

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014

EXPLANATORY NOTES

SCHEDULES

Schedule 2: Change of gender of married persons or civil partners

Part 1 – Applications by married persons and civil partners

Overview

244. This schedule makes changes to the Gender Recognition Act 2004 (“the Gender Recognition Act”).
245. The Gender Recognition Act enables people to change their legal gender by applying for a gender recognition certificate under section 1 of that Act. The Gender Recognition Act extends across the UK but relates largely to devolved matters. The Gender Recognition Panel (“the Panel”) deals with applications for a gender recognition certificate and operates across the UK. Schedule 5 to the UK Marriage (Same Sex Couples) Act 2013 makes similar provision to this schedule in respect of people who married in England and Wales or overseas or entered into a civil partnership in England and Wales.
246. The issue of a full gender recognition certificate enables recipients to be recognised in law for all purposes in their new gender (“the acquired gender”). Under the Gender Recognition Act as enacted, people who are married or in a civil partnership must end their marriage or civil partnership before a full gender recognition certificate can be issued. This is achieved by the Panel issuing an interim gender recognition certificate to married applicants and applicants in civil partnerships. The issue of an interim gender recognition certificate is, in Scotland, a ground for divorce or dissolution of a civil partnership. Once a marriage or civil partnership has been ended the court can issue a full gender recognition certificate.
247. This schedule amends the Gender Recognition Act to enable a marriage solemnised in Scotland (a “protected Scottish marriage”, defined by amendments made in paragraph 2 of the schedule) to continue where one or both parties change their gender and both parties wish to remain married. It also amends that Act to enable a civil partnership registered in Scotland (“protected Scottish civil partnership”, defined by amendments made in paragraph 2) to continue where both parties change their gender simultaneously and wish to remain in their civil partnership.

Paragraph 2 – interpretation

248. **Paragraph 2** inserts definitions of the terms “protected Scottish civil partnership” and “protected Scottish marriage” into section 25 of the Gender Recognition Act (interpretation). Paragraph 2 also amends the existing definitions of “full gender recognition certificate” and “interim gender recognition certificate” to reflect that, in

the future, gender recognition certificates may be issued under more provisions of the Gender Recognition Act.

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

Paragraph 3 – evidence

250. **Paragraph 3** inserts new subsections (6D), (6E) and (6F) into section 3 of the Gender Recognition Act to amend the evidence requirements for an application to the Panel.
251. As enacted, section 3(6)(a) of that Act requires people who apply to the Panel for a gender recognition certificate to submit a statutory declaration as to whether they are married or in a civil partnership. Submission of this evidence enables the Panel to determine whether to issue a full gender recognition certificate (for people who are not married or in a civil partnership) or an interim certificate (for people who are married or in a civil partnership).
252. New subsection (6D) requires applicants who are party to a protected Scottish marriage to include in their statutory declaration an additional declaration that they wish the marriage to continue after the issue of a full gender recognition certificate (if that is the case). It also requires the application to include either a “statutory declaration of consent” by the applicant’s spouse (which is a declaration that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate), or a statutory declaration by the applicant that no such declaration of consent by the applicant’s spouse is included.
253. If an application to the Panel contains a statutory declaration of consent by the applicant’s spouse, new subsection (6E) requires the Panel to inform the spouse that an application has been made.
254. New subsection (6F) provides that applicants in a protected Scottish civil partnership must provide a statutory declaration as to where the civil partnership was registered.

Paragraph 4 – successful applications

255. **Paragraph 4** amends section 4 of the Gender Recognition Act by inserting a new subsection (1A) and by amending and adding to subsections (2), (3), (3A) and (3B) (as substituted and inserted by paragraph 3 of Schedule 5 to the Marriage (Same Sex Couples) Act 2013). Section 4(2) to 4(3B) of the Gender Recognition Act makes provision on the issue of a gender recognition certificate following successful application. The type of certificate received, whether full or interim, depends on the marital or civil partnership status of the applicant and, in the case of a married applicant, whether the applicant’s spouse has consented to the marriage continuing following the issue of a full gender recognition certificate.
256. Section 4(2) to (3B) applies in relation to applicants who are either (i) a party to a marriage under the law of England and Wales or under the law of a country or territory outside the UK (“a protected marriage”) or (ii) a party to a civil partnership under the law of England and Wales (“a protected civil partnership”). The amendments made by paragraph 4 of schedule 2 to the Act make similar provision to that in section 4(2) to 4(3B) of the Gender Recognition Act but, aside from the provision about single applicants, these amendments apply in relation to applicants who are a party to a protected Scottish marriage or a protected Scottish civil partnership.
257. The effect of these amendments is to enable a full certificate to be issued:
- to single applicants (new subsection (1A));

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- to applicants who are party to a protected Scottish marriage and both parties to the marriage consent to the marriage continuing (new subsection (3C)(a)); and
 - to applicants who are party to a protected Scottish civil partnership and the Panel has decided to issue the other party to the civil partnership with a full gender recognition certificate (new subsection (3C)(b)).
258. Interim gender recognition certificates will be issued:
- to applicants in protected Scottish marriages if either party to the marriage has not consented to the marriage continuing (new subsection (3D)(a));
 - subject to subsection (2)(b) (which makes provision about applicants in a protected marriage), to applicants not in a protected Scottish marriage (new subsection (3D)(b));
 - to applicants in protected Scottish civil partnerships where the other party to the civil partnership has not made an application for a gender recognition certificate at the same time as the applicant or the other party has made such an application but the Panel has decided not to issue a full gender recognition certificate to the other party (new subsections (3D)(c) and (3D)(d)); and
 - subject to subsection (2)(c) (which makes provision about applicants in a protected civil partnership), to applicants in a civil partnership which is not a protected Scottish civil partnership (new subsection (3D)(e)).
259. New subsection (3E) requires the Panel to notify an applicant's spouse where it issues a full gender recognition certificate to the applicant.
260. New subsection (3F) provides that section 4(3C)(b) of the Gender Recognition Act is subject to new section 5C (inserted into that Act by paragraph 7 of this schedule).

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

261. **Paragraph 5** inserts new sections 4C, 4D, 4E and 4F into the Gender Recognition Act.
262. New section 4C provides for two situations (“Case A” and “Case B”) when the Panel must issue a full gender recognition certificate.
263. Case A is the situation where an applicant is in a protected Scottish marriage but the applicant's spouse has not issued a statutory declaration of consent. If the applicant's spouse changes his or her mind before the marriage is ended and wishes the marriage to continue, subsection (2) provides that the applicant can apply to the Panel for a full gender recognition certificate. The Panel can only issue a full gender recognition certificate to the applicant following such an application if it is satisfied that the following conditions are met:
- an interim gender recognition certificate has been issued to the applicant (subsection (2)(a));
 - the applicant was a party to a protected Scottish marriage at the time the interim gender recognition certificate was issued (subsection (2)(b));
 - the applicant is in a protected Scottish marriage (subsection (2)(c)); and
 - both parties to the marriage now consent to the marriage continuing (subsection (2)(d)).
264. If these conditions are not met, the Panel will reject an application for a full gender recognition certificate (subsection (4)). Subsection (5) sets a time limit for an

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application under Case A. The time limit is six months from the date on which the interim certificate was issued.

265. Case B is the situation where an application is made by a civil partner in a protected Scottish civil partnership, an interim gender recognition certificate is issued and the couple subsequently decide to change their civil partnership into a marriage under section 3 of the 1977 Act, as amended by this Act. Subsection (3) provides that once the civil partnership has become a marriage, such applicants can apply for a full gender recognition certificate.
266. The Panel can only issue a full gender recognition certificate to the applicant if it is satisfied that the following conditions are met:
- an interim gender recognition certificate has been issued to the applicant (subsection (3)(a));
 - the applicant was a party to a civil partnership at the time the interim gender recognition certificate was issued (subsection (3)(b));
 - the notice of intention to marry must have been given within six months of the date of issue of the interim gender recognition certificate being issued (subsection 3(c));
 - the civil partnership must have become a marriage (subsection (3)(d));
 - the applicant is a party to that marriage (subsection (3)(e)); and
 - the applicant's spouse consents to the marriage continuing (subsection (3)(f)).
267. If these conditions are not met, the Panel will reject an application for a full gender recognition certificate (subsection (4)).
268. Subsection (6) sets a time limit for conversion of an interim certificate to a full certificate under Case B. The time limit is six months from the date when the civil partnership becomes a marriage.
269. Applications under Case A and Case B require the applicant's spouse to issue a statutory declaration of consent (subsection (7)). Applications under Case B must additionally include evidence of the date on which notice of intention to marry was given and evidence that the civil partnership has become a marriage (subsection (8)).
270. Where the Panel receives an application to issue a full gender recognition certificate in either Case A or Case B, subsection (9) requires it to notify the applicant's spouse both of the application and also of the issue of the full gender recognition certificate (if the Panel grants the application).
271. New section 4D provides for the situation where an applicant has made an application for a full gender recognition certificate under new section 4C but before that application can be determined the applicant's spouse dies.
272. Under section 5(2)(b) of the Gender Recognition Act as enacted, if the applicant's spouse dies within six months of the interim gender recognition certificate being issued, the applicant can apply for a full gender recognition certificate within six months of the date the death. This section may not be available to applicants who have applied under new section 4C if the application has not been determined within the time limit in new section 4C(5) and (6). New section 4D provides that in such cases the applicant can still rely on the existing section 5(2)(b) to apply for a full gender recognition certificate.
273. New section 4E makes provision so that a person who is in a protected Scottish marriage may apply under summary application to the sheriff for a full gender recognition certificate. An application may be made where the applicant has an interim gender recognition certificate issued by the Panel and the applicant's spouse has not given a statutory declaration of consent to the marriage continuing after the issue of a full gender recognition certificate.

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274. Under subsection (2), the sheriff must grant the application if the sheriff is satisfied that the applicant was in a protected Scottish marriage when the interim gender recognition certificate was issued; the applicant is still in the marriage; and the application is made to the sheriff within 6 months of the interim gender recognition certificate being issued by the Panel.
275. Subsection (3) requires the sheriff to notify the applicant's spouse when an application is made and when the full gender recognition certificate is issued.
276. Subsection (4) requires the sheriff where a full gender recognition certificate has been issued to send a copy to the Gender Recognition Panel.
277. New section 4F makes provision to allow applications to be made to the Panel for a full gender recognition certificate in certain cases where the civil partner or spouse of a transgender person dies.
278. Section 4F covers two types of cases (cases A and B) where an interim gender recognition certificate has been issued to a person who is in a protected Scottish civil partnership; the civil partners then take steps to change their civil partnership to a marriage but this process is interrupted by the death of the non-transgender partner before a full gender recognition certificate has been issued.
279. Subsection (2) makes provision for 'Case A' where an interim gender recognition certificate has been issued to a person who was in a protected Scottish civil partnership; the civil partners submitted notice of intention to marry within the specified timescales and the non-transgender partner dies before the marriage has taken place.
280. Subsection (3) makes provision for 'Case B' where an interim gender recognition certificate has been issued to a person who was in a protected Scottish civil partnership; the civil partners have changed their civil partnership to a marriage but the non-transgender spouse dies before the transgender person could make an application to the Panel for a full gender recognition certificate under section 4C(3) of the 2004 Act. Where an application is made under section 4C(3) and the non-transgender spouse dies before the application is determined, section 4D of the 2004 Act, as explained in paragraphs 271 to 272, already allows an application to be made to the Panel for a full gender recognition certificate.
281. Applications under section 4F (under both cases A and B) can only be made if the civil partner or spouse died 6 months after the issue of the interim gender recognition certificate. This is because section 5 of the 2004 Act (in relation to spouses) and section 5A of the 2004 Act (in relation to civil partners) already allow applications to be made to the Panel for a full gender recognition certificate when the applicant's spouse or civil partner dies within 6 months of the issue of an interim gender recognition certificate.
282. In relation to case B, the Panel must be satisfied that the applicant's spouse died within six months of the civil partnership becoming a marriage.
283. Under section 4F(4), the applicant must still be single. Under section 4F(5), an application must be made within 6 months of the death of the spouse or the civil partner.
284. Under section 4F(6), an application must include evidence (i) of the death of the spouse or civil partner and of the date the death took place and (ii) of the date on which notice of intention to marry was submitted.

Applications by both civil partners

285. [Paragraph 7](#) inserts new section 5C into the Gender Recognition Act. If both parties to a protected Scottish civil partnership make successful applications to the Panel, section 4(2)(c) of the Gender Recognition Act as amended by this Act applies, and both parties will be entitled to full gender recognition certificates. In such cases, the new

section 5C enables the Panel to issue full gender recognition certificates to both parties simultaneously, ensuring that the continuity of the civil partnership is not affected by the changes in law to the gender of both parties.

286. [Paragraph 7](#) also inserts new section 5D into the Gender Recognition Act. This empowers the Scottish Ministers to make provision by order to set up other procedures to enable the Panel to issue full gender recognition certificates to applicants in a protected Scottish civil partnership. By virtue of amendments made by paragraph 19, any such orders are subject to the affirmative procedure.

Appeals etc.

287. [Paragraph 8](#) makes consequential amendments to section 8 (appeals etc.) of the Gender Recognition Act to reflect the insertion of sections 4C, 4E and 4F of the Act by this Act.
288. [Paragraph 8](#) also inserts new subsection (5B) into section 8 of the Gender Recognition Act and makes a consequential amendment to section 8(6) of that Act. New subsection (5B) enables an applicant's spouse or civil partner to apply to the Court of Session where the spouse or civil partner considers that a full gender recognition certificate has been obtained fraudulently.

Registration

289. [Paragraph 9\(1\)](#) amends section 10 of the Gender Recognition Act. New subsection (1B) provides that if the Panel or the sheriff issues a full gender recognition certificate to one or both parties in a protected Scottish marriage or protected Scottish civil partnership, the Panel must send a copy of the full gender recognition certificate(s) to the Registrar General for Scotland.
290. [Paragraph 9\(2\)](#) makes some consequential amendments to Part 2 of Schedule 3 to the Gender Recognition Act which concerns registration matters in Scotland. In addition, paragraph 9(2) inserts a new paragraph 20A into Schedule 3 to that Act. It provides the Registrar General with a power to make regulations, with the approval of the Scottish Ministers, about the registration of qualifying Scottish marriages and Scottish civil partnerships (defined as marriages and civil partnerships in Scotland where one or both parties (both parties in relation to civil partnerships) have been issued with full gender recognition certificates). Such regulations could make provision for the administrative issue of new marriage and civil partnership certificates.
291. In accordance with the amendments made by paragraph 19, any regulations under the new paragraph 20A of Schedule 3 to the Gender Recognition Act would be subject to negative procedure.

Continuity of marriage

292. [Paragraph 10](#) inserts a new section 11C into the Gender Recognition Act. Section 11C provides that the continuity of a protected Scottish marriage is not affected by the issuing of a full gender recognition certificate to one or both of the parties to the marriage.

Continuity of civil partnership

293. [Paragraph 11](#) inserts a new section 11D into the Gender Recognition Act. Section 11D provides that the continuity of a protected Scottish civil partnership is not affected by the issuing of full gender recognition certificates to both of the parties to the civil partnership under section 4(3C)(b) of that Act.

Foreign gender change and marriage

294. [Paragraph 12](#) repeals section 21(2) to (5) of the Gender Recognition Act (foreign gender change and marriage).

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