with the UK Government.

24. On pensions, the increase in the number of new same sex unions entered into is expected to be modest and there are changes each year to the number of marriages and civil partnerships

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<sup>10</sup> <http://services.parliament.uk/bills/2013-14/marriagesamesexcouplesbill.html>

entered into. Therefore, the Scottish Government would not expect the UK Government to make a claim under the Statement of Funding Policy.

## **COSTS ON THE SCOTTISH ADMINISTRATION**

### **Pensions**

25. Pension policy is a reserved matter for the UK Government, although there are some devolved powers in terms of certain public sector pension schemes in Scotland<sup>11</sup>.

26. There are some differences between civil partners and married couples in relation to survivor benefits in pensions. The benefit paid to a surviving civil partner can be less than the benefit paid to a surviving spouse as it may not be based on the full service given by the deceased surviving partner.

27. In public sector schemes, survivor benefits for civil partners are based on service since 1988. In schemes for which the Scottish Government has responsibility, same sex married couples will be treated in the same way as civil partners.

28. As a result, there will be no costs in relation to the devolved public sector pension schemes through the introduction of same sex marriage in Scotland if the overall number of registered same sex unions does not increase. In addition, persons changing their relationship from a civil partnership to a marriage has no cost implications for devolved public sector pension schemes. However, as indicated in paragraph 19, it is possible that there could be a small increase in the number of registered same sex unions.

29. Using the US data highlighted in paragraphs 15 and 16 (on a potential increase in the total number of registered same sex unions), the potential impact on devolved public sector pension schemes could be:

- there are around 500 civil partnerships a year at the moment;
- in the first year, there could be 330 additional same sex registered unions [500 x 66%];
- around 12.6% of Scotland's working population is employed in a devolved public sector pension scheme [approximately 315,000 scheme members<sup>12</sup> out of a working population of around 2.5 million<sup>13</sup> in Scotland];
- therefore, there could be an additional 42 same sex registered unions in such schemes [330 x 12.6%];
- the average survivor benefit is assumed to be £3,900 a year<sup>14</sup>;

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<sup>11</sup> More details can be found on the Scottish Public Pensions Agency website: <http://www.sppa.gov.uk/>

<sup>12</sup> Scottish Public Pensions Agency – Corporate Plan 2012 - 2015: <http://www.sppa.gov.uk/Documents/Corporate/Corporate%20Plans/Corporate%20Plan%202012-15.pdf> - see section 9

<sup>13</sup> Local Area Labour Markets in Scotland: Statistics from the Annual Population Survey 2012. Annex A, Table 1: Employment rates and levels by local authority, Scotland, 2008, 2011, 2012: <http://www.scotland.gov.uk/Resource/0042/00421587.pdf>

- there could be a maximum of £163,800 a year additional costs arising for devolved public sector schemes [42 x £3,900].

30. However, there are various uncertainties in these calculations..

31. First of all, not all the costs will occur at the same time. People marry, retire and die at different ages. Therefore, the estimated additional costs will occur at different times.

32. Secondly, in some cases the person who was not the member of the pension scheme may die before their partner so there would never be any survivor benefit.

33. Thirdly, around 1 in 3 of these additional unions will result in dissolution/divorce<sup>15</sup>.

34. The Government expects, therefore, that the cost of £163,800 per year is likely to be a maximum figure. For example, assuming that 1 in 3 of the unions end in divorce/dissolution could reduce the estimated costs by £54,600 per year [ $£163,800/3$ ] to £109,200.

### **National Records of Scotland**

35. For National Records of Scotland, some minor adjustments will be needed in relation to forms, extracts and the on-line registration IT system. Upper estimates to amend these administrative processes are around £200,000 in total.

36. £75,000 would be required for the “registration administration and family history” system and £45,000 for the IT systems which maintains statistical data which would be sourced from within current budgets. However, these costs are based on a comprehensive re-write of existing marriage functionality and the underlying data structures. It is therefore likely that the final costs will be lower. In addition, the Government estimates that costs to make minor adjustments to forms and extracts would be around £80,000.

37. The Government expects that the costs will be incurred in 2014/15. This is on the assumption that the Bill is passed, receives Royal Assent early in 2014 and it then takes around 12 months in total to implement the legislation.

38. It is envisaged that IT changes could not be made any earlier than 2014/15 because:

- they could not be specified until legislation had been passed; and
- in any event, National Records of Scotland will have to give priority to work on the changes that will be required for the new arrangements for the certification of death, which are due to be introduced on 1 April 2014.

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<sup>14</sup> Paragraph 1.11 on page 26 of the Independent Public Services Commission suggested the average pension paid to a public sector pension member is around £7,800 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207720/hutton\\_final\\_100311.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207720/hutton_final_100311.pdf)

Assuming the pension for the survivor is at 50% gives a figure of £3,900.

<sup>15</sup> Around 1 in 3 marriages end in divorce in Scotland: Statistics on life events can be found at <http://www.gro-scotland.gov.uk/statistics/theme/vital-events/general/ref-tables/2011/index.html>

## **Scottish Legal Aid Board**

39. There could potentially be costs for the Scottish Legal Aid Board in relation to divorce and dissolution of civil partnerships, although any impact would be very minimal.

40. Very broadly, around one in three marriages end in divorce in Scotland. There are around 30,000 marriages a year; 10,000 divorces; 500 civil partnerships and a very small number of dissolutions of civil partnerships<sup>16</sup>. The number of civil partnerships dissolving is still very low as the form of relationship is still relatively new.

41. The majority of divorces and dissolutions are dealt with in the local Sheriff Court where 60% are through the simplified divorce procedure<sup>17</sup>. This can be used where there are no children under 16 and no financial issues to be sorted out between spouses<sup>18</sup>. The simplified divorce procedure is straightforward and, therefore, has few legal aid implications. The remaining 40% of divorces and dissolutions can have legal aid implications.

42. The introduction of same sex marriage could increase the number of registered same sex unions (as outlined in paragraphs 11 to 20). However, as also indicated, we expect that any increase in demand would relate to the first year.

43. If there were to be an increase in the number of registered same sex unions, following the introduction of same sex marriage, there could be more divorces and dissolutions. Using the assumptions outlined above of an extra 330 same sex unions in the first year and of one third ending in divorce/dissolution:

- there could be 110 additional divorces (one third of 330);
- 40% could be through ordinary procedures, with legal aid implications, and 60% through simplified procedures;
- so 44 additional divorces (40% of 110) might have legal aid implications.

44. Therefore, an increase in the number of registered same sex unions could lead to a very modest impact on legal aid. The Scottish Legal Aid Board indicated earlier this year that it was introducing cost limitations on grants of civil legal aid<sup>19</sup>. For divorces in the sheriff court, the limit is £6,000. £6,000 multiplied by 44 produces a figure of £264,000. This could be payable over a number of years, as divorces occur. The average length of a marriage which ends in divorce is around 16 years<sup>20</sup>.

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<sup>16</sup> Statistics on life events can be found at <http://www.gro-scotland.gov.uk/statistics/theme/vital-events/general/ref-tables/2011/index.html>

<sup>17</sup> See table 11 in these statistics: <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS/civlaw1112>

<sup>18</sup> Guidance on the simplified procedures for divorce can be found on the Scottish Court Service website at <http://www.scotcourts.gov.uk/taking-action/divorce-and-dissolution-of-civil-partnership>

<sup>19</sup> [http://www.slab.org.uk/common/documents/profession/mailshots/2013/Cost\\_Limitations\\_Mailshot\\_-\\_27\\_February\\_2013.pdf](http://www.slab.org.uk/common/documents/profession/mailshots/2013/Cost_Limitations_Mailshot_-_27_February_2013.pdf)

<sup>20</sup> <http://www.scotland.gov.uk/Publications/2010/12/17151409/16>

45. There would be no additional legal aid implications if there is no overall increase in the number of registered same sex unions. Instead of dissolutions of civil partnerships, there would be divorces.

### **Gender Recognition Panel**

46. Both the Scottish and UK Bills propose to allow transgender people to obtain a full gender recognition certificate without having to divorce. This may lead to more applications to the Gender Recognition Panel (“the Panel”). The Panel operates across the UK and is run by HM Courts and Tribunals Service, an agency of the UK Ministry of Justice. The UK Government’s Impact Assessment for the Marriage (Same Sex Couples) Bill estimates the total costs of increased applications to the Panel at up to £700,000. Financial responsibility for the Panel rests with the UK Government and there would therefore be no financial impact for the Scottish Government.

### **COSTS ON LOCAL AUTHORITIES**

#### **Civil marriage ceremonies**

47. Under current legislation, civil marriage ceremonies can only take place at approved places such as a registrar’s office or at premises approved by the local authority. The Bill removes the references to “approved places” from legislation. It will make it possible for civil marriage, for both opposite sex and same sex marriage, to take place at any place agreed by the registrar and the couple, except in religious premises.

48. This provision to deregulate the approval of places is expected to reduce licensing fees income to the 32 councils by a total of £150,000 to £200,000.

49. However, such fees cannot be set above cost recovery levels so, in practice, local authorities will not lose revenue given they will be relieved of the burden of carrying out a licensing function. In addition, as the function is a relatively insignificant element of licensing activity, the Government expects local authorities will redeploy their resources to reflect the removal of this function.

50. There may also be an increase in demand for civil ceremonies for opposite sex marriage once these ceremonies can take place anywhere agreed by the couple and the registrar. Couples would be choosing to have a civil ceremony rather than opting for a religious ceremony as they are no longer constrained by having a civil ceremony in a licensed venue.

51. In addition, there will be a demand from existing civil partners to change their relationship to a marriage and this change could be carried out through a ceremony under section 7 of the Bill. As indicated in paragraph 12, there were 4,435 civil partnerships in Scotland from 2005 to 2012. As paragraph 13 indicates, a survey suggested 54% of people in a civil partnership may wish to change their relationship to a marriage.

52. As indicated in paragraph 19, there may be an increase in the number of same sex civil unions in the first year of same sex marriage.

53. Any marriage ceremony would attract a fee, designed to recover costs<sup>21</sup>.

#### **Familiarisation costs – civil registrars**

54. There will be no significant familiarisation costs to local authority civil registrars because the proposed process for same sex marriage is the same as the existing process for opposite sex marriage and very similar to the existing civil partnership process.

55. There will therefore be a very little net financial impact on local authorities in Scotland.

#### **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

##### **Individuals and businesses**

56. There will be some impact on individuals by the Bill which would result in costs being incurred.

57. There will be costs for couples in an existing civil partnership who wish to change their civil partnership to a same sex marriage following implementation of the Bill.

58. Such couples may choose to have a marriage ceremony to change their relationship, under section 7 of the Bill. Fees would be payable by such couples. The fee for a basic marriage ceremony in Scotland is currently £125 (see information at footnote 19).

59. In addition, section 8 of the Bill gives the power for Scottish Ministers to make regulations so that an alternative administrative process could be established. Section 8 gives ministers the power to make provision on fees.

60. There would also be a fee payable by couples who enter into a same sex marriage or enter into a religious or belief registration of civil partnership who had chosen previously not to enter in to a civil partnership.

61. There could also be a cost for a couple where one partner has been issued with a full gender recognition certificate and the couple wishes to have a new marriage certificate. Section 28 of the Bill makes provision for any such couple to have a renewed marriage ceremony so that a new certificate could be issued, reflecting the acquired gender. It is possible to have a civil marriage ceremony for £125.

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<sup>21</sup> Information on marriage fees is at <http://www.gro-scotland.gov.uk/files2/registration/rm1b-new-fees.pdf>

**TOTAL OF ESTIMATED COSTS**

<b>Organisation</b>	<b>Description</b>	<b>Cost</b>
Scottish Government	Public sector pension schemes	£0 – £163,800 per year (costs only likely to arise if overall number of registered same sex unions increases)
Local authorities	Following repeal of provisions that civil ceremonies can only take place in approved places	£150,000 – £200,000 (in total for all 32 local authorities) as a result of the loss of licensing income. However, these fees are aimed at recovering costs and the loss of fee income is offset through being relieved of the burden of carrying out a licensing function
Local authorities	Familiarisation costs for civil registrars	Very little impact
National Records of Scotland	To reform the “registration administration and family history” system	£75,000 (upper estimate)
National Records of Scotland	To reform the “statistical” systems	£45,000 (upper estimate)
National Records of Scotland	Minor adjustments to forms and extracts.	£80,000
Scottish Legal Aid Board	Legal aid for divorces and dissolutions	£0 – £264,000 over a period of several years (costs only likely to arise if increase in overall number of registered same sex unions)

*These documents relate to the Marriage and Civil Partnership (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 26 June 2013*

## **SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

On 26 June 2013, the Cabinet Secretary for Health and Wellbeing (Alex Neil MSP) made the following statement:

“In my view, the provisions of the Marriage and Civil Partnership (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

On 26 June 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Marriage and Civil Partnership (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”



*These documents relate to the Marriage and Civil Partnership (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 26 June 2013*

# **MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL**

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

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