

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

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## **POLICY 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 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 36–EN.

### **Structure of the Policy Memorandum**

2. This Memorandum covers first the provisions of the Bill that apply to all marriages and civil partnerships. It then covers the introduction of same sex marriage and the provisions which give effect to that policy. Therefore, the structure is as follows:

- summary of the Bill's main provisions and the principles that informed the Bill's development;
- changes that apply to marriages and civil partnerships generally;
- the introduction of same sex marriage and changes flowing from that;
- consultation that the Scottish Government undertook;
- the effect of the Bill in relation to equal opportunities; human rights; island communities; local government, and sustainable development; and
- provisions that the Scottish Government intends to appear in an order under section 104 of the Scotland Act 1998 in relation to reserved matters.

### **POLICY OBJECTIVES OF THE BILL**

#### **Principles behind the Bill**

3. The principles behind this Bill are:

- equality of opportunity
- freedom of religion, belief, and expression

- upholding the dignity and solemnity of marriage ceremonies and civil partnership registration in Scotland.

4. For example, the Bill gives the members of a same sex couple the opportunity to marry each other. A religious or belief body that wishes to solemnise the marriage of a same sex couple will be able to do so. Crucially, a religious or belief body which does not wish to solemnise same sex marriages will not have to. Nor will a religious or belief celebrant.

5. This Bill follows two consultations carried out by the Government. The first was on general principles<sup>1</sup> and the second was on a draft Bill<sup>2</sup>.

### **Summary of the main provisions in the Bill**

6. The Bill allows same sex couples to marry. It provides for the consequences of that change.

7. It also ends the current requirement for a couple to divorce before obtaining a full gender recognition certificate, which provides legal recognition in an acquired gender, under the Gender Recognition Act 2004 (“the Gender Recognition Act”)<sup>3</sup>.

8. The Bill makes the following changes that apply to all marriages and civil partnerships:

- putting belief celebrants on an equal footing with religious celebrants;
- introducing the religious and belief registration of civil partnership;
- relaxation of the rules about where a civil marriage may be solemnised;
- giving the Scottish Government power to prescribe in regulations qualifying requirements which religious and belief bodies must meet before their celebrants can be authorised to solemnise marriage or register civil partnerships.

9. Some bodies focused around a set of beliefs – such as humanism – would like to be authorised to solemnise marriage on the same basis as religious bodies. The Bill gives such bodies the opportunity to seek such authorisation.

10. The Bill introduces provisions to allow the religious and belief registration of civil partnership. Under the current law, only a civil registrar may register a civil partnership<sup>4</sup>.

11. The rules on where civil marriage ceremonies may take place are different to the rules applying to where religious marriage ceremonies may take place and where civil partnerships may take place.

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<sup>1</sup> The first consultation can be found at <http://www.scotland.gov.uk/Publications/2011/09/05153328/0>

<sup>2</sup> The second consultation can be found at <http://www.scotland.gov.uk/Publications/2012/12/9433>

<sup>3</sup> More information on the Gender Recognition Act is at <http://www.justice.gov.uk/tribunals/gender-recognition-panel>

<sup>4</sup> Information on how to register a civil partnership in Scotland is at <http://www.gro-scotland.gov.uk/files2/registration/RCPI-Leaflet.pdf>

12. At the moment, civil marriage ceremonies can only take place at a registrar's office or at premises approved by the local authority<sup>5</sup>. The Bill will allow civil marriage ceremonies, for both opposite sex and same sex marriage, to take place anywhere agreed by the couple and the registrar, other than religious premises.

## **GENERAL PROVISIONS ON MARRIAGE AND CIVIL PARTNERSHIP**

### **The forbidden degrees (sections 1 and 22)**

13. Section 1 of the Bill makes a number of amendments to the Marriage (Scotland) Act 1977 ("the 1977 Act") in relation to the "forbidden degrees". The forbidden degrees are about people who are too closely related to marry. Section 1 of the Bill simplifies the existing table of forbidden degrees and takes account of the introduction of same sex marriage. Section 22(22) of the Bill amends the Civil Partnership Act 2004 ("the 2004 Act") to introduce a simplified table of forbidden degrees in respect of civil partnerships.

#### *Alternatives*

14. The obvious alternative would have been to reflect the introduction of same sex marriage without simplifying the tables. However, the Government considers that this would miss an opportunity for simplification.

### **Belief bodies and celebrants (sections 10, 11 and 12)**

15. Since 2005, the Registrar General for Scotland has authorised humanists as marriage celebrants. This means that persons who wish to have a humanist marriage ceremony recognised by the state can do so. The Government considers this provides a wide variety of choice to persons seeking to marry. Humanist celebrants are authorised temporarily under section 12 of the Marriage (Scotland) Act 1977 ("the 1977 Act"). That is undesirable for two reasons.

16. First, the authorisation is temporary, meaning that there is a difference in treatment between religious bodies and belief bodies. Secondly, section 12 is designed at the moment for the temporary authorisation of religious celebrants. The Scottish Government considers it inappropriate to continue to authorise under that section a celebrant who is not religious.

17. Therefore, the Bill makes provision so that, in future, there will be two types of marriage ceremony in Scotland. The option of having a civil ceremony will remain available. Under the Bill, the other category of ceremony will become "religious or belief", thus ensuring that belief bodies will be placed on the same footing in marriage legislation as religious bodies.

#### *Alternatives*

18. The Government considered a number of alternatives in this area.

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<sup>5</sup> Information on getting married in Scotland is at <http://www.gro-scotland.gov.uk/regscot/getting-married-in-scotland/i-want-to-get-married-in-scotland-how-do-i-go-about-it.html>

19. First of all, when the Scottish Government consulted on the draft Bill, it proposed introducing a new category of “belief” into the 1977 Act. That would have meant three kinds of celebrant in Scotland: civil registrars, religious celebrants, and belief celebrants. Following the consultation, it became clear that it can in some cases be difficult to determine whether a body is a religious body or a belief body. This suggested that it would be logical to have a religious or belief category.

20. A number of those responding to the consultation on the draft Bill suggested that it would be confusing to have three categories, which was a further reason for having two categories rather than three.

21. A second option would be to make no changes and continue to authorise humanists under the provisions at section 12 of the 1977 Act for temporary authorisation of celebrants. One argument for this option is that the Bill amends section 12 of the 1977 Act so that section 12 refers to religious or belief bodies. However, the fact remains that authorisation under section 12 was not meant to be a permanent way of authorising humanist celebrants. Therefore, the Scottish Government rejected this option.

22. A third option would be that only a civil registrar could solemnise a marriage or register a civil partnership. That would mean that only a civil marriage ceremony would be legally recognised by the state. A couple who wanted to celebrate their marriage in accordance with their religion or belief would have to do that separately to the civil ceremony.

23. This is the position in some other European countries such as France and the Netherlands. Some stakeholders, including respondents to the consultation on the draft Bill, have suggested this approach for Scotland. It would have the advantage of clarifying the roles and responsibilities of the state and of religious and belief celebrants. Arguably, it would make it clear that the legal institution of marriage, as provided for by the state, does not necessarily correspond to marriage as understood within a religious or belief context.

24. The Scottish Government decided against this option, for a number of reasons.

25. The Scottish Government values the role that religious and belief celebrants play in solemnising marriage in Scotland. That role is an important part of Scotland’s past and present and not something that it has any desire to change. The Registrar General authorises celebrants and the system operates well. It is convenient for couples to be able to have one ceremony that satisfies both their legal and their religious or belief requirements.

26. Some stakeholders have commented that the combination of being married before God and in law is, in itself, deeply spiritual and, as a result, should remain in place.

27. Finally, the Scottish Government did not consult on the possibility. It would wish to consult extensively before changing the law on marriage in Scotland in this way.

28. A fourth option would be to open up the solemnisation of marriage more widely, to celebrants without any links to religious or belief bodies. The Government has rejected this as:

- a civil registration service is already available for those without religious convictions or belief values. The Bill will further improve this service by allowing civil ceremonies to take place anywhere (other than religious premises) agreed by the couple and the registrar;
- there does not appear to be any significant demand from couples to open up solemnisation more widely;
- it is legitimate to provide that non-civil ceremonies should be grounded in a set of religious or belief values;
- it would not be desirable to offer a marriage or civil partnership service as a commercial service.

*Change made to the definition of belief body following the consultation on the draft Bill*

29. In the consultation draft of the Bill, “belief body” was defined as meaning “an organised group of people, not being a religious body, the principal object (or one of the principal objects) of which is to uphold or promote philosophical or humanitarian beliefs and which meets regularly for that purpose”.<sup>6</sup>

30. In the Bill introduced to Parliament, there is a definition of the term “religious or belief body”, to reflect the decision to have a religion or belief category of marriage ceremony rather than two separate categories. In this definition, the reference to “humanitarian” beliefs has been removed as the Government considered, on reflection, that the word “humanitarian” did not accurately reflect the type of belief bodies which it would wish to solemnise marriage.

**Religious and belief registration of civil partnership (section 22)**

31. Civil partnership is a status created by the 2004 Act. It is open only to same sex couples. The responsibilities and rights flowing from civil partnership largely mirror the responsibilities and rights that flow from marriage.

32. One of the significant differences between marriage and civil partnership is that the process of entering into a civil partnership is purely secular. At the moment, only a civil registrar can register a couple’s partnership. Should a couple wish to have a religious ceremony, they would have to hold that separately to the civil process. That contrasts to the law on marriage, where a religious celebrant can have a dual role, acting in both a religious and a civil capacity.

33. Section 22 of the Bill introduces the religious or belief registration of civil partnership. The Bill amends the 2004 Act to allow a religious or belief body to seek authorisation for its celebrants to register civil partnerships. Section 22(10) of the Bill also amends the 2004 Act so that it continues to be the case that civil ceremonies cannot take place on religious premises. Authorisation of religious and belief celebrants can be achieved by:

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<sup>6</sup> The consultation draft of the Bill is at <http://www.scotland.gov.uk/Resource/0041/00410333.pdf> The definition of “belief body” can be found at sections 8(4) and 19(21).

- seeking to be prescribed in regulations made by the Scottish Ministers;
- putting forward members who the bodies wish to be empowered to register civil partnerships.

34. In addition, the Registrar General will be able to grant temporary authorisations to register civil partnerships.

35. Introducing the religious or belief registration of civil partnerships will give a couple who choose to enter into a civil partnership the possibility to do so within their faith or belief community. It will give religious or belief bodies who wish to register civil partnerships the opportunity to do so. There will be a number of protections for religious and belief bodies who do not wish to register civil partnerships:

- under the Bill, religious and belief bodies have to opt in. This means that a body must ask to be prescribed by regulations or nominate celebrants to the Registrar General or seek temporary authorisation of celebrants;
- the Bill makes it clear that religious and belief bodies are under no duty to opt in;
- the Bill also makes it clear that there is no duty under the Bill on any person who is an approved celebrant in relation to civil partnerships to register civil partnerships;
- the UK and Scottish Governments are preparing an amendment to the Equality Act 2010 (“the 2010 Act”) to provide further protection in relation to discrimination.

### *Alternatives*

36. The alternative approaches to permitting the religious or belief registration of civil partnership are 1) do nothing, leaving civil partnership as an entirely secular process and 2) introduce a hybrid system – for instance, where a registrar can register a civil partnership in a church.

37. The Scottish Government rejected the first option because it considers that it is right for a couple who wish to enter into a civil partnership to be able to do that within their faith or belief. Similarly, the Government wishes to permit religious or belief celebrants the opportunity to register civil partnerships, where they wish to do so.

38. The UK Government has introduced a system in England and Wales whereby a civil registrar may register a civil partnership on religious premises<sup>7</sup>. The Scottish Government considers that such a system would go against the longstanding principle in Scotland that civil registrars do not carry out ceremonies on religious premises or include any religious content in a civil marriage ceremony.

39. In addition, in the first consultation the Scottish Government sought views on the system in England and Wales. Question 2 asked “Do you think that the proposals in England and Wales

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<sup>7</sup> More information on civil partnerships on religious premises in England and Wales can be found at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/118818/civil-partnership-premises-qa.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118818/civil-partnership-premises-qa.pdf)

on registration of civil partnerships in religious premises would be appropriate for Scotland?” Of those responding to the question, 59% answered “no” and only 11% answered “yes”. The remainder did not know or did not have a view<sup>8</sup>.

### **Where a civil marriage may be solemnised (section 19)**

40. Under sections 18 and 18A of the Marriage (Scotland) Act 1977, a civil marriage ceremony may only take place in a registration office or at an approved place (places approved by the local authority). This follows changes made in 2002.<sup>9</sup>

41. These provisions are more onerous than the situation applying to religious marriage ceremonies (and, in future, to religious and belief ceremonies) and to civil partnership. A religious marriage ceremony may take place anywhere agreed between the celebrant and the couple. A civil partnership may be registered at a registration office or any other place which the couple and the local registration authority agree is to be the place of registration. The exception to the latter is that a civil partnership may not be registered in religious premises.

42. The Registrar General has over 10 years’ experience in operating the system of approved places. In the light of that experience, the Scottish Government believe that the degree of regulation provided by the 2002 rules is unnecessary.

43. The Government sees no rational reason to continue to distinguish between where a civil marriage may be solemnised and where a civil partnership may be registered. The Bill repeals the rules about approved places. It permits a civil marriage to be solemnised at a place agreed between the couple and the local registration authority – so long as the place is not religious premises.

### *Alternatives*

44. The alternative approach is to do nothing – to leave the existing legislation in place. However, that puts civil marriage ceremonies on a different footing from both civil partnership and religious marriage ceremonies. It places an unnecessary burden on local authorities. It limits the venues in which couples may marry. The Government’s experience since the introduction of approved places 10 years ago is that the level of regulation in this area is disproportionately high.

45. Around 1,200 respondents to the second consultation commented on this proposal. A number supported broadening the choices available to couples. Some suggested that the exclusion for religious premises should, in relation to same sex marriage, be extended to all religious premises owned or occupied by religious or belief bodies (e.g. church halls). Some local authorities noted practical issues such as the need to carry out a risk assessment of any unlicensed premises to ensure any health and safety issues were fully addressed. It was also

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<sup>8</sup> The analysis of the responses to the first consultation is at <http://www.scotland.gov.uk/Publications/2012/07/5671/0> Details on question 2 are at <http://www.scotland.gov.uk/Publications/2012/07/5671/7#table6>

<sup>9</sup> More information on the current system in relation to civil marriage ceremonies in Scotland is at <http://www.gro-scotland.gov.uk/regscot/getting-married-in-scotland/civil-marriages-in-approved-places.html>

noted that if an outdoor venue is chosen, there should be a requirement for an alternative indoor venue to be available in the case of bad weather.

### **Power of district registrars (sections 15, 23 and 29)**

46. Sections 15 and 23 of the Bill make provision so that a district registrar may require specified nationality evidence when a couple is seeking to enter a marriage or a civil partnership.

47. The Scottish Government considers that these provisions are useful to:

- verify information provided on the marriage and civil partnership notice form;
- monitor where couples come from in terms of national patterns and trends;
- combat sham and forced marriage;
- enable the registrar to remind any non-UK nationals that he or she may wish to take steps to ensure the marriage or civil partnership is recognised in his or her own country.

48. Section 29 of the Bill 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”.

#### *Alternatives*

49. The obvious alternative is to do nothing. However, on sections 15 and 23 the Scottish Government considers this would be a missed opportunity to improve marriage and civil partnership procedures. On section 29, this would be a missed opportunity to correct a minor error in the statute book.

### **Marriage outwith Scotland: evidence of dissolution of former civil partnership (section 17)**

50. Section 17 of the Bill makes provision so that if a person wants to marry outwith Scotland and seeks a certificate about his or her legal capacity to do so, the person must provide a copy of the decree of dissolution or annulment of any previous civil partnership. This provision clarifies the law in this area.

#### *Alternatives*

51. The obvious alternative is to do nothing. However, the Scottish Government considers this would be a missed opportunity to clarify the law in this area.

### **Deacons of the Church of Scotland (section 18)**

52. The Church of Scotland has asked the Registrar General to authorise its deacons to solemnise opposite sex marriage. The Church of Scotland’s celebrants are authorised



automatically by virtue of section 8 of the 1977 Act. Section 8 currently refers to “a minister of the Church of Scotland”. That definition excludes the Church’s deacons.

53. Since 1 March 2006, Church of Scotland deacons have been given temporary authorisation to solemnise marriage under section 12 of the Marriage (Scotland) Act 1977.

54. The Scottish Government considers it appropriate for deacons of the Church of Scotland to be authorised to solemnise opposite sex marriage by virtue of their position within the Church. Section 18 of the Bill makes provision to that effect.

#### *Alternatives*

55. Instead of authorising deacons of the Church of Scotland in section 8 of the Marriage (Scotland) Act 1977, the Scottish Government could have done nothing. That would have meant continuing to authorise them temporarily under section 12 of the 1977 Act. However, the Scottish Government sees no good reason for them not to be authorised automatically and the Church of Scotland has asked for the change to be made. The authorisation of deacons has worked well since 2006 and needs to be put on a permanent statutory footing.

56. Around 1,050 respondents to the second consultation commented on this proposal. Many just noted that this was a matter for the Church of Scotland. Some responses suggested that within the Christian faith, marriages should only be solemnised by ministers of religion and, therefore, Church of Scotland deacons should not be authorised to solemnise marriage. The Church of Scotland welcomed the provision<sup>10</sup>.

#### **Marriage and civil partnership schedules and certificates of no impediment (sections 16 and 22)**

57. Section 16(2)(a) of the Bill amends section 6 of the 1977 Act so that the regulations to prescribe the form of the marriage schedule may make different provision for different cases or circumstances. This allows the form of the marriage schedule for opposite sex marriage to be different to the form for same sex marriage.

58. Section 16(2)(b), (3) and (4) of the Bill also increases the minimum period that must elapse before the marriage schedule or a certificate of no impediment should be issued after notice of intention to marry has been submitted by the parties to an intended marriage. Section 22(7), (8), (12) and (18) of the Bill makes similar changes in relation to issuing civil partnership schedules and 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.

59. Currently, these documents should not generally be issued within 14 days. The Bill changes that so that they should not generally be issued within 28 days.

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<sup>10</sup> See the Church of Scotland’s response on question 4: <http://www.actsparl.org/media/148778/or-cofs-sgmarriagecpbill-mar13.pdf>

60. It remains possible for the Registrar General to authorise the registrar to issue a schedule earlier, on a specified date. Section 22(8)(c) of the Bill makes it clear that a request for early registration of a civil partnership can be made electronically – this creates an equivalent provision to section 6(4A) of the 1977 Act.

61. Section 22(18) of the Bill relates to section 97 of the 2004 Act. Section 97(5) of the 2004 Act makes provisions for objections in writing to the district registrar against the issue of a certificate of no impediment. The amendment inserted by section 22(18)(b) makes it clear that any such objection may be submitted electronically.

#### *Alternatives*

62. The obvious alternative is to do nothing and not make the changes. However, the Government considers that separate marriage schedules may be required so that, for example, the forms for opposite sex marriage can continue to refer to “bridegroom” and “bride”. The changes to the time periods reflect the reality of the length of time it can take to check that a person is eligible to marry or enter into a civil partnership in Scotland.

63. The consultations did not cover issues in relation to marriage and civil partnership schedules. The Government decided at a late stage to include provisions in the Bill on time periods to reflect the reality of the existing workload.

64. On separate marriage schedules, some religious bodies indicated at meetings with the Government that they would have concerns if the current references to “bridegroom” and “bride” should be removed from the marriage schedules for opposite sex marriage.

#### **Qualifying requirements to apply to religious and belief bodies (sections 10, 11, 12 and 22)**

65. The Registrar General for Scotland authorises a wide range of bodies to solemnise marriage<sup>11</sup>. All marriages and civil partnerships in Scotland ought to be conducted in a dignified and solemn manner that reflects the seriousness of the commitment involved. The Government is also concerned about sham and forced marriages taking place in Scotland.

66. We would like all celebrants to be informed about and equipped to deal with a marriage that is potentially a sham or a forced marriage.

67. Therefore, to ensure that marriages and civil partnerships are carried out with dignity, are not sham or forced and are not carried out for profit or gain, the Bill contains a power for Scottish Ministers to prescribe qualifying requirements. A religious or belief body would have to meet these requirements before its celebrants could be authorised to solemnise marriage or register civil partnership.

68. The second consultation outlined, at paragraph 2.21, the type of requirements which might be laid down in regulations:

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<sup>11</sup> This table shows the number of marriages in Scotland in 2011 by denomination, where the denomination solemnised 10 marriages or more: <http://www.gro-scotland.gov.uk/files2/stats/ve-reftables-2011/ve2011-t7.7.xls>

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

69. The Scottish Government will consult on any regulations before they are brought into effect. Any qualifying requirements would not apply to the Church of Scotland in relation to opposite sex marriage. Under section 8 of the 1977 Act, as amended by this Bill, Church of Scotland ministers and deacons are authorised automatically to solemnise opposite sex marriage.

#### *Alternatives*

70. The primary alternative to introducing qualifying requirements for religious and belief bodies would be to do nothing – that is, to continue using the current system of authorisation.

71. The Scottish Government values the diversity of bodies authorised to solemnise marriage and expects that diversity to grow further on the introduction of belief celebrants. That diversity places a responsibility on the Government to ensure a degree of consistency of approach. The Government's aim is to uphold the good reputation of marriage in Scotland and to tackle the problems of sham and forced marriages.

72. Another alternative would be to change the law so that only civil marriage ceremonies would be legally recognised by the state. The Scottish Government rejected that approach for the reasons set out at paragraphs 22 to 27.

73. Some respondents to the consultation on the draft Bill suggested that the qualifying requirements should also apply to the Church of Scotland. Recognising the national status of the Church of Scotland, the Government does not intend to remove the automatic authorisation of Church of Scotland celebrants to solemnise opposite sex marriage under section 8 of the 1977 Act.

74. Around 1,200 respondents to the second consultation commented on this proposal. A number noted that more detail was required (e.g. draft regulations) before they could make substantive comment. Other comments included:

- support for work against forced and sham marriages;
- concerns about placing too many burdens on religious and belief bodies [the Scottish Government and the Registrar General would intend to work closely with bodies on any training that might be required];

- concerns about how bodies from outwith Scotland could demonstrate a track record [the Scottish Government and the Registrar General would take account of track records established outwith Scotland];
- bodies currently prescribed under the Regulations so that their celebrants can solemnise marriage should not have to reapply [the Scottish Government and the Registrar General expects that such bodies would comply with the qualifying requirements];
- the qualifying requirements should not be used to discriminate against religious bodies opposed to same sex marriage [that is not the intention of the Scottish Government of the Registrar General];
- greater clarity is needed on what is meant by “profit or gain” [the Scottish Government and the Registrar General would intend to discuss this further when consulting on draft regulations].

### **Second marriage ceremony: form of endorsement (section 20)**

75. Section 20 of the 1977 Act 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. Section 20 of the 1977 Act sets out the form in which the authorised registrar is to make an endorsement on the Marriage Schedule once it has been signed by the parties following the second marriage ceremony. Section 20 of the Bill amends the form of the endorsement. At the moment, the 1977 Act provides that the year in these forms should start with the figures “19”, reflecting the twentieth century.

#### *Alternatives*

76. None were considered given this is a straightforward matter.

### **Sheriff court jurisdiction in relation to declarator of marriage (section 21)**

77. Section 21 of the Bill amends the Domicile and Matrimonial Proceedings Act 1973 to make it clear that, in certain circumstances, the sheriff court has jurisdiction in relation to declarators of opposite sex marriage. Section 4 of the Family Law (Scotland) Act 2006 amends the Sheriff Courts (Scotland) Act 1907 to provide that actions for declarator of (opposite sex) marriage or nullity of (opposite sex) marriage are competent not only in the Court of Session but also in the sheriff courts. It is considered, however, that further amendments to the 1973 Act are needed to ensure that the intention behind the 2006 Act is achieved in relation to declarators of opposite sex marriage.

#### *Alternatives*

78. The alternative would have been to make no change. However, this would have left the question of the jurisdiction of the sheriff courts in these cases uncertain.

### **Dissolution of civil partnership (section 25)**

79. The Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012 removed the need for third party evidence in actions to dissolve civil partnerships using the simplified procedure<sup>12</sup>. Some civil partnerships were dissolved using the simplified procedure and without obtaining third party evidence before the Order came into force on 30 March 2012. Section 25 of the Bill provides that the Order is to be treated as having had effect since 5 December 2005, when civil partnerships were introduced. This means that any decrees of dissolution granted since 5 December 2005 under simplified dissolution procedures are valid, notwithstanding whether the grounds of action were based on third party evidence.

#### *Alternatives*

80. One alternative, suggested by a consultee responding to the second consultation by the Scottish Government, would be to provide instead that dissolutions through the simplified procedure could not be challenged just because no third party evidence had been provided. This seems to the Government to have the same effect.

81. A further alternative might be to do nothing. However, this could create uncertainty for couples who dissolved using the simplified procedure without third party evidence before the Order came into force on 30 March 2012.

### **Bigamy (section 26)**

82. Section 26 of the Bill makes bigamy a statutory offence and abolishes the current offence at common law.

83. The Government considers that making bigamy a statutory offence adds clarity to the scope of the offence and ensures the penalties for the offence are proportionate. Common law offences attract a maximum penalty of life imprisonment. We consider life imprisonment to be an excessive penalty for the offence of bigamy.

#### *Alternatives*

84. One obvious alternative would be to make no changes. However, the Government wished to clarify the offence and ensure it is committed by a person purporting to enter into a marriage whilst in a civil partnership. This makes it desirable to clarify the scope of the offence by putting it wholly on a statutory footing.

85. Another alternative would be to abolish the offence. However, the Government considers that bigamy can represent a type of fraud. In addition, the offence reflects the Government's view, and approach in legislation generally, that marriage is between two people.

86. Around 550 respondents to the second consultation commented on making bigamy a statutory offence.

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<sup>12</sup> The simplified procedure can, in essence, be used when there is no dispute over financial matters and no children under 16. More detail on the simplified procedure can be found at <http://www.scotcourts.gov.uk/taking-action/divorce-and-dissolution-of-civil-partnership>

87. A number supported the proposal. There were some comments on the proposed penalties. Some argued that the proposed penalties (the maximum proposed is imprisonment for up to 2 years) did not reflect the seriousness of the offence. Others considered imprisonment was not an appropriate penalty at all and that alternatives, such as community payback orders, would be more in keeping with the nature of the offence. Some respondents suggested that, assuming all parties are aware of the arrangements, polygamous marriages should be permitted and bigamy should not be an offence at all. The Government made it clear in the second consultation that it had no intention of allowing polygamous marriages to take place in Scotland.

**PROVISIONS ON SAME SEX MARRIAGE (SECTIONS 2, 3, 4, 5, 6, 7, 8, 9, 14, 24, 27 AND 28, SCHEDULES 1 AND 2 AND ASPECTS OF SECTIONS 10, 11 AND 12)**

**Introduction of same sex marriage (sections 2, 3, 4, 10, 11 and 12)**

88. The Bill introduces same sex marriage into Scots law. Under section 5(4) of the 1977 Act, there is a legal impediment to a marriage where both parties are of the same sex. Section 2 of the Bill removes that impediment. Section 3 of the Bill amends the 1977 Act so that where a party to a marriage is not domiciled in Scotland, a certificate of no impediment from the home jurisdiction is not required if it would not be issued just because the parties to the marriage are of the same sex. Section 4 of the Bill makes provision on how terms such as “marriage” should be interpreted in enactments and documents. The general intention is that such terms in future should cover both opposite sex and same sex marriage.

89. The Government intends to introduce same sex marriage because:

- it will further equality for lesbian, gay, bisexual and transgender (LGBT) people;
- LGBT people of faith or who hold belief values can be expected to welcome the introduction of religious or belief ceremonies to solemnise same sex marriage;
- a number of religious or belief bodies would wish to solemnise same sex marriage;
- protections are being put in place to protect those religious and belief bodies who do not wish to solemnise same sex marriages.

90. On protections for religious and belief bodies who do not wish to solemnise same sex marriage, the system being put in place to authorise celebrants is based on the system in place to authorise celebrants for opposite sex marriages. The exception to this is that Church of Scotland celebrants will not be authorised on the face of the 1977 Act to solemnise same sex marriage. The system is “opt-in”, so that a body which does not wish to solemnise same sex marriage will not have to do so.

91. Under section 8(1B) of the 1977 Act, as inserted by section 10(2) of the Bill, a same sex marriage can only be solemnised by a civil registrar or a person who is:

- a minister, clergyman, pastor, priest or other celebrant of a religious or belief body prescribed by regulations made by the Scottish Ministers or another person recognised by a prescribed religious or belief body as entitled to solemnise same sex marriage on its behalf;

- nominated, by a religious or belief body which has not been prescribed, to the Registrar General to solemnise same sex marriage, and accepted by the Registrar General;
- a member of a religious or belief body who has been granted temporary authorisation to solemnise same sex marriage by the Registrar General.

92. Under the Bill:

- a religious or belief body may only be prescribed if it makes a request to the Scottish Ministers;
- there is no duty to make such a request;
- there is no duty on any religious or belief body to nominate any persons to the Registrar General;
- temporary authorisations to solemnise same sex marriage may only be granted by the Registrar General when the religious or belief body of which the person is a member is prescribed or has nominated persons to the Registrar General;
- there is no duty on any person to apply for temporary authorisation;
- there is no duty on any person who is an approved religious or belief celebrant in relation to same sex marriages to solemnise such marriages.

93. In addition, the UK and Scottish Governments are preparing amendments to the Equality Act 2010 to provide further protection in relation to discrimination. Following comments from persons responding to the Scottish Government's second consultation, and the approach taken in clause 2(6) of the Marriage (Same Sex Couples) Bill, the amendment to the Equality Act for Scotland will:

- cover religious or belief celebrants who do not wish to carry out same sex marriages or civil partnerships, even if their body has opted in. The amendment on which the Scottish Government consulted just protected against sexual orientation discrimination. The amendment now will protect against discrimination claims generally. In addition, the amendment will not now depend, as originally proposed, on there being a conflict with the celebrant's religious or philosophical beliefs;
- cover other persons (e.g. the organist, the choir and the choirmaster) who play an integral part in the religious or belief aspects of the marriage or civil partnership ceremony;
- protect a person controlling the use of religious or belief premises who refuses to allow the premises to be used for a same sex marriage or civil partnership.

*Alternatives*

94. The Scottish Government considered a number of potential alternatives to the introduction of same sex marriage through religious or belief and civil ceremonies.

95. The first alternative was to do nothing and just retain civil partnerships for same sex couples and not extend marriage to same sex couples<sup>13</sup>.

96. The Scottish Government considers that there would be several disadvantages to continuing only to provide civil partnership for same sex couples. These are as follows:

- it would deny same sex couples the opportunity to marry solely on the grounds that they are of the same sex. There are impediments to marriage (e.g. under 16 years of age or already married) and, at the moment, being of the same sex is one of them. It seems reasonable to allow consenting same sex couples to marry;
- the introduction of same sex marriage will further equality for LGBT people. Not introducing same sex marriage would remove this opportunity to advance equality;
- not introducing same sex marriage would deny same sex couples of faith or with belief values the opportunity of having a religious or belief marriage ceremony;
- it would not end the requirement for a couple to divorce following the issue of an interim gender recognition certificate. Paragraphs 110 to 118 set out the changes the Bill makes in this area.

97. Many people and organisations hold the view that marriage can only ever be between a man and a woman. The Government has made clear its respect for this view and has taken a number of steps in the Bill (e.g. the protections for religious and belief bodies and section 14 on freedom of speech) to recognise the concerns expressed. However, the Government does not consider that marriage can only ever be between a man and a woman. As the first consultation noted, in paragraph 3.11, “same sex couples, like opposite sex couples, can and do establish loving relationships which they wish to formalise in a manner recognised by the state, and in some cases by the religious body to which they belong”.

98. A second alternative could have been the introduction of same sex marriage through civil ceremonies only. The Scottish Government consulted on this in the first consultation: question 12 asked “do you agree with the introduction of same-sex civil marriage only?”. Of those responding to question 12, 79% were against the introduction of same sex civil marriage only, and only 6% of those responding were in favour<sup>14</sup>.

99. This option would allow same sex couples to marry, but not within their faith or belief system. The Scottish Government knows that for some LGBT people and for some religious and belief bodies, being able to celebrate same sex marriages within their faith or belief community is a matter of considerable importance. This option would not have provided equality with opposite sex marriage.

100. A third alternative could have been an opt-out system for celebrants. Under this system, authorisations of religious and belief celebrants to solemnise opposite sex marriage would have been extended to same sex marriage. It would have been made clear that religious and belief

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<sup>13</sup> Arguments put forward by consultees against same sex marriage were summarised in paragraphs 6.6 to 6.14 of the analysis of the first consultation: <http://www.scotland.gov.uk/Publications/2012/07/5671/8>

<sup>14</sup> See <http://www.scotland.gov.uk/Publications/2012/07/5671/9#table16>



bodies and celebrants who did not wish to solemnise same sex marriage would not have been required to do so.

101. The first consultation sought views on this issue. Question 17 asked: “which of the options do you favour to ensure that religious bodies and celebrants do not have to solemnise same sex marriage against their will?”. Of those who responded, 9% supported an opt-out system; 50% supported an opt-in system; 31% favoured neither option and 10% did not know.<sup>15</sup>

102. The Government considers that an opt-in system provides better protection for religious and belief bodies and celebrants and the Bill, therefore, makes appropriate provision.

### **Changing civil partnership to marriage (sections 7, 8 and 9)**

103. A number of people in a civil partnership may wish to change their relationship to a marriage. Section 7 of the Bill allows couples who registered a civil partnership in Scotland<sup>16</sup> to have a marriage ceremony in order to make the change. Section 9(1)(b) of the Bill provides for the responsibilities and rights that a couple acquired during their civil partnership to continue within the marriage. For instance, where spouses wish to divorce, the couple’s “matrimonial property” will include property that would have been considered “partnership property” during the time the couple were in a civil partnership with each other.

104. Section 8 of the Bill provides a power for Ministers to make regulations to establish an administrative procedure for the parties to a qualifying civil partnership to change their civil partnership into a marriage. This reflects that some people who entered into a civil partnership in Scotland may wish to change their relationship to a marriage through an administrative process rather than a marriage ceremony or may now live outwith Scotland and, as a result, may not find it easy to return to Scotland to undergo a marriage ceremony.

105. Section 9 of the Bill makes provision on the effect of two civil partners changing their relationship by marrying. The general effect is that the civil partners are to be treated as having been married since they registered their civil partnership. Where civil partners change their relationship to a marriage through administrative procedures, section 8(2)(g) allows Ministers to make provision by regulation on the effect of doing so. The intention is that the effect would be the same as if the civil partners had changed their relationship by undergoing a marriage ceremony.

### *Alternatives*

106. One alternative would have been to restrict changing civil partnerships to marriage only to those couples who registered their civil partnership when same sex marriage was not available.

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<sup>15</sup> See <http://www.scotland.gov.uk/Publications/2012/07/5671/9#table18>

<sup>16</sup> Under section 7(3) of the Bill, this includes civil partnerships registered overseas through UK consular services or the UK armed forces, so long as the couple elected Scotland as the relevant part of the UK and details of the civil partnership have been sent to the Scottish Registrar General

107. The Government rejected this option for two reasons. First, it would not have allowed for the possibility of a couple changing their mind about the type of relationship they wished to enter into. For example, a couple might acquire religious faith and consider that they should be married rather than in a civil partnership. Secondly, the proposals to allow transgender people in a civil partnership to stay together (outlined at paragraph 114) largely rest on the civil partnership being changed into a marriage.

108. A second alternative would be to allow persons who entered into a civil partnership outwith Scotland to change their relationship to a marriage in Scotland. Some consultees responding to the Government's second consultation suggested this. The Government has rejected this as it could lead to a person having two legal statuses at the same time: e.g. married in Scotland but in a civil partnership in the Netherlands. The UK Marriage (Same Sex Couples) Bill makes provision at clause 9 for civil partners who registered their civil partnership in England and Wales to change their relationship to a marriage, through procedures to be set out in regulations.<sup>17</sup>

109. A number of consultees responding to the Government's second consultation suggested that there should be an administrative route to change a civil partnership to a marriage. Section 8 of the Bill now includes provision to establish, through regulations, an administrative route to change a civil partnership to a marriage. This was not included in the consultation draft of the Bill.

### **Transgender persons (section 28 and schedule 2)**

110. The law on gender recognition is set out in the Gender Recognition Act. This gives the Gender Recognition Panel ("the Panel") power to issue a person meeting certain criteria with a Gender Recognition Certificate (GRC). Under section 9(1) of the Gender Recognition Act, when a full GRC is issued to a person "the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

111. The Gender Recognition Act currently provides that where a successful applicant to the Panel is married or in a civil partnership, the Panel should issue the applicant with an interim GRC. The interim GRC does not change the applicant's sex. It allows the applicant to get a divorce or to dissolve his or her civil partnership. Once the court has ordered the divorce or dissolution, the applicant will receive a full GRC.

112. In other words, at the moment a couple must divorce or dissolve their civil partnership before a full GRC can be issued. The Scottish Government consider that this requirement places a couple who wish to stay together in an extremely difficult position. Therefore, schedule 2 to

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<sup>17</sup> The UK Marriage (Same Sex Couples) Bill is at <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0029/14029.pdf> This version takes account of amendments made in the House of Commons before the Bill moved to the House of Lords.

the Bill, and section 28, makes changes to enable couples who married in Scotland or entered into a civil partnership in Scotland<sup>18</sup> to stay together.

113. For a married person:

- where an application is made to the Panel and both parties to the marriage wish to stay married evidence must be provided to the Panel accordingly, through statutory declarations (paragraph 3 of schedule 2);
- this enables the Panel to issue a full GRC (paragraph 4 of schedule 2);
- provision is also made to allow a full GRC to be issued where an interim GRC has been issued and the couple decide within 6 months to stay married (paragraph 5 of schedule 2);
- the Registrar General, with the approval of the Scottish Ministers, may make provision through regulations on the registration of marriages (which are continuing following the issue of a full GRC) through an administrative procedure (paragraph 8 of schedule 2);
- in addition, the Scottish Ministers, after consulting the Registrar General, may make regulations about a renewal marriage ceremony following the issue of a full GRC (section 28 of the Bill).

114. For civil partners who wish to stay together:

- the Bill provides that when both parties to a civil partnership obtain a full GRC on the same day, the civil partnership can continue (paragraph 6 of schedule 2);
- the Registrar General, with the approval of the Scottish Ministers, may make provision through regulations on the registration of civil partnerships (which are continuing following the issue of a full GRC to each of the civil partners) through an administrative process (paragraph 8 of schedule 2);
- in addition, the Scottish Ministers, after consulting the Registrar General, may make regulations about a renewal civil partnership ceremony following the issue of a full GRC (section 28 of the Bill);
- in other cases, a full GRC can be issued after an interim GRC when, within 6 months, the civil partners have changed their civil partnership to a marriage (paragraph 5 of schedule 2);
- provision is also made for the possibility of a more streamlined system for civil partners who wish to stay together and change their relationship to a marriage to be established by an order made by the Scottish Ministers, after consulting the Registrar General (paragraph 6 of schedule 2).

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<sup>18</sup> Paragraph 2 of schedule 2 makes provision so that certain civil partnerships and marriages registered overseas through UK consular services and the UK armed forces are treated as having been registered in Scotland for these purposes

115. The Bill does not affect the ability of married couples and of civil partners to divorce or dissolve their civil partnership on the grounds of the issue of an interim GRC having been issued, if they wish to do so.

#### *Alternatives*

116. The second consultation suggested that the Scottish Bill could cover applications to the Panel by persons resident in Scotland. However, the UK Marriage (Same Sex Couples) Bill bases jurisdiction on where the couple married or entered into a civil partnership. It is appropriate for the Scottish Bill to follow this as, otherwise, some people could miss out. For example, if the Scottish Bill had been based on residence, a person who married in Scotland but now lives in England would not have been covered by either the UK or the Scottish Bill.

117. A couple may only use the provisions in the Scottish Bill where their marriage was solemnised or their civil partnership registered in Scotland<sup>19</sup>. Some consultees suggested that the Scottish Bill should go further and cover people who married or entered into a civil union outwith Scotland. The Government has rejected this option. The UK Bill covers persons who married overseas (the definition of “protected marriage” at paragraph 14 of Schedule 5 to the UK Bill refers). On civil partnerships, as outlined at paragraph 108 above, the Scottish Government’s approach prevents a person from having more than one legal status at the same time.

118. A number of consultees suggested that the process should be made as straightforward as possible. The Scottish Government has tried to reflect these comments in the procedures now contained in schedule 2 to the Bill, which reflect closely similar proposals in Schedule 5 to the UK Bill.

#### **Freedom of speech (section 14)**

119. Many stakeholders have raised the concern that if the Scottish Parliament legislates to introduce same sex marriage, it will be more difficult to publicly express opposition to such marriages.

120. Section 14 of the Bill is designed to make it clear that although the Bill introduces same sex marriage, the Bill does not affect the exercise of:

- the right in the European Convention of Human Rights to freedom of thought, conscience and religion;
- the right in the European Convention of Human Rights to freedom of expression;
- any equivalent right conferred by rule of law.

#### *Alternatives*

121. One alternative would be not to include section 14 in the Bill. The Bill does not contain any provision which limits or attempts to limit any of the rights which section 14 refers to.

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<sup>19</sup> As indicated above, certain overseas marriages and civil partnerships through UK consular services and the UK armed forces will be treated as having been registered in Scotland for these purposes.

However, the Scottish Ministers nonetheless considered it helpful to include provision on freedom of speech on the face of the Bill. The Scottish Government recognise the wide range of views that people hold about marriage. Section 14 underlines the Government's commitment to upholding and protecting human rights across society.

122. Some consultees have suggested that the Scottish Government should go further.

123. In education, for example, there have been suggestions that:

- there should be specific legislation in place to protect teachers who would not wish to use certain types of teaching materials which might mention same sex marriage or homosexual relationships;
- there should be legislation in place to allow parents to withdraw their children from any lesson which might mention same sex marriage.

124. The Government's approach to education was outlined in Annex C to the second consultation<sup>20</sup>. In brief:

- the Government plans no changes to section 9 of the Education (Scotland) Act 1980, which allows parents to withdraw any pupil from any instruction in religious subjects;
- the faith content of the curriculum at Roman Catholic state schools is decided by the Scottish Catholic Education Service on behalf of the Bishops' Conference of Scotland. The Government is committed to maintaining this;
- the Scottish Government has no plans to make any changes to denominational education generally;
- there is a specific exclusion in the Equality Act 2010 in respect of the contents of the curriculum. Section 89(2) of the 2010 Act provides that: "Nothing in this Chapter applies to anything done in connection with the content of the curriculum". Therefore, the provisions of the 2010 Act about discrimination and protected characteristics do not have a direct effect on the content of the curriculum in schools;
- the General Teaching Council for Scotland issues Professional Standards for teachers and other guidance material, including the Code of Professionalism and Conduct;<sup>21</sup>
- all employers are required by the public sector equality duty to give consideration to religious beliefs of their employees<sup>22</sup>. All local authorities have procedures in place to handle any moral objections by teachers;
- the Scottish Government is not seeking any changes to existing UK employment legislation which protects teachers, and other employees, against unfair dismissal;

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<sup>20</sup> Annex C to the second consultation is at <http://www.scotland.gov.uk/Publications/2012/12/9433/272400>

<sup>21</sup> The General Teaching Council for Scotland's website is at [www.gtcs.org.uk](http://www.gtcs.org.uk)

<sup>22</sup> There is guidance by the Equality and Human Rights Commission on religion and belief in the workplace: <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/religion-or-belief-new-guidance-february-2013/>

- legislative provision on providing information to parents in relation to their child's education is contained in the Education (School and Placing Information) (Scotland) Regulations 2012<sup>23</sup>;
- paragraph 13 of Education Circular 2/2001 allows parents to withdraw children from specific programmes of sexual health education, although it does also encourage participation<sup>24</sup>. The Scottish Government is committed to maintaining this right and intends to update the Circular;
- the Scottish Government does not consider that it would be appropriate to allow parents to withdraw children from any lesson where same sex marriage, civil partnerships or homosexuality might be mentioned. This could cut across a child's right to an education and could be impracticable.

125. There have also been suggestions that there should be a provision in the Bill laying down that civil registrars do not have to solemnise same sex marriage<sup>25</sup>. The Bill does not have a provision of this nature for a variety of reasons:

- civil registrars (unlike religious and belief celebrants) are carrying out a civil function. Therefore, it is not appropriate to provide an opt-out for civil registrars based on religious or belief grounds;
- the registration of civil partnerships by civil registrars has worked well in Scotland;
- provision in the Bill relating to civil registrars would cut across the relationship civil registrars have with their employer – the local authority. The Government does not consider it would be helpful to intervene in this way.

126. In other areas, the Government is considering if it would be helpful to amend existing guidance on fostering to make it clear that a would-be fosterer should not be rejected just because of his or her views on same sex marriage.

### **Adultery, impotency and reset (section 5)**

127. Under section 1 of the Divorce (Scotland) Act 1976, there are two grounds of divorce: irretrievable breakdown of the marriage, or one of the spouses being issued with an interim gender recognition certificate after the date of the marriage.

128. The irretrievable breakdown of a marriage may be established if, since the date of the marriage, the defender in an action of divorce has committed adultery. Adultery is defined in the common law to mean sexual intercourse with a member of the opposite sex outwith of marriage.

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<sup>23</sup> These can be found at <http://www.legislation.gov.uk/ssi/2012/130/contents/made>

<sup>24</sup> Education Circular 2/2001 is at <http://www.edlaw.org.uk/guidance/sexed.pdf>

<sup>25</sup> There is a recent relevant decision by the European Court of Human Rights: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{"itemid":\["001-115881"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{). This relates to a civil registrar (Ms Ladele) in England who did not wish to register civil partnerships. The Court did not hold that there had been a violation of the Convention.

The Government's understanding is that the leading Scottish case in this area is *MacLennan v MacLennan*<sup>26</sup>.

129. The judge in this case considered some English cases on non-consummation. From these, the judge concluded that in relation to adultery "according at least to the law of England:- 1. For adultery to be committed there must be the two parties physically present and engaging in the sexual act at the same time. 2. To constitute the sexual act there must be an action of union involving some degree of penetration of the female organ by the male organ. 3. It is not a necessary concomitant of adultery that male seed should be deposited in the female's ovum. 4. The placing of the male seed in the female ovum need not necessarily result from the sexual act, and if it does not, but is placed there by some other means, there is no sexual intercourse".

130. The judge went on to say that: "I can find nothing to persuade me that the law of Scotland is not the same as the law of England so far as the legal propositions above enunciated are concerned (although non-consummation of the marriage is not a ground of nullity in the law of Scotland) and, in my opinion, these propositions are equally valid in our law."

131. Section 5(3) of the Bill amends the Divorce (Scotland) Act 1976 to provide that "for the avoidance of doubt, in relation to marriage between persons of the same sex, adultery has the same meaning as it has in relation to marriage between persons of different sexes." That means that for any couple, whether same sex or opposite sex, the existing definition of adultery (sexual intercourse with a person of the opposite sex outwith of marriage) will continue to apply.

132. If a spouse in a marriage (whether same sex or opposite sex) considers that his or her spouse has committed sexual infidelity which is not covered by the definition of adultery, he or she may seek a divorce on the grounds that the marriage has irretrievably broken down and could demonstrate the breakdown on the basis of unreasonable behaviour or the basis of non-cohabitation.<sup>27</sup>

133. The Scottish Government publishes statistics on divorce. These show that the number of divorces on the basis of adultery in 2010/11 was 65 (out of 10,112 divorces) and the number in 2011/12 was 64 (out of 9,863 divorces)<sup>28</sup>.

134. Section 5(2) of the Bill provides that any rule of law which provides for a marriage to be voidable by reason of impotence only has effect in relation to opposite sex marriage. The Government considers this rule would be hard to apply to same sex marriage and, in any effect, is of limited effect.

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<sup>26</sup> The judgment in this case can be found at [http://judgmental.org.uk/judgments/ScotCS/1958/\[1958\]\\_ScotCS\\_CSOH\\_5.html](http://judgmental.org.uk/judgments/ScotCS/1958/[1958]_ScotCS_CSOH_5.html)

<sup>27</sup> In Scotland, irretrievable breakdown of the marriage can be shown in four ways: adultery; unreasonable behaviour; non-cohabitation for 1 year (where both parties agree to the divorce); non-cohabitation for 2 years (where one party does not agree to the divorce).

<sup>28</sup> See table 2 at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS/civlawscot1112?refresh=0.09949338570896027>

135. Section 5(1) of the Bill provides that any rule of law under which a wife who receives or conceals stolen goods stolen by her husband is, in certain circumstances, not guilty of reset only applies to opposite sex marriage. Again, the Government considers this rule would be hard to apply to same sex marriage and, in any effect, is of limited effect.

#### *Alternatives*

136. One alternative would be to remove adultery as a way of demonstrating the irretrievable breakdown of a marriage. Some consultees responding to the Scottish Government's consultation suggested this option. The adultery basis for divorce is seldom used and it is likely that behaviour which is adulterous would also satisfy the basis of unreasonable behaviour. In a consultation paper on family law issued in the year 2000, called "Parents and Children"<sup>29</sup>, the then Scottish Executive asked for views on whether the fault bases of adultery and unreasonable behaviour could be merged into a single fault basis.

137. There was considerable opposition to this proposal<sup>30</sup> and it was not proceeded with.

138. The Scottish Government's views on removing adultery from divorce law now are:

- it has not consulted on this specific proposal and would need to do so, given responses to previous consultations;
- this is not the right Bill in which to be making such a major change to divorce law;
- it appears that for a small number of spouses, it may be important to have the civil court find that the other spouse was adulterous.

139. On impotence, a number of consultation responses suggested that the idea that impotency (or any other medical condition) should be grounds for voiding a marriage was archaic. Consultees suggested that impotency should be abolished as grounds for voiding a marriage. However, other consultees suggested that the concept of "voidable" marriages can have some advantages, particularly for those who might wish to enter another marriage but might not be able to do so (on religious grounds) if they were divorced.

140. On reset, a clear alternative is to abolish the defence. The Government is considering if that option should be taken up at some point.

141. A second alternative on adultery would be to extend the definition of so that it would cover homosexual activity as well as heterosexual intercourse. Some consultees responding to the Government's second consultation suggested this option. If this option were followed, the Scottish Government assumes that such an extended definition would apply to both opposite sex and same sex marriage so that, unlike now, an opposite sex spouse could cite homosexual activity outwith marriage as adultery when raising an action for divorce.

142. The Scottish Government is not following this option, for several reasons:

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<sup>29</sup> See <http://www.scotland.gov.uk/Topics/Justice/law/17867/FLSA2006/13804/ParentsandChildren> (Paragraphs 4.8 and 4.9)

<sup>30</sup> See <http://www.scotland.gov.uk/Resource/0039/00396142.pdf> (See analysis of responses to question 4).



- it would not confer any additional rights. A spouse (whether opposite sex or same sex) who is unhappy about sexual infidelity not covered by the current definition of adultery could raise a divorce action and cite unreasonable behaviour (or non-cohabitation);
- it is not clear what further sexual activity (homosexual and heterosexual) would be covered. A spouse may be unhappy with a wide variety of conduct – e.g. looking at another person; kissing; hugging as well as forms of sexual activity. A line would need to be drawn somewhere as to what does, and does not, constitute adultery. It is doubtful that this is useful activity given that, as indicated above, divorce would still be available for a spouse concerned about infidelity;
- it is not clear what effect such a change would have on the small number of spouses for whom adultery forms a useful part of divorce law.

143. A further alternative might be to remove section 5(3) from the Bill and leave it up to the courts to determine what would or would not be considered as “adultery” in the context of same sex marriage. That does not seem satisfactory when the matter can be clarified by a provision such as section 5(3).

## **THE SCOTTISH GOVERNMENT CONSULTATIONS**

144. The first consultation took place between 2 September and 9 December 2011 on the registration of civil partnership and same sex marriage. That is a 14 week consultation period, longer than the usual 12 weeks.

145. That consultation sought views on the possibility of allowing religious ceremonies for civil partnerships and the possible introduction of same sex marriage.

146. Counting all types of responses, over 77,000 responses were received to this consultation: the largest number of responses to a Scottish Government consultation. The Government published an analysis of the responses to that consultation on 25 July 2012. The responses from organisations that gave permission for their responses to be published are also available online.<sup>31</sup>

147. The Scottish Government acknowledges that a significant number of those responding to the 2011 consultation were opposed to the introduction of same sex marriage. Details of the number of responses received, and the views expressed in relation to same sex marriage, can be found in the analysis<sup>32</sup>.

148. A number of consultees have asked why the Government is proceeding with same sex marriage although most respondents to the first consultation were opposed. A number of points arise:

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<sup>31</sup> These are available at <http://www.scotland.gov.uk/Publications/2012/07/9221>.

<sup>32</sup> See <http://www.scotland.gov.uk/Publications/2012/07/5671/8#table13> for information on what views the respondents to the first consultation on same sex marriage.

- a consultation is not a referendum on a particular proposal. Instead, a consultation is a way of seeking views, on detailed points as well as on matters of principle;
- the first consultation also showed significant support in Scotland for the introduction of same sex marriage;
- the Bill reflects comments made in the first consultation. For example, there are strong protections for religious and belief bodies and celebrants, with an opt-in method to be approved to solemnise same sex marriage.

149. Between 12 December 2012 and 20 March 2013, the Government consulted on the draft Marriage and Civil Partnership (Scotland) Bill. Again, this was a 14 week period.

150. The Scottish Government received around 15,000 responses to this consultation. The analysis and responses from organisations that gave permission for their responses to be published are available on-line<sup>33</sup>. Key changes made to the Bill following the consultation and before the Bill was introduced to Parliament are outlined in paragraphs 152 to 164 below.

### **Consultation meetings**

151. The Scottish Government met a wide range of organisations to discuss its proposals. It is grateful to all those who took the time to share their views. Bodies the Scottish Government met include:

- Associated Presbyterian Churches
- Baptist Union of Scotland
- CARE (Christian Action Research and Education)
- Christian Institute
- Church of Scotland
- Equality Network
- Evangelical Alliance
- Free Church of Scotland
- Free Church of Scotland (Continuing)
- Free Presbyterian Church of Scotland
- Gender Recognition Panel User Group
- Glasgow Central Mosque
- Humanist Society Scotland
- Lanarkshire Muslim Women's Alliance
- LGBT Youth
- Methodist Church

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<sup>33</sup> They can be accessed through <http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex>

- Metropolitan Community Church
- Muslim Council of Scotland
- Pagan Federation of Scotland
- Quakers
- Roman Catholic Church
- Salvation Army
- Scottish Catholic Education Service
- Scottish Council of Jewish Communities
- Scottish Episcopal Church
- Scottish Interfaith Council
- Scottish Transgender Alliance
- Stonewall
- Unitarian Church
- United Free Church of Scotland
- United Reformed Church.

### **Changes between the draft Bill and the Bill as introduced to Parliament**

152. Following the consultation on the draft Bill, the Scottish Government made some changes to the Bill. The main changes are as follows.

#### *Marriage by cohabitation with habit and repute*

153. We have removed the section which would have repealed the remaining law on marriage by cohabitation with habit and repute<sup>34</sup>. Section 3(3) and (4) of the Family Law (Scotland) Act 2006 extended the concept of marriages through cohabitation with habit and repute to cases where a couple erroneously believed themselves to be married overseas but it transpires after one of them dies that the marriage was not valid. Part of the rationale for repealing these provisions was that the 2006 Act, including section 29, improved rights for cohabitants. However, a number of consultees noted that the proposed repeal could remove rights from certain people and section 29 might not be an adequate solution. Given these points, we are not proceeding with the repeal of section 3(3) and (4).

154. Given the terms of section 4 of the Bill, section 3(3) and (4) of the 2006 Act will now extend to same sex relationships as well as opposite sex relationships.

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<sup>34</sup> The discussion on this in the second consultation was at paragraphs 2.28 to 2.31: <http://www.scotland.gov.uk/Publications/2012/12/9433/272394>

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

155. Section 4 of the Bill makes provision on how terms such as “marriage” should be interpreted in legislation and private documents following the introduction of same sex marriage. The Government has extended and clarified this section so that, for example, it covers references in legislation to unmarried persons living together as if they were husband and wife. This reflected comments by consultees that it was not clear how the provisions of the Bill would relate to references in enactments to cohabitants.

*Jurisdiction*

156. The Scottish Government has added provisions on jurisdiction to the Bill at section 6 and schedule 1. These provide for the Scottish courts to have jurisdiction in relation to same sex matrimonial actions which mirrors the courts’ jurisdiction in relation to opposite sex matrimonial actions.

157. The Bill also makes provision for the Scottish courts to have jurisdiction in certain circumstances where no other court has jurisdiction. Those provisions are designed to assist a couple who married in Scotland but continued to live in a country which does not recognise same sex marriage. For example, it might not be possible for such a couple to get a divorce in their home country.

158. Section 21 of the Bill now clarifies the jurisdiction of the sheriff court in relation to declarators of opposite sex marriage. More details explaining the reasons for these changes are provided at paragraphs 77 and 78 of this Memorandum.

*Changing qualifying civil partnership into marriage*

159. Section 8 now allows Ministers to make regulations on administrative procedures for changing civil partnerships into marriages. This is in addition to section 7, on civil partners changing their relationship by undergoing a marriage ceremony. Section 8 has been added following comments from consultees that an administrative route should be available (e.g. to cover people who entered into a civil partnership in Scotland but now live overseas and who might not wish to return to Scotland to undergo a marriage ceremony).

*Belief ceremonies*

160. Instead of introducing separate belief ceremonies, the Bill now makes provision so that non-civil ceremonies are “religious or belief”. The definitions relating to “belief” have been amended to remove references to “humanitarian”. More details explaining the reasons for these changes are provided at paragraphs 15 to 30 of this Memorandum.

*Marriage and civil partnership schedules*

161. The Bill now changes the usual period for issuing of schedules from not less than 14 days to not less than 28 days. The Bill also makes provision so that different marriage schedules could be prescribed for opposite sex marriage when compared with same sex marriage. More details on these changes are provided at paragraphs 57 to 61 of this Memorandum.

### *Bigamy*

162. Changes have been made to the proposed statutory offence of bigamy. In particular, the penalties following summary conviction and the existing offence at section 100 of the 2004 Act, on purporting to enter into a civil partnership when already married or in a civil partnership, have been clarified.

### *Transgender people*

163. The Bill now contains provisions on transgender persons. The consultation on the draft Bill outlined possible approaches to policy on transgender persons. The Bill now contains detailed provisions that reflect points made in consultation. The provisions are in line with the approach that the UK Government has taken in the Marriage (Same Sex Couples) Bill. More details on the provisions are provided at paragraphs 110 to 118 of this Memorandum.

### *Modifications to the Family Law (Scotland) Act 1985*

164. The Scottish Government removed schedule 1 as it appeared in the consultation draft of the Bill. The schedule modified the Family Law (Scotland) Act 1985. The Bill allows a couple to change their civil partnership to a marriage. The schedule was designed to ensure that the time in the civil partnership could be counted towards the period of the marriage. The provisions are no longer considered necessary. The policy intention is the same, but the Government has determined that section 9(1)(b) of the Bill achieves the desired effect.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT AND SUSTAINABLE DEVELOPMENT**

### **Equal opportunities**

165. The second consultation included a draft Equality Impact Assessment<sup>35</sup>.

166. On religion and belief, a number of bodies have expressed their concern about the introduction of same sex marriage. The Scottish Government has tried to mitigate these by providing protections, such as the protections outlined at paragraphs 90 to 93 for religious and belief bodies and celebrants. Other religious and belief bodies have welcomed the planned introduction of same sex marriage and the opportunities for them to take part.

167. On sexual orientation, the Bill allows same sex couples to marry, thus increasing equality of opportunity.

168. On gender reassignment, the Bill removes the requirement on married transgender people to divorce before obtaining a full GRC. It also makes provision so that transgender people in a civil partnership can obtain a full GRC and stay together (in the civil partnership if both are acquiring a new gender or by changing the relationship to a marriage if one of them is acquiring a new gender). This increases equality of opportunity markedly for those affected.

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<sup>35</sup> This is at <http://www.scotland.gov.uk/Publications/2012/12/9433/272408>

169. On age, data is available on the ages at which people marry or enter into a civil partnership and on how views on same sex marriage can be affected by the age of the person holding the views. However, it is hard to see any equality impact on the protected characteristic of age.

170. There is no evidence that the Bill has any impact on the protected characteristics of disability or race.

171. On sex, it appears that more women than men enter into civil partnership. However, it is hard to see any equality impact on the protected characteristic of sex.

### **Human rights**

172. The Scottish Government considers that the Bill appropriately balances various rights. Those include the rights of those wishing to enter into a same sex marriage or civil partnership and the rights of religious and belief bodies and celebrants who do not wish to solemnise same sex marriages or register civil partnerships.

173. The Bill allows same sex couples to marry. It allows religious and belief celebrants who wish to solemnise such marriages, and register civil partnerships, to do so but also contains no requirement on any religious or belief body or on any religious or belief celebrant to make a request or apply to be authorised to solemnise or register a same sex marriage or civil partnership. The Bill respects the right of celebrants to hold any beliefs in relation to the solemnisation of same sex marriages and registration of civil partnerships. The Bill also makes it clear, in section 14, that the introduction of same sex marriage has no adverse impact on existing rights to freedom of expression.

174. The provisions of the Bill appear to the Government to be a proportionate response, dealing with conflicting aspirations.

175. The Government understands that the leading ECHR case on same sex marriage is *Schalk and Kopf v Austria*<sup>36</sup>. Paragraph 61 of the judgment notes that “the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State”. Paragraph 62 goes on to say that: “In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society”.

176. Therefore, the Government considers its proposals on same sex marriage and the religious or belief registration of civil partnerships are in line with the leading relevant case from the European Court of Human Rights.

177. In addition, the Government does not consider that any of the other provisions in the Bill conflict with the European Convention on Human Rights.

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<sup>36</sup> The judgment in *Schalk and Kopf v Austria* is at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605#{"itemid":\["001-99605"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605#{)

### **Island communities**

178. The Bill has no identified differential effect on Scotland's island communities.

### **Local government**

179. The Bill has an impact on registration services provided by local government. These are considered in more detail in the Financial Memorandum and in the partial Business and Regulatory Impact Assessment (BRIA) prepared as part of the second consultation<sup>37</sup>.

180. In brief, local authorities will no longer need to approve places where civil marriage ceremonies can take place. In future, civil marriage ceremonies can take place anywhere (other than religious premises) agreed between the couple and the registrar. Local authorities may lose licensing income in relation to approved places but will also be relieved of a licensing burden. There may also be increased demand for civil marriage ceremonies.

181. Local authority registrars will also need to familiarise themselves with arrangements for same sex marriage and for religious and belief registration of civil partnership. Familiarisation should be straightforward as arrangements are built on existing arrangements.

### **Sustainable development**

182. The Bill has no effect on sustainable development.

### **SECTION 104 ORDER**

183. There are a number of consequences flowing from the Bill which are matters reserved to the UK Parliament under the Scotland Act 1998. The Scottish Government and the UK Government will prepare an order under section 104 of the 1998 Act to cover these matters. The order will be voted on at Westminster.

184. At the moment, the Scottish Government has identified the following areas to be covered by the order:

- the amendment to the Equality Act 2010 to provide further protection as regards discrimination (more details on this are contained in paragraph 93);
- amendments to the Social Security Contributions and Benefits Act 1992; the Pension Schemes Act 1993 and the Human Fertilisation and Embryology Act 2008. These enactments are all reserved. The amendments made to them by the UK Bill following the proposed introduction of same sex marriage south of the border only extend to England and Wales and so amendments will be needed for Scotland;
- provision for Scottish same sex marriages to be recognised as civil partnerships in Northern Ireland;

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<sup>37</sup> The partial BRIA is at <http://www.scotland.gov.uk/Publications/2012/12/9433/272407>

*This document relates to the Marriage and Civil Partnership (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 26 June 2013*

- ensuring that references to being married in existing and new legislation are taken to be read as applying equally to opposite sex and same sex marriage in relation to reserved matters. (Section 4 of this Bill only extends to devolved matters);
- amendment to section 14 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to reflect that the Bill makes bigamy a statutory offence in Scotland rather than a common law offence;
- provision so that transgender people who married or entered into a civil partnership in Scotland but now live elsewhere in the UK are recognised under the laws applying elsewhere in the UK, as well as under Scots law;
- potentially, provisions to protect Scottish religious and belief celebrants carrying out armed forces weddings overseas, so that they do not need to carry out same sex ceremonies. (Schedule 6 to the UK Bill already has protections but these may need to be extended for marriages having a connection with Scotland);
- potentially, provisions to allow transgender persons resident in England and Wales but who married in Scotland to go to the High Court to appeal if they were issued with the incorrect Gender Recognition Certificate.





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

## **POLICY MEMORANDUM**

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