LEGISLATIVE CONSENT MEMORANDUM
MARRIAGE (SAME SEX COUPLES) BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Health and Wellbeing, is—

“That the Parliament agree that the relevant provisions of the Marriage (Same Sex Couples) Bill introduced in the House of Commons on 24 January 2013 relating to the recognition of English and Welsh same sex marriages under the law of Scotland; the dissolution by the courts in Scotland and Northern Ireland of English and Welsh same sex marriages recognised as civil partnerships in Scotland and Northern Ireland and the recognition of the ending of those relationships; provisions on transgender people who married or entered into a civil partnership in England and Wales being able to stay in the relationship and obtain a full Gender Recognition Certificate and on errors in Certificates and fraud in relation to Certificates; the repeal of the Foreign Marriage Act 1892; marriages overseas; and transitional and consequential provisions, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Alex Neil, Cabinet Secretary for Health and Wellbeing, under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Marriage (Same Sex Couples) Bill was introduced in the House of Commons on 24 January 2013. The latest version of the Bill can be found at—

http://services.parliament.uk/bills/2013-14/marriagesamesexcouplesbill.html

3. The Bill introduces same sex marriage in England and Wales and has some consequential impact on Scotland. The Scottish Government has consulted separately on the introduction of same sex marriage in Scotland.

Content of Marriage (Same Sex Couples) Bill: Summary

4. The Bill introduces same sex marriage, through both religious and civil ceremonies, in England and Wales. It also—

- contains provisions to protect religious bodies and celebrants from having to solemnise same sex marriages;
- makes provision so that the parties to a civil partnership registered in England and Wales can, if they wish, change that civil partnership to a marriage;
- recognises in English and Welsh law any same sex marriages from elsewhere in the United Kingdom and overseas;
- contains provision on the recognition of English and Welsh same sex marriages in Scots and Northern Irish law;
- makes provision on how existing legislation applying to England and Wales should be interpreted in relation to marriage;
enables an existing marriage registered in England and Wales or overseas to continue where one or both parties change their gender and both parties wish to remain married;

allows the person covered by a Gender Recognition Certificate (GRC) which is the wrong certificate or contains errors, and the Secretary of State, to apply to the Gender Recognition Panel or to the court which issued the certificate to issue the correct certificate or to correct information in the certificate;

makes provision so that the spouse of an applicant for a GRC can go to court if he or she considers that a full GRC has been obtained by his or her spouse fraudulently;

 repeals the Foreign Marriage Act 1892. The 1892 Act is mainly about marriages overseas of UK nationals by British consular officials and through the British armed forces. The Bill provides a power for Her Majesty by Order in Council to make legislation in these areas. The key aim is to update the legislation and reflect the introduction of same sex marriage;

allows transitional and consequential provision to be made as a consequence of the Bill.

Provisions which relate to Scotland

5. The Bill impacts on a number of devolved matters, as outlined below.

Recognition in Scots law of English and Welsh same sex marriages

6. Clause 10(3) of the Bill gives effect to Schedule 2, which extends to Scotland.

7. Paragraph 1(1) of Schedule 2 gives an order-making power to the Secretary of State to provide that English and Welsh same sex marriages are to be recognised as civil partnerships under Scots law. Treating English and Welsh same sex marriages as civil partnerships is in line with the current approach for overseas same sex marriages through the Civil Partnership Act 2004, which are treated as civil partnerships across the UK. By virtue of clause 15(6)(a) of the Bill, the consent of the Scottish Ministers must be obtained before the Secretary of State makes an order under paragraph 1(1) so long as the order contains provision which would be within the legislative competence of the Scottish Parliament.

8. An order under paragraph 1(1) can only be made if marriages of same sex couples are not lawful under the law of Scotland (paragraph 1(3) refers). This reflects that the Scottish Government has made it clear that it intends to introduce a Bill into the Scottish Parliament to allow same sex marriage in Scotland. Once same sex marriage is introduced in Scotland, the order-making power would not be exercisable. The Scottish Government’s intention would be to recognise English and Welsh and overseas same sex marriages as marriages in Scots law.

9. The UK Bill also gives the Secretary of State an order-making power to specify cases where a same sex marriage should not be treated as a civil partnership. This power is subject to the consent of the Scottish Ministers so long as the order contains provisions which would be within the legislative competence of the Scottish Parliament.

10. One particular reserved area is state pensions and transgender people. The general approach taken by the UK Bill in relation to pensions is to treat same sex
spouses as civil partners. Some benefits, such as survivor benefits, can be lower for civil partners when compared with opposite sex spouses.

11. The UK Government have indicated that where a woman is entitled to a state pension based on her husband’s National Insurance contributions, this entitlement will remain even if her husband changes gender.

12. The relevant provisions in the UK Bill about pensions, at Part 5 of Schedule 4, only extend to England and Wales. However, the order-making power at paragraph 1(2) of Schedule 1 on when an England and Wales same sex marriage should not be treated as a civil partnership in Scotland would allow appropriate provision on state pensions to be made for Scotland.

13. The Bill also enables contrary provision to the treatment of a same sex marriage in England and Wales as a civil partnership in Scotland to be made through other subordinate legislation made under the Bill. Any such subordinate legislation will be subject to the consent of the Scottish Ministers if it contains provisions relating to matters within the legislative competence of the Scottish Parliament.

14. Part 2 of Schedule 2 to the UK Bill also makes provision on dissolution of a relationship. In particular, if a same sex couple marry in England and Wales, move to Scotland or Northern Ireland, are recognised as being in a civil partnership and then dissolve or otherwise end the relationship, the Bill makes provision so the ending of the relationship is recognised across the UK.

Transgender people

15. Schedule 5 to the UK Bill makes provision so that a married person can stay in the marriage when obtaining the full Gender Recognition Certificate (GRC), which provides legal recognition in an acquired gender. The jurisdiction of Schedule 5 is based on where the couple got married and covers people who married in England and Wales or overseas. Therefore, Schedule 5 extends to Scotland as a couple may have married in England and Wales or overseas and then moved to Scotland.

16. In addition, Schedule 5—

- makes provision so that a couple in a civil partnership registered in England and Wales can stay in the civil partnership if both parties are obtaining a full GRC. (Paragraph 5 of Schedule 5);
- makes provision so that if a GRC has been issued in error, the person or the Secretary of State can make an application for a correction. This is a devolved matter. The provision ensures that the administration of GRCs is kept as consistent as possible across the UK. (Paragraph 6 of Schedule 5);
- makes provision so that the spouse of an applicant for a GRC can go to court if he or she considers that a full GRC has been obtained by his or her spouse fraudulently. Again, this is a devolved matter and keeps the legislation on GRCs as consistent as possible across the UK. (Paragraph 8 of Schedule 5).

Marriages overseas

17. Clause 13(2) repeals the Foreign Marriage Act 1892, which extends to Scotland. The 1892 Act is mainly about overseas marriage ceremonies for UK nationals by British consular officials and through the British armed forces. The 1892 Act is mainly reserved
but does cover some devolved matters such as validity as a matter of Scots law of marriages solemnised or registered overseas by British officials.

18. In practice, most marriages overseas of UK nationals by British consular officials take place in the Middle East where local facilities for non-Muslims to marry can be limited and the home jurisdictions do not object to British consuls carrying out marriages of UK nationals.

19. One aspect of the 1892 Act is not being replaced. At the moment, a couple with a UK connection who marry overseas in a ceremony taking place under local law may apply to a British consul to register the marriage. Relevant documents are then transmitted to the relevant Registrar General in the UK. The Foreign and Commonwealth Office now plan to discontinue this transmission service as unnecessary. There is, and will continue to be, legislation in place (section 20 of the Marriage (Scotland) Act 1977) which allows a couple in Scotland to have a second marriage service here if their marriage overseas turns out to be of doubtful validity.

20. Clause 13(1) introduces Schedule 6. Under Schedule 6, Her Majesty may by Order in Council make provision on marriages (both same sex and opposite sex) overseas by British consular officials and by persons working for the British armed forces. Under the Bill, if a proposed Order in Council contains provisions which would be within the legislative competence of the Scottish Parliament the Scottish Ministers must be consulted before a recommendation is made to Her Majesty.

21. Such marriages can only take place where the people proposing to marry would be eligible to marry in the part of the UK which they identify with (paragraphs 1(2)(b) and 8(2)(b) of Schedule 6 refer). As a result, consular and armed forces same sex marriages of people who identify with Scotland will only take place once same sex marriage is possible in Scotland.

22. Consular marriages can only be carried out through civil ceremonies— paragraph 3 of Schedule 6 refers.

23. Armed forces marriages may be carried out by means of civil or religious ceremonies. Paragraph 9 of Schedule 6 makes provision to give protection to religious bodies and celebrants who do not wish to carry out same sex ceremonies.

Consequent provisions

24. Under clause 14, the Secretary of State and the Lord Chancellor may make orders containing transitional, transitory, saving or consequential provision. The Secretary of State and the Lord Chancellor must obtain the consent of the Scottish Ministers before making any such order containing provision which would be within the legislative competence of the Scottish Parliament.

Reasons for seeking a legislative consent motion

25. There are a variety of reasons for seeking a legislative consent motion.

26. On the recognition of English and Welsh same sex marriages in Scotland, it remains uncertain if and when same sex marriage will be introduced north and south of

---

1 Paragraph 163 of the Explanatory Notes to the UK Bill states that currently consular marriages are conducted in Saudi Arabia and five other countries in the Middle East, where there are no local facilities and the local authorities have no objection. (The Explanatory Notes to the UK Bill are at http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm)
the border. However, if same sex marriage is introduced earlier south of the border than in Scotland, the Scottish Government considers that provision is needed so that the status of those new relationships in Scots law is clear. Treating English and Welsh same sex marriages as civil partnerships is in line with how overseas same sex marriages are treated at the moment across the UK.

27. Many of the provisions on transgender people in the UK Bill have an impact on Scotland, given that jurisdiction is based on where couples married and couples who married in England and Wales or overseas may now live in Scotland. In addition, the provisions on fraud and errors in gender recognition certificates extend to Scotland keeping the administration of GRCs as consistent as possible across the UK to the benefit of people affected by them.

28. The provisions on marriages overseas are mainly reserved as the duties of British consuls and persons working for the armed forces are reserved matters. Therefore, it appears appropriate that provision is made in the UK Bill covering both reserved and devolved matters.

29. At this stage, it is uncertain what transitional, transitory, saving or consequential provision may be needed as a result of the UK Bill. Neither we nor the UK Government have currently identified any provision which might impact on devolved matters. However, powers have been taken in case they are needed, with the consent of the Scottish Ministers required if any order in this area does impact on devolved matters. There is a large amount of relevant legislation, and work to identify any possible provisions is likely to continue up to implementation of the UK Bill.

Financial implications

30. No significant costs have been identified.

31. The responsibilities and rights of civil partners and married couples are very similar. Therefore, recognising same sex marriages from England and Wales as civil partners in Scotland has no significant costs.

32. Allowing transgender people to stay married if they and their spouse wish will have limited financial impact given the small number of people affected.

33. The changes to consular and armed forces marriages will have limited financial impact. The Scottish Government expects that any people seeking to have a consular or armed forces marriage would need to pay registration fees in the normal way.

34. No costs are expected through any transitional, transitory, saving or consequential provision impacting on devolved matters.

Consultation

35. The Scottish Government has carried out two consultations on the introduction of same sex marriage in Scotland.

36. The UK Government has consulted on the introduction of same sex marriage in England and Wales. The House of Commons also sought written evidence when the UK Bill was considered at Committee.
Conclusion

37. The Scottish Government considers that the UK Bill makes provision in Scotland to ensure that, if need be, there is appropriate recognition of English and Welsh same sex marriages in Scotland. The Bill also impacts on persons living in Scotland who married in England and Wales or overseas and are now seeking to change their gender. The provisions on consular and armed forces marriages reflect that this is largely reserved but with some devolved implications.

38. The UK Bill, rightly, does not stop the Scottish Parliament from reaching its own view as to whether or not same sex marriage should be introduced in Scotland.

Scottish Government
May 2013