

# **CIVIL PARTNERSHIP (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **INTRODUCTION**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Civil Partnership (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **OUTLINE OF BILL PROVISIONS**

3. The Bill is comprised of 15 sections and 2 schedules.

4. The Bill makes civil partnership available to mixed sex couples. It includes provisions on eligibility, registration, dissolution, family law matters, recognition of similar relationships from other jurisdictions, gender recognition, and forced civil partnership. The Bill confers powers on the Scottish Ministers to make regulations in relation to:

- recognition of similar relationships from other jurisdictions;
- prescribing religious or belief bodies for the purposes of registering mixed sex civil partnership;
- prescribing religious bodies for the purposes of the provisions on postponement of decree of dissolution where a religious impediment to marriage exists;
- ancillary provisions; and
- commencement.

5. Generally, the powers conferred by the Bill relate to matters where, due to their nature, a flexible approach is needed. Therefore, they can appropriately be dealt with in subordinate legislation.

### **RATIONALE FOR SUBORDINATE LEGISLATION**

6. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has carefully considered the need to:

- strike the appropriate balance between the importance of the issue and providing sufficient flexibility to respond to changing or unforeseen circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment; and
- anticipate the unexpected, which might otherwise frustrate the purpose of the provision approved by the Parliament.

## **DELEGATED POWERS**

### **Section 2(3)(f) (inserted section 213(7) of the Civil Partnership Act 2004) – specification of overseas different sex relationships for the purposes of recognition in Scotland**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations made by Scottish statutory instrument</b>
<b>Parliamentary procedure:</b>	<b>affirmative where the regulations amend the description of a relationship or omit a relationship, and negative where a relationship is being added</b>

#### ***Provision***

7. Sections 212 to 218 of the Civil Partnership Act 2004 (“the 2004 Act”) currently provide for the recognition in Scotland as civil partnerships of same sex relationships other than marriages registered overseas. Generally, relationships will be recognised if they meet general conditions or if the type of relationship has been specified. Section 213 provides for the specification of relationships for this purpose. This section is amended by section 2(3) of the Bill to make provision for the specification of overseas mixed sex relationships.

8. Part 2 of Schedule 20, added to the 2004 Act by schedule 1 of this Bill, contains a list of overseas mixed sex relationships that will be specified for the purposes of recognition. Section 2(3)(f) inserts a new subsection (7) into section 213 of the 2004 Act which provides for the Scottish Ministers, by regulations, to amend Part 2 of Schedule 20 by adding a relationship, amending the description of a relationship, or omitting a relationship.

#### ***Reason for taking power***

9. The purpose of taking the power is to provide flexibility so that changes in the law overseas can be reflected in Part 2 of Schedule 20. This is consistent with section 213(2), which gives powers to the Secretary of State to amend the list of same sex relationships from overseas that currently appears in Schedule 20.

#### ***Choice of procedure***

10. The procedures which are to apply to regulations modifying the list of mixed sex relationships in the new Part 2 of Schedule 20 reflect those which apply to regulations under the existing power (discussed in paragraph 9) to modify the list of same sex relationships in Schedule 20.

11. The Scottish Government's view is that the affirmative procedure is appropriate for regulations amending a description of a relationship or omitting a relationship: given the potential implications for couples whose relationship might cease to be recognised as a civil partnership, greater scrutiny by Parliament is appropriate. A lesser degree of scrutiny would be needed where a relationship is being added, making the negative procedure appropriate, as regulations in this area would not have the same potential to impact adversely on a couple's existing status.

**Section 2(4)(b) (inserted section 215(3B) of the 2004 Act) – recognition of overseas mixed sex relationships: date relationship to be treated as having been created – contrary provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

*Provision*

12. Section 215 of the 2004 Act provides that an overseas relationship is to be treated as having been entered into at the time it is registered in the overseas jurisdiction or at the time section 215 originally came into force, whichever is later. Section 2(4) amends section 215 to allow the Scottish Ministers to make contrary provision as to the application of that provision to overseas mixed sex relationships registered before subsection (3A) (inserted by section 2(4) of the Bill) comes into force.

*Reason for taking power*

13. This power is needed to address situations where, when an overseas mixed sex relationship is recognised as a civil partnership, treating it as having been formed before it became possible to register mixed sex civil partnerships in Scotland does not work appropriately in the context of the rights and responsibilities that follow from recognition.

14. Once overseas mixed sex relationships are treated as civil partnerships in Scotland, under the provisions of the Bill, it is not anticipated that difficulties will generally arise from treating such a civil partnership as having been formed before the introduction of mixed sex civil partnership in Scotland. However, there may be instances, particularly in the context of rights that are dependent on when a civil partnership was entered into, such as survivor benefits in pensions schemes, when it will be appropriate to modify or disapply the effect of the general rules in section 215(2).

15. The power includes the ability to make consequential, supplementary, incidental, transitional, transitory or saving provision. If it is necessary to provide under subsection (3B) that civil partnerships are to be treated for certain purposes as having been formed other than on the date on which the overseas relationship was registered, it may be necessary or desirable to be able to make such further provision in order to address any anomalies or inconsistencies that might arise from that provision.

***Choice of procedure***

16. Negative procedure is in line with the approach taken in section 11(4) to (6) of the Marriage and Civil Partnership (Scotland) Act 2014, on contrary provision relating to the date when a marriage formed by changing a civil partnership is to be treated as having started.

**Section 3(4) – interim recognition of overseas mixed sex relationships: contrary provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

***Provision***

17. Section 3 of the Bill makes provision regarding the treatment of certain mixed sex relationships entered into outside Scotland in the period prior to the coming into force of the provisions of the Bill that will allow mixed sex couples to register civil partnerships in Scotland. Subsection (2) provides for such relationships to be treated as marriages during that interim period. Subsection (4)(a) confers a power on the Scottish Ministers to specify purposes for which that is not to apply. Subsection (4)(b) confers a power to make transitional or saving provision in connection with subsection (2) ceasing to have effect.

***Reason for taking power***

18. The Scottish Ministers' view is that it may be necessary to specify certain situations in which interim recognition of a mixed sex relationship as a marriage is not to apply. Treating mixed sex civil partners as if they were married in the period before the Bill provisions enabling mixed sex civil partnerships to be registered in Scotland can be commenced ensures that their relationship is subject to a comprehensive scheme of rights and responsibilities. The power ensures that regulations can be made if it should prove necessary not to treat mixed sex civil partners as married during the interim period for certain purposes. This might be required, for example in areas such as survivor benefits in pensions.

19. The power includes the ability to make transitional or saving provisions in relation to the interim scheme of recognition ceasing to have effect. Such provisions might be needed to ensure the continuing effect of any action taken on the basis of the relationship being treated as a marriage once it is recognised as a civil partnership.

***Choice of procedure***

20. The Scottish Government's view is that negative procedure is appropriate. These regulations are not amending primary legislation and the power is limited, capable of being exercised only in relation to the period while the scheme of interim recognition exists. Use of negative procedure is also typical for regulations making transitional or saving provisions.

**Section 5(3) (inserted section 94A(2A)(a)(i) of the 2004 Act) – registration of civil partnership: power to prescribe religious or belief bodies whose celebrants are authorised to register mixed sex civil partnerships**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** negative

***Provision***

21. Section 94A of the 2004 Act makes provision on the persons who may register same sex civil partnerships. It includes at subsection (1)(a)(i) a power for the Scottish Ministers to prescribe religious or belief bodies so their celebrants are entitled to register civil partnerships on the body's behalf without those persons requiring to be individually registered or authorised by the Registrar General for Scotland.

22. Section 5(3) of the Bill amends section 94A to include parallel provision regarding persons who may register mixed sex civil partnerships. Section 94A(2A)(a)(i) confers a corresponding power on Scottish Ministers to prescribe religious or belief bodies so that their celebrants are authorised to register mixed sex civil partnership.

23. The Bill also provides for religious and belief celebrants to be individually authorised to register mixed sex civil partnerships by registration with the Registrar General, or through temporary authorisation.

***Reason for taking power***

24. The proposed procedure is in line with current arrangements for prescribing religious and belief bodies so that their celebrants are authorised to register same sex civil partnership. It will reduce bureaucracy by avoiding the need for those bodies that are granted prescribed status to approach the Registrar General on a regular basis seeking to have their celebrants individually registered or granted temporary authorisation. However, bodies have to ask to be prescribed, and are under no obligation to do so. Where celebrants within a religious or belief body have varied views on registering mixed sex civil partnership, it will remain open to the body not to apply and instead to approach the Registrar General for authorisation of specific celebrants rather than the body itself being prescribed.

***Choice of procedure***

25. The Scottish Government considers that negative procedure will provide the appropriate level of scrutiny in relation to regulations which list religious or belief bodies. It is also in line with current practice in relation to prescribing religious or belief bodies to register same sex civil partnership or to solemnise mixed sex or same sex marriage. Before making any regulations, the Scottish Government will liaise with religious or belief bodies to confirm that they wish to be prescribed.

**Section 9(2) (inserted section 121A(7) of the 2004 Act) – postponement of decree of dissolution where religious impediment to marriage exists**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

***Provision***

26. Section 9(2) inserts section 121A in the 2004 Act which gives the court the power to postpone the granting of a decree of dissolution where one of the civil partners will be prevented from entering into a subsequent religious marriage by virtue of a requirement of that religion, and where the other party can act to remove the impediment to the marriage. The provision is limited in its application to cases where the subsequent marriage would be solemnised by a celebrant of a religious body that has been specified by the Scottish Ministers for the purpose. The applicable power to specify religious bodies is conferred by section 121A(7).

27. This replicates arrangements in section 3A of the Divorce (Scotland) Act 1976 (“the 1976 Act”), as inserted by section 15 of the Family Law (Scotland) Act 2006. That provision also gives the court the power, where a party in an action of divorce is prevented by a religious impediment from entering a subsequent religious marriage, to postpone the grant of decree until the other party to the action has acted to remove or to assist in the removal of the impediment if he or she is able to do so. For the purposes of section 3A, a religious marriage is a marriage solemnised by a marriage celebrant of a religious body prescribed in regulations subject to the negative procedure made by the Scottish Ministers.

***Reason for taking power***

28. The power added by section 9(2) is intended to assist those who, as a matter of faith, wish to marry within their religion but who are prevented from doing so until an impediment is removed. The Scottish Government’s view is that the power is needed to provide flexibility in relation to the religious bodies to which the section might apply. The Scottish Ministers would expect to prescribe Judaism, as is currently the case under the 1976 Act. The power enables Ministers to prescribe other religions too, if requests should be made.

***Choice of procedure***

29. The Scottish Government considers that the negative procedure will provide an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for a provision of this nature. It is appropriate that this matter be dealt with by secondary legislation to provide for flexibility to deal with requests from religions to be prescribed.

### **Section 13(1) – ancillary provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative where they add to, replace or omit any part of the text of an Act, and otherwise negative

#### ***Provision***

30. Section 13(1) allows the Scottish Ministers to make by regulations any incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill or any provision made under it.

#### ***Reason for taking power***

31. As with any new legislation, this Bill may give rise to a need for a range of ancillary provisions. The ancillary provision power is needed to ensure that the policy intentions of the Bill can be achieved if further changes are found to be necessary as a result of provisions in the Bill. The ancillary power is wide-ranging, but this reflects that the Bill needs to interact well with existing legislation as well as practices and procedures across a variety of related areas.

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

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

#### ***Choice of procedure***

34. In line with usual practice, regulations will follow the affirmative procedure when they are amending primary legislation. Otherwise, they will follow the negative procedure. It is considered that this provides the appropriate degree of parliamentary scrutiny where primary legislation is being amended, while striking an appropriate balance between expedition and convenience and the need for parliamentary scrutiny where subordinate legislation is being amended.

**Section 14(2) – commencement**

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

***Provision***

35. Section 14(2) enables the Scottish Ministers to commence the main provisions in the Bill by conferring a power to bring the provisions of the Bill into force on such day as the Scottish Ministers may by regulations appoint. Section 14(3) provides that such regulations may include transitional, transitory or saving provision. It is usual practice for such commencement provisions to be dealt with by subordinate legislation.

***Reason for taking power***

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

***Choice of procedure***

37. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act applies. The Scottish Government's view is that there is no justification for taking a different approach to this power in this case.



*This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57) as introduced in the Scottish Parliament on 30 October 2019*

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