

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

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Marriage and Civil Partnership (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **BACKGROUND**

3. The Marriage and Civil Partnership (Scotland) Bill makes a number of changes to marriage and civil partnership law. Key points in the Bill are:
  - It allows same sex couples to get married, with protections for religious bodies and celebrants who do not wish to take part.
  - It puts belief celebrants on the same footing as religious celebrants.
  - It introduces the religious and belief registration of civil partnerships.
  - It makes provision so that persons in a civil partnership registered in Scotland can change the civil partnership into a marriage.
  - It makes provision so that persons who are married can stay married and obtain a full Gender Recognition Certificate, providing legal recognition in their acquired gender.

- It gives the Scottish Ministers power to prescribe in regulations qualifying requirements which religious and belief bodies must meet before their celebrants are authorised to solemnise marriage or register civil partnerships.
- It allows civil marriage ceremonies to take place anywhere agreed between the couple and the registrar, except in religious premises.
- It makes bigamy a statutory offence.
- It makes provision so that deacons of the Church of Scotland are authorised on the face of the Marriage (Scotland) Act 1977 (“the 1977 Act”) to solemnise opposite sex marriage.

4. The Bill follows two consultations by the Scottish Government. The first consultation ran from 2 September 2011 to 9 December 2011. It was on general principles and attracted around 77,500 responses. The second consultation ran from 12 December 2012 to 20 March 2013. It was on a draft Bill and attracted around 15,000 responses<sup>1</sup>.

#### **APPROACH TO USE OF DELEGATED POWERS**

5. The Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example, changes in relation to the existence and doctrine of religious or belief bodies) and to make changes quickly without the need for primary legislation;
- the need to allow detailed administrative and procedural arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to make proper use of valuable Parliamentary time; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

#### **DELEGATED POWERS**

##### **Section 4(8) to (9) – meaning of marriage and related expressions in enactments and documents**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** negative procedure

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<sup>1</sup> The first consultation is at <http://www.scotland.gov.uk/Publications/2011/09/05153328/0> and the second is at <http://www.scotland.gov.uk/Publications/2012/12/9433>

### *Provision*

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

### *Reason for taking power*

7. The general intention is that, in future, references to “marriage” and to married couples will be interpreted as including both same sex and opposite sex couples. However, there may be a small number of exceptions, reflecting that rights and responsibilities may not be exactly the same. For example, in public sector pension schemes, the intention is that same sex married couples will be treated in the same way as civil partners, rather than in the same way as opposite sex married couples. So contrary provision to the general intention may be required.

8. The power also allows consequential, supplementary, incidental, transitional, transitory or saving provision to be made. This reflects that the desired result may not be achievable by simply modifying or dis-applying the effect of any of the subsections (1) to (6). Additional provision may be necessary to ensure the intended meaning in terms of the order is clear. For example, in some cases provision may be needed to reflect the position of married transgender people, who may have been in an opposite sex marriage and which may become a same sex marriage.

9. It is also possible that transitional, transitory or saving provision may be needed in an order where, for example, the aim is to disapply the general intention for a limited period of time only, to allow adjustments to be made to take account of the general intention.

### *Choice of procedure*

10. It is considered that negative procedure will offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for provisions of this nature. The power does not extend to amending primary legislation but rather can only be used to modify the effect of or disapply any of subsections (1) to (6). The Government expects to discuss any potential order with key stakeholders beforehand to obtain technical and policy comments on what is proposed.

## **Section 8(1) – change of qualifying civil partnership into marriage**

<b>Power conferred on:</b>	<b>The Scottish Ministers, after consultation with the Registrar General of Births, Deaths and Marriages for Scotland</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>negative procedure, unless amendments are made to primary legislation in which case the affirmative procedure applies</b>

### *Provision*

11. This provision relates to procedures by which qualifying civil partnerships can change their civil partnership to marriage by means of an administrative process. Under section 8(7), “qualifying civil partnership” is defined by reference to section 5(6) of the Marriage (Scotland) Act 1977 (as inserted by section 7(3)(b) of the Bill). The definition covers civil partnerships registered in Scotland and certain civil partnerships registered overseas through the UK diplomatic service and the UK armed forces.

12. The provision allows regulations to be made covering the application process; the information required from the applicants; evidence needed; any requirement to attend at a particular place or appear before a particular person; the conferring of functions (including in relation to the recording of information and issuing certified copies of any such information); fees and the effect of changing a qualifying civil partnership into a marriage.

### *Reason for taking power*

13. The Bill, at section 7, already allows qualifying civil partners to change their civil partnership to a marriage by going through a marriage ceremony. However, some civil partners (for example, persons who registered in Scotland but now live overseas) may wish to change their civil partnership to a marriage through administrative arrangements. The detailed arrangements may be complex – the Government would intend to establish a working group to consider them. Therefore, it is appropriate to set out the detailed provisions in secondary legislation rather than on the face of the Bill.

14. The power includes the ability to make consequential, supplementary, incidental, transitional, transitory and saving provision and the ability to modify any enactment including the Bill.

15. This reflects that, for example, changing a qualifying civil partnership to a marriage may have an effect on the existing registration of the civil partnership and provision may be required on what the consequences of that effect should be. Provision may include altering existing legislation about, for example, the register of civil partnerships.

16. Provision may also be needed on the effect of changing a civil partnership to a marriage. Section 9 of the Bill makes provision on the effects of having a marriage ceremony to change a civil partnership to a marriage. The general intention is that when civil partners in a qualifying civil partnership become married through administrative arrangements established under section 8, the effect of that change will be the same as in section 9(1) of the Bill. Consequential provision may be needed using the powers at section 8(5) on the effects of changing a civil partnership to a marriage through administrative arrangements, for example to make provision similar to section 9(6) and (7) in the Bill.

17. Provision may also be needed in respect of people in a civil partnership who obtain an interim gender recognition certificate. Under section 4C(3) of the Gender Recognition Act 2004, inserted by paragraph 5 of schedule 2 to the Bill, a person in a protected Scottish civil partnership (defined by amendments at paragraph 2 of schedule 2) may, in certain circumstances, make an application to change an interim gender recognition certificate to a full gender recognition certificate. (A full gender recognition certificate provides legal recognition in an acquired gender).

18. Section 4C(3) operates on the basis that the civil partners change their civil partnership to a marriage through a ceremony. The powers at section 8(5) may need to be used to amend section 4C(3) to reflect any administrative arrangements established under section 8 to change civil partnerships to marriages.

#### *Choice of procedure*

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

#### **Section 9(4) and (5) – effect of marriage between civil partners in a qualifying civil partnership**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** negative procedure

#### *Provision*

20. Section 9(1)(b) of the Bill provides that when civil partners in a qualifying civil partnership have a marriage ceremony to change their relationship to a marriage, 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.

21. Section 9(3)(b) provides that this is subject to any contrary provision made by order under subsection (4). The power at subsection (4) gives the Scottish Ministers an order-making power to provide that section 9(1)(b) has effect in a different way or does not apply. Such an order can, under subsection (5), include provisions which are consequential, supplementary, incidental, transitional, transitory or saving.

*Reason for taking power*

22. The general intention is that same sex couples who change their civil partnership into a marriage should be regarded as having been married from when they first entered into the civil partnership. This is relevant, for example, if the couple subsequently divorce. Under the Family Law (Scotland) Act 1985, financial provision is based on a concept of “matrimonial property”. This is, broadly, property acquired for and during the marriage. It could produce perverse results if property acquired for and during the preceding civil partnership did not count as part of the “matrimonial property”.

23. However, there may be circumstances where it is not always appropriate to treat same sex couples who change their civil partnership into a marriage as having been married from when they first entered into the civil partnership. 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.

24. The power includes the ability to make consequential, supplementary, incidental, transitional, transitory and saving provision. It may not be straightforward to make provision for cases where marriages formed after changing civil partnerships to a marriage are not to be treated as having been formed when the civil partnership was first entered into. For example, any provision relating to the recognition of foreign decrees applying to civil partnerships which have now become marriages might need to outline what recognition should be given to such decrees and whether there should be any time limits on the recognition of such decrees.

*Choice of procedure*

25. It is considered that negative procedure will offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for provisions of this nature. The power does not extend to amending primary legislation but rather can only be used to modify the effect of or disapply subsection (1)(b) in specified cases. The Government expects to discuss any potential order with key stakeholders beforehand to obtain technical and policy comments on what is proposed.

**Section 10(2)(a)(ii) (amendment to section 8(1)(a)(ii) of the 1977 Act) – Persons who may solemnise marriage: power to prescribe religious or belief bodies whose celebrants are authorised to solemnise opposite sex marriage**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** negative procedure

**Section 10(2)(b) (inserted section 8(1B)(a)(i) of the 1977 Act) – Persons who may solemnise marriage: power to prescribe religious or belief bodies whose celebrants are authorised to solemnise same sex marriage**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** negative procedure

**Section 22(13) (inserted section 94A(1)(a)(i) of the 2004 Act) – Registration of civil partnership: power to prescribe religious or belief bodies whose celebrants are authorised to register civil partnerships**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** negative procedure

#### *Provision*

26. Section 10(2)(a)(ii) of the Bill amends section 8(1)(a)(ii) of the 1977 Act. This amendment extends the existing regulation-making power to allow the Scottish Ministers to prescribe religious *or belief* bodies whose celebrants are authorised to solemnise opposite sex marriage. The existing power relates to religious bodies only.

27. Section 10(2)(b) of the Bill inserts a new subsection (1B) into section 8 of the 1977 Act. Section 8(1B)(a)(i) allows the Scottish Ministers to prescribe religious or belief bodies whose celebrants are authorised to solemnise same sex marriage.

28. Section 22(13) of the Bill inserts section 94A into the Civil Partnership Act 2004 (“the 2004 Act”). Section 94A(1)(a)(i) allows the Scottish Ministers to prescribe religious or belief bodies whose celebrants are authorised to register civil partnership.

#### *Reason for taking power*

29. Section 10(2)(a)(ii) amends existing powers in the Marriage (Scotland) Act 1977 in relation to prescribing religious bodies whose celebrants are authorised to solemnise opposite sex marriage.

30. There are, at the moment, four ways in which celebrants can be authorised to solemnise marriage. Church of Scotland ministers are automatically authorised by section 8(1)(a)(i) of the 1977 Act; religious bodies can be prescribed by regulations made under section 8(1)(a)(ii); other religious bodies can nominate persons to the Registrar General for Scotland to be registered to solemnise marriage under section 9 and the Registrar General may give temporary authorisation for celebrants under section 12.

31. The effect of prescribing bodies by regulations is that their celebrants are then authorised to solemnise marriage. The reason for prescribing bodies is to reduce bureaucracy: it saves them from having to regularly nominate persons to the Registrar General. There may be bodies whose celebrants solemnise a large number of ceremonies each year<sup>2</sup>. Authorising their celebrants by name under section 9 is likely to be onerous for them and for the Registrar General who deals with each application.

32. Prescribing bodies under section 8, rather than authorising persons under section 9, also effectively places an onus on the body to ensure that their celebrants are following appropriate procedures on the conduct of ceremonies. Whereas if a celebrant is authorised by name under section 9, the Registrar General may, under section 10 of the 1977 Act, remove that person from the register where procedures have not been complied with.

33. The amendments made by section 10(2)(a)(ii) of the Bill allows the Scottish Ministers to prescribe belief bodies whose celebrants would then be authorised to solemnise opposite sex marriage. This reflects the overall policy intention to place belief bodies on the same footing as religious bodies in relation to opposite sex marriage.

34. Paragraph 2.26 of the Scottish Government's second consultation, on a draft Bill, noted that the current regulations (SI 1977/1670) need to be revised. The current regulations are made under the existing powers. The consultation noted that one body (the Congregational Union of Scotland) no longer exists; another body, the United Reformed Church, has indicated that it would like to be prescribed; and, with the exception of the Hebrew Congregation, all of the bodies currently prescribed are Christian and there may be scope to prescribe other non-Christian bodies. In their response to the second consultation, the Scottish Council of Jewish Communities (SCoJeC) noted that the nomenclature of "The Hebrew Congregation" should be changed to "The Jewish Community".<sup>3</sup>

35. The Scottish Government would intend to contact extant bodies which are currently prescribed, and other major religious and belief bodies, and ask if they would wish to be prescribed so their celebrants could solemnise opposite sex marriage in future. The Government expects to consult publicly on prescribing bodies. Any consultation would be linked to the "qualifying requirements": the "qualifying requirements" are explained at paragraphs 45 to 62 below.

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<sup>2</sup> Statistics on the number of marriages by denomination are at <http://www.gro-scotland.gov.uk/files2/stats/ve-reftables-2011/ve2011-t7.7.xls>

<sup>3</sup> The SCoJeC response to the second consultation is at [http://www.scojec.org/consultations/2013/13iii\\_marriage\\_and\\_civil\\_partnership.pdf](http://www.scojec.org/consultations/2013/13iii_marriage_and_civil_partnership.pdf) The comments on nomenclature are at the end of the response.



36. Section 10(2)(b) of the Bill allows Ministers to prescribe religious or belief bodies whose celebrants are authorised to solemnise same sex marriage.

37. This power in section 10(2)(b) is separate to the power in section 8(1) to prescribe religious or belief bodies whose celebrants are authorised to solemnise opposite sex marriage. This separate power reflects that a number of bodies who wish to solemnise opposite sex marriage may not wish to solemnise same sex marriage.

38. Some bodies which are prepared to solemnise same sex marriage may have celebrants who object to doing so, notwithstanding the position of the body they belong to. In these cases, the Scottish Government would not expect to prescribe the body using the power in section 8(1B) of the 1977 Act. Instead, the body could, under section 9 of the 1977 Act, as amended by the Bill, nominate persons to the Registrar General to be empowered to solemnise same sex marriage. This would allow the body to nominate only those persons who are content to solemnise same sex marriage.

39. The Scottish Ministers would expect to consult publicly on prescribing bodies whose celebrants would be authorised to solemnise same sex marriage. Any consultation would be linked to the “qualifying requirements”: the “qualifying requirements” are explained at paragraphs 45 to 62 below.

40. Section 22(13) of the Bill inserts section 94A into the 2004 Act. Section 94A(1)(a)(i) allows the Scottish Ministers to prescribe religious or belief bodies whose celebrants are authorised to register civil partnership. At the moment, civil partnerships can only be registered through a civil ceremony. The Bill changes that to allow them to be registered through a religious or belief ceremony as well. The proposed procedures are in line with the procedures used to authorise celebrants to solemnise marriage. Therefore:

- religious or belief bodies can be prescribed by regulations so that their celebrants are authorised to register civil partnership; or
- the names of persons wishing to be empowered to register civil partnership can be put forward by religious or belief bodies to the Registrar General.

41. In addition, the Registrar General may grant temporary authorisations.

42. As with marriage, the reason for prescribing bodies is to reduce bureaucracy. It saves such bodies from having to regularly nominate persons to the Registrar General and saves the Registrar General from having to deal with individual applications. Where members of a religious or belief body have mixed views on carrying out services for same sex couples, it may be appropriate for a body to nominate persons to the Registrar General rather than be prescribed by regulations.

43. The Scottish Ministers would expect to consult publicly on prescribing bodies whose celebrants would be authorised to register civil partnerships. Any consultation

would be linked to the “qualifying requirements”: the “qualifying requirements” are explained at paragraphs 45 to 62 below.

*Choice of procedure*

44. The Scottish Government considers that negative procedure will provide the appropriate level of scrutiny in relation to regulations which list religious or belief bodies. Before making the regulations, the Scottish Government will have liaised with the bodies to confirm that they wish to be prescribed. The existing regulation-making power in section 8(1)(a)(ii) of the 1977 Act on prescribing of religious bodies is not subject to negative or affirmative parliamentary procedure, consistent with the general approach taken by the 1977 Act.

**Section 10(2)(b) (inserted section 8(1E) of the 1977 Act) – Persons who may solemnise marriage: power in relation to qualifying requirements for bodies to meet before they can be prescribed so their celebrants are authorised to solemnise marriage**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       regulations**  
**Parliamentary procedure: negative procedure**

**Section 11(2)(e) (inserted section 9(2A) of the 1977 Act) – Registration of nominated persons as celebrants: power on qualifying requirements for nominating bodies to meet when putting forward persons to the Registrar General to be empowered to solemnise marriage**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       regulations**  
**Parliamentary procedure: negative procedure**

**Section 12(2)(b) (inserted section 12(1D) of the 1977 Act) – Temporary authorisation of celebrants: power on qualifying requirements in relation to temporary celebrants**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       regulations**  
**Parliamentary procedure: negative procedure**

**Section 22(13) (inserted section 94A(5) of the 2004 Act) – Registration of civil partnership: power in relation to qualifying requirements for bodies to meet before they can be prescribed so their celebrants are authorised to register civil partnerships**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       regulations**  
**Parliamentary procedure: negative procedure**

**Section 22(13) (inserted section 94(B)(3) of the 2004 Act) – Registration of civil partnership: power on qualifying requirements for nominating bodies to meet when putting forward persons to the Registrar General to be empowered to register civil partnership**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** negative procedure

**Section 22(13) (inserted section 94E(4) of the 2004 Act) – Registration of civil partnership: power on qualifying requirements in relation to temporary authorisations to register civil partnerships**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** negative procedure

*Provision*

Qualifying requirements in respect of prescribed religious or belief bodies so its celebrants can solemnise marriage

45. Section 10(2)(b) of the Bill inserts subsection (1A) into section 8 of the 1977 Act. The new subsection (1A) provides that the Scottish Ministers may only prescribe a religious or belief body so that its celebrants can solemnise opposite sex marriage if the body requests to be prescribed and the body meets the qualifying requirements.

46. Section 10(2)(b) of the Bill inserts subsection (1C) into section 8 of the 1977 Act. The new subsection (1C) provides that the Scottish Ministers may only prescribe a religious or belief body so that its celebrants can solemnise same sex marriage if the body requests to be prescribed and the body meets the qualifying requirements.

47. Section 10(2)(b) of the Bill inserts subsection (1E) into section 8 of the 1977 Act. The new subsection (1E) provides that the “qualifying requirements” are such requirements as may be set out in regulations made by the Scottish Ministers.

Qualifying requirements when persons are nominated to the Registrar General to solemnise marriage

48. Section 11 of the Bill amends section 9 of the 1977 Act. Under the provisions, religious or belief bodies, other than the Church of Scotland and bodies prescribed by regulations, can put forward to the Registrar General persons they wish to be empowered to solemnise opposite sex marriage. Similarly, religious and belief bodies, other than those prescribed by Statutory Instrument, can put forward to the Registrar General persons they wish to be empowered to solemnise same sex marriage.

49. The Registrar General has to reject nominations when certain circumstances arise. One of these is when, in his or her view, the nominating body does not meet qualifying requirements set out in regulations made by the Scottish Ministers. Under the new subsection (2A) of section 9 of the 1977 Act, inserted by section 11(2)(e) of the Bill, the “qualifying requirements” are such requirements as may be set out in regulations made by the Scottish Ministers.

Qualifying requirements in respect of temporary authorisation of celebrants to solemnise marriage

50. Section 12 of the Bill amends section 12 of the 1977 Act. Under these provisions, persons who are members of a religious or belief body may obtain temporary authorisation from the Registrar General to solemnise opposite sex or same sex (or both) marriages. Under new subsection (1A) of section 12 of the 1977 Act, inserted by section 12(2)(b) of the Bill, the Registrar General may grant an authorisation only if satisfied that the body of which the person is a member meets the qualifying requirements. Under new subsection (1D) of section 12 of the 1977 Act, the “qualifying requirements” are such requirements as may be set out in regulations made by the Scottish Ministers.

Qualifying requirements in respect of prescribed religious or belief bodies so its celebrants can register civil partnerships

51. Section 22(13) of the Bill inserts section 94A into the 2004 Act, on persons who may register civil partnerships. Section 94A(2)(b) provides that the Scottish Ministers may only prescribe a religious or belief body so its celebrants are authorised to register civil partnerships if Ministers are satisfied that the body meets the qualifying requirements. Section 94A(5) provides that the “qualifying requirements” are such requirements as may be set out in regulations made by the Scottish Ministers.

Qualifying requirements when persons are nominated to the Registrar General to register civil partnerships

52. Section 22(13) of the Bill inserts section 94B into the 2004 Act. This makes provision so that a religious or belief body which has not been prescribed by regulations made under section 94A can nominate to the Registrar General persons who it wishes to be empowered to register civil partnership. Section 94B(2)(d) provides that the Registrar General must reject a nomination if in the Registrar General’s opinion the nominating body does not meet the qualifying requirements. Section 94B(3) provides that the “qualifying requirements” are such requirements as may be set out in regulations made by the Scottish Ministers.

Qualifying requirements in respect of temporary authorisation of celebrants to register civil partnerships

53. Section 22(13) of the Bill inserts section 94E into the 2004 Act. This makes provision so that the Registrar General may grant temporary authorisation to register civil partnerships to any member of a religious or belief body. Section 94E(2) provides that

the Registrar General may only grant such an authorisation if satisfied that the religious or belief body of which the person is a member meets the qualifying requirements. Section 94E(4) provides that the “qualifying requirements” are such requirements as may be set out in regulations made by the Scottish Ministers.

*Reason for taking power*

54. Paragraphs 2.15 to 2.17 of the second consultation outlined the rationale for introducing qualifying requirements.

55. As the consultation outlined, the Scottish Government and the Registrar General wish to ensure the integrity of Scottish marriage ceremonies, both opposite sex and same sex, which are legally recognised by the state. One of the strengths of the Scottish system is its diversity and variety. Couples are free to have a civil or religious or belief ceremony. However, recognising a wide range of bodies to solemnise marriages brings its own challenges. As the consultation noted, forced marriages and sham marriages are growing problems.

56. Therefore, the aim of the qualifying requirements is to ensure that religious and belief bodies have robust procedures in place for dealing with issues which may arise in relation to marriage ceremonies. Powers to lay down qualifying requirements for bodies to meet in relation to civil partnerships have also been taken. The Government is not aware of any particular issues at the moment in relation to forced civil partnerships but such issues could arise. Sham civil partnerships could be set up for similar reasons as sham marriages (eg to avoid immigration controls).

57. The type of requirements which might be laid down were outlined in paragraph 2.21 of the second consultation paper. These referred specifically to marriages but similar points could arise in relation to civil partnerships:

- The religious or belief body and their celebrants would not be allowed to solemnise marriages, or register civil partnerships, for profit or gain.
- The religious or belief body would have to show that their celebrants were trained in areas such as tackling forced marriage and sham marriage or civil partnership.
- The religious or belief body would have to show that their celebrants discuss the forthcoming marriage or civil partnership with the couple.
- The religious or belief body would have to show that their celebrants have a track record in carrying out relevant ceremonies (eg marriages recognised by the state; marriages or blessings not recognised by the state; baptisms or baby namings).

58. New sections 8(1F), 9(2B) and 12(1E) of the 1977 Act, inserted, respectively, by sections 10(2), 11(2) and 12(2) of the Bill, allow regulations to make different provision for different cases or circumstances. This would, for example, allow Ministers to

distinguish between the requirements to meet to solemnise opposite sex marriage and the requirements to meet to solemnise same sex marriage. Power is also taken in respect of transitional and saving provision. This may be needed in respect of marriages planned before any qualification requirements are put in place.

59. The regulation-making powers added to the 2004 Act are subject to the provisions already in place at section 258 of the 2004 Act.

60. The second consultation made it clear, at paragraph 2.20, that there would be a consultation on any regulations establishing qualifying requirements before the regulations are brought into effect. This would cover any regulations introducing qualifying requirements, whether in relation to marriage or civil partnership.

#### *Choice of procedure*

61. The negative procedure applies to all of the regulations, as a result of the following provisions:

- section 8(1G) of the 1977 Act (inserted by section 10(2)(b) of the Bill);
- section 9(2C) of the 1977 Act (inserted by section 11(2)(e) of the Bill);
- section 12(1F) of the 1977 Act (inserted by section 12(2)(b) of the Bill);
- section 126(4) of the 2004 Act, as amended by section 22(20) of the Bill.

62. It is considered that negative procedure will offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for provisions of this nature. There will be consultation on any regulations laying down qualifying requirements. In particular, the Government will work closely with religious and belief bodies, and with National Records of Scotland, before any regulations to lay down qualifying requirements are made. The Government considers that the key aim of ensuring the integrity of marriage and civil partnership ceremonies is shared across society but recognises that the detail will be important for religious and belief bodies, to ensure that what is proposed is practical and realistic.

#### **Section 16(2) – the marriage schedule**

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

*Provision*

63. Section 16(2)(a) amends section 6 of the 1977 Act. Section 6 of the 1977 Act relates to the marriage schedules – forms which are completed when a marriage takes place. In accordance with section 6(1) of the 1977 Act, a marriage schedule is to be in a form prescribed by regulations. Section 26(2) of the 1977 Act provides that “prescribed” means prescribed by regulations made by the Registrar General. The amendment allows different provision for different cases or circumstances.

*Reason for taking power*

64. The current marriage schedule refers to “bridegroom” and “bride”. These terms are not appropriate in relation to same sex marriage. The amendment would allow different marriage schedules to be prescribed for same sex marriages when compared with opposite sex marriages.

*Choice of procedure*

65. This provision amends existing powers in the 1977 Act. The approach taken in the 1977 Act is that regulations made by the Registrar General are not subject to negative or affirmative Parliamentary procedures (unless they set fees, when they are subject to the negative procedure). Having no negative or affirmative Parliamentary procedure for this amended power is consistent with the 1977 Act generally. The default position applies under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, so that the regulations are laid before Parliament.

**Section 22(15) – Registration of civil partnership: prescribed forms requiring delivery of civil partnership schedule**

**Power conferred on:** The Registrar General, with the approval of the Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** negative

*Provision*

66. Section 22(15) adds section 95ZA to the 2004 Act. The new provision allows the district registrar to serve notices in the prescribed form if the civil partnership schedule is not delivered to the district registrar.

67. By virtue of section 126 of the 2004 Act, “prescribed” means prescribed by the Registrar General, with the approval of the Scottish Ministers, in regulations subject to annulment in pursuance of a resolution of the Scottish Parliament (i.e. the negative procedure).

*Reason for taking power*

68. Currently, civil partnerships can only be registered through civil ceremonies. The Bill introduces religious or belief registration of civil partnerships.

69. As a result, the Bill makes provision for the schedule to be issued to one or both of the parties to the intended civil partnership where the partnership will be registered by an approved celebrant (see the amendments made to section 94 of the 2004 Act by section 22(12)(c) of the Bill). The Bill also makes provision for the schedule to be returned (see new subsection (1A) of section 95 of the 2004 Act, as inserted by section 22(14)(b) of the Bill).

70. The new section 95ZA makes provision on the district registrar serving notices in the prescribed forms if the schedule is not returned. The first notice, which can be served if the district registrar does not receive the schedule within 21 days of the date of registration, requires one of the parties to the civil partnership to deliver the schedule or post it to the registrar within 8 days. The second notice, served if the first is not complied with, requires the person to attend the registration office within 8 days to deliver the schedule to the district registrar.

71. As section 95ZA(2) provides, the purpose of these provisions is to enable the registrar to enter the civil partnership in the register.

72. Failure to comply with the second notice is an offence: see section 100(3A)(d) of the 2004 Act, as added by section 22(19)(b) of the Bill.

73. The provisions in section 95ZA are based on similar procedures in relation to marriage contained in section 16 of the 1977 Act.

*Choice of procedure*

74. The negative procedure appears appropriate to prescribe a form. This is in line with existing powers to prescribe forms relating to the registration of civil partnerships which are subject to the negative procedure. It would not appear to be an effective use of Parliamentary time to apply affirmative procedures to an SSI prescribing forms. The forms would be straightforward and would be based on similar forms already in place in relation to requiring the delivery of marriage schedules. We do not consider that the content of these forms should merit a higher degree of scrutiny than that already provided for in the 2004 Act in relation to other forms.

**Section 28(1) – renewed marriage or civil partnership following issue of full gender recognition certificate**

<b>Power conferred on:</b>	<b>The Scottish Ministers after consultation with the Registrar General of Births, Deaths and Marriages for Scotland</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>negative procedure, unless amendments are made to primary legislation in which case the affirmative procedure applies</b>



### *Provision*

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

76. The regulations could cover: the giving of notice of intention to enter into a renewed marriage or civil partnership; the information required from the parties; evidence needed; any requirement to attend at a particular place or appear before a particular person; the conferring of functions (including in relation to the recording of information, the issue of certified copies of any such information and the conducting of services or ceremonies); fees; and the effect of entering into a renewed marriage or civil partnership.

77. The Bill makes provision, in schedule 2, for married persons to apply to the Gender Recognition Panel and receive a full Gender Recognition Certificate, which provides legal recognition in the acquired gender. Provision is also made in schedule 2 for civil partners to obtain a full Gender Recognition Certificate when both are acquiring a new gender.

78. The regulation-making power at section 28 enables procedures to be established so that persons can have a renewed marriage or civil partnership ceremony in their acquired gender. This could be used so that the couple could receive a marriage or civil partnership certificate reflecting the acquired gender. There is also a regulation-making power at paragraph 8 of schedule 2 which could allow changes to be made to marriage and civil partnership certificates through administrative procedures.

79. The power includes the ability to make consequential, supplementary, incidental, transitional, transitory and saving provision. This reflects that, for example, undergoing a renewal ceremony may have an effect on the existing registration of the relationship. In addition, further provision may be needed to protect religious and belief bodies and celebrants who would not wish to carry out renewal ceremonies.

80. The Scottish Government, with the Registrar General, will discuss in a working group the detail of any provision in this area. In particular, the Government will discuss with stakeholders the benefits and dis-benefits of establishing procedures under this route and how such procedures will work together with or separately to the powers at paragraph 8 of schedule 2.

### *Choice of procedure*

81. Negative procedure seems appropriate for detailed procedural matters in this area. In line with usual practice, the affirmative procedure will apply if amendments are made to primary legislation.

### **Section 31 – ancillary provision**

**Power conferred on:**            **The Scottish Ministers**  
**Power exercisable by:**       **order**

**Parliamentary procedure: negative procedure, unless amendments are made to primary legislation in which case the affirmative procedure applies.**

*Provision*

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

*Reason for taking power*

83. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. This Bill makes a number of significant amendments to marriage and civil partnership law. The ancillary provision is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provision in the Bill. The ancillary power is wide-ranging but the Bill needs to interact well with existing legislation as well as practices and procedures in these areas. There are a number of areas which ancillary powers might have to deal with. These include, for example, formally revoking Scottish Statutory Instruments made under powers being repealed under this Bill and ensuring that marriages arranged before changes to celebrant authorisations are made can continue to take place.

84. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues. Without this power, it may be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Parliament or the Scottish Government.

85. The power, whilst potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, or in connection with, or for giving full effect to any provision of the Bill.

*Choice of procedure*

86. In line with usual practice, orders will follow the affirmative procedure when they are amending primary legislation. Otherwise, they will follow the negative procedure. It is considered that this provides the appropriate degree of parliamentary scrutiny where primary legislation is being amended but will strike the appropriate balance between expedition and convenience on the one hand and, on the other hand, the need for parliamentary scrutiny where subordinate legislation is being amended.

## **Section 32 – commencement**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** laid before Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

### *Provision*

87. Section 32(2) enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by order, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 32(2) provides that such an order may include transitional, transitory or saving provision. This might be required, for example, in relation to marriages being solemnised using existing authorisations under the 1977 Act. It is usual practice for such commencement provisions to be dealt with by subordinate legislation.

### *Reason for taking power*

88. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable.

### *Choice of procedure*

89. As is now usual for commencement orders, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act applies. We see no reason to depart from this position in relation to the order-making power in this case. As indicated in paragraph 87, a commencement order may include transitional, transitory or saving provision. The Government expects that any such provision should be straightforward. As indicated in paragraph 87, the particular area we have identified is ensuring that marriages already due to take place under existing authorisations under the 1977 Act when the relevant provisions in the Bill are commenced can continue to take place.

## **Schedule 1 (paragraph 1(4)) - jurisdiction in proceedings relating to same sex marriages**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** affirmative procedure

*Provision*

90. 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.

91. The rules in the 1973 Act often define jurisdiction by reference to Council Regulation 2201/2003 (known as Brussels IIa) on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility. Paragraph 2 of Schedule 1B to the 1973 Act, as inserted by paragraph 1(4) of schedule 1 to the Bill, creates a power for the Scottish Ministers to make regulations about the jurisdiction of the courts in relevant proceedings in relation to a same sex marriage. The regulations may correspond with the terms of the Brussels IIa Regulation.

92. The regulation-making power also enables the Scottish Ministers to make provision as to the recognition, or non-recognition, in Scotland of any judgment of a court of another member State which orders the divorce, separation or annulment of a same sex marriage.

*Reason for taking the power*

93. Brussels IIa extends to opposite sex marriage only. The power in the Bill enables equivalent provision to be made for same sex married couples. In relation to the power about recognition of judgments, section 45 of the Family Law Act 1986 makes provision about recognition of overseas judgments in relation to divorce, annulments and legal separation. Section 45(2) specifies that section 45 and subsequent provisions do not apply to such judgments insofar as provision as to recognition is made by the Brussels IIa Regulation.

94. Given that Brussels IIa only applies to opposite sex marriage, it is considered useful for the Scottish Ministers to take a power to make equivalent provision to that set down in Brussels IIa as to the recognition, or non-recognition, of a judgment of a court of another member State in relation to a same sex marriage. The provision on recognition of judgments is capable of applying retrospectively to enable relevant judgments to be recognised even if the judgments were issued prior to the provision being brought into force.

95. Similar provision for civil partners was made in section 219 of the Civil Partnership Act 2004. This power has been used to make the Civil Partnership (Jurisdiction and Recognition) (Scotland) Regulations 2005 (SSI 2005/629)<sup>4</sup>

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<sup>4</sup> <http://www.legislation.gov.uk/ssi/2005/629/contents/made>

*Choice of procedure*

96. As this involves jurisdictional issues in a number of areas, affirmative procedure seems appropriate. The equivalent power in section 219 of the 2004 Act is subject to affirmative procedures.

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

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

*Provision*

97. Schedule 2 to the Bill amends the Gender Recognition Act 2004. This Act makes provision on people applying to the Gender Recognition Panel to obtain legal recognition in an acquired gender. The key policy changes being made by the Bill are to allow a married people and civil partners to stay in their relationship when obtaining a full Gender Recognition Certificate, which provides legal recognition in the acquired gender.

98. The Bill makes provision at section 7 for civil partners to change their relationship to a marriage and obtain a full Gender Recognition Certificate. Paragraph 6 of schedule 2 would allow an order to be made to introduce a more streamlined process, to reduce the number of steps civil partners would have to go through to change their civil partnership to a marriage and obtain the full Gender Recognition Certificate. The order could cover the evidence or other information required with the application; procedures to be followed; the effect of issuing a full Gender Recognition Certificate and provision to change the civil partnership into a marriage.

*Reason for taking power*

99. The aim is to introduce a more streamlined procedure to reduce the number of steps which civil partners would have to go through. The procedures may be detailed and so it is appropriate for them to be included in an order rather than on the face of the Bill. Potential procedures could include the applicant in a civil partnership applying to the Gender Recognition Panel to obtain recognition in an acquired gender; the applicant including statutory declarations to show that both parties wish to stay in the civil partnership; the Panel granting a full Gender Recognition Certificate and the couple then changing their civil partnership to a marriage.

100. Power is taken to amend primary legislation in cases changes are required to the Marriage (Scotland) Act 1977, the Gender Recognition Act 2004 and the Civil Partnership Act 2004.

*Choice of procedure*

101. Negative procedure appears appropriate for detailed procedures matters of this nature. In line with usual practice, orders would follow the affirmative procedure if they are amending primary legislation.

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

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

**Power exercisable by:** regulations

**Parliamentary procedure:** negative resolution

*Provision*

102. Paragraph 8 of schedule 2 contains provisions to allow the Registrar General, with the approval of the Scottish Ministers, to make regulations on the registration of qualifying Scottish marriages and civil partnerships.

*Reason for taking power*

103. Following gender recognition where the person has stayed in his or her relationship, changes may be required to marriage and civil partnership certificates. These changes may be carried out by an administrative route or may follow a renewal marriage or civil partnership ceremony (as outlined in section 28 of the Bill). This power allows the Registrar General, with the approval of the Scottish Ministers, to lay down detailed procedures. Procedures could include the issue of a revised marriage or civil partnership certificate to reflect gender acquisition. In addition, it may be necessary for a link to be made from the original certificate to the revised certificate so that the parties to the marriage or the civil partnership can have access to both.

104. It is customary for the Registrar General to be involved in making regulations relating to registration.

105. The Government and the Registrar General will discuss the detail of procedures in this area with key stakeholders.

*Choice of procedure*

106. Negative procedure is considered appropriate for detailed procedural matters of this nature as the regulations would simply be setting out an administrative process under which qualifying marriages and civil partnerships may be registered and relevant certificates issued following the acquisition of a new gender. There will be consultation with key stakeholders on these regulations. In particular, NRS and the Government will work closely with the transgender community so that those who could be affected by any

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as introduced in the Scottish Parliament on 26 June 2013*

registration procedure will be given the opportunity to express their views and ensure that what is proposed is practical and realistic.

**Scottish Government  
June 2013**

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

## **DELEGATED POWERS MEMORANDUM**