

POLICY NOTE

THE MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014 (COMMENCEMENT No. 2 AND SAVING PROVISIONS) ORDER 2014

SSI 2014/212 (C.18)

The above instrument was made in exercise of the powers conferred by section 36 of the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”). The instrument is laid before Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Policy Objectives

The 2014 Act introduces same sex marriage; makes other changes to marriage law; introduces the religious and belief registration of civil partnership; and allows transgender people to stay married and obtain a full gender recognition certificate.

To implement the 2014 Act, the Scottish Ministers need to make a number of pieces of secondary legislation. This Order is part of the implementation process.

This second Commencement Order follows the first Commencement Order, SSI 2014/121. The first Commencement Order commenced sections 7, 19, 20, 22, 23, 27 and 32 of the 2014 Act.

This Order commences sections 4(8) to (10), 9, 10, 11(5) and (6), 17, 18(2)(a), 21, 25, 28, 30 and 33 of the 2014 Act. It also brings into force sections 6, 12(2)(a) and (b), 13(2)(e), 14(2), 24(13) and (15) and 29 of and paragraph 1(4) of schedule 1 and paragraphs 7, 9(2)(b), 15 and 17 of schedule 2 to the 2014 Act for the purposes of making secondary legislation.

Details are outlined below.

This Order commences sections 17 and 25 of the 2014 Act. These relate to the powers of the district registrar to require evidence of nationality from couples seeking, respectively, to enter into a marriage or enter into a civil partnership. The aim of these provisions is 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.

In line with sections 17 and 25, the Registrar General is currently preparing guidance to be issued to registrars on evidence of nationality.

The Order also commences section 21. Currently, a civil marriage ceremony may only take place in a registration office or at an approved place (places approved by the local authority). Section 21 changes this so that a civil marriage may be solemnised at a place agreed between

the couple and the local registration authority, other than religious premises. This flexibility already exists in relation to civil partnership ceremonies. In addition, a religious marriage ceremony may take place anywhere agreed between the couple and the celebrant.

Section 21(3) repeals section 18A of the Marriage (Scotland) Act 1977 (“the 1977 Act”), on approved places. The regulations currently in force under section 18A are the Marriage (Approval of Places) (Scotland) Regulations 2002 (SSI 2002/260, as amended by SSI 2005/657 and SSI 2006/573). The Government considers that these Regulations will be revoked by the repeal of section 18A. To put the matter beyond doubt, the Government intends to make an Order under section 35 of the 2014 Act, on ancillary provision, which will expressly revoke the Regulations.

The Order also commences section 28 which makes bigamy a statutory offence and abolishes the current offence at common law. Making bigamy a statutory offence clarifies the law and ensures the offence is committed by a person purporting to enter into a marriage whilst in a civil partnership. Making bigamy a statutory offence ensures the penalties are proportionate. Common law offences attract a maximum penalty of life imprisonment which the Government considers to be an excessive penalty for the offence of bigamy.

Article 3(2) of the Order contains a saving provision in respect of the common law offence of bigamy. This saving provision ensures that any on-going prosecutions in respect of the common law offence can continue. It also ensures that prosecutions in respect of the common law offence can take place on or after 1 September 2014 in respect of any marriages or purported marriages entered into before 1 September 2014.

The Order also commences provisions under the 2014 Act which provide for powers to make secondary legislation, or provisions which amend existing powers to make secondary legislation. This is to help ensure that these powers can be exercised in coordination with full implementation of the 2014 Act in due course.

Details of the powers which are commenced are:

- Section 4(8) to (10). These allow Ministers to make contrary provision to section 4(1) to (6) of the 2014 Act which provide that references in legislation and in the common law to “marriage”, and related expressions, means both opposite sex marriage and same sex marriage.
- Section 6 to allow Ministers to make regulations under Schedule 1B to the Domicile and Matrimonial Proceedings Act 1973, as inserted by schedule 1 to the 2014 Act, on jurisdiction of the courts in cases relating to same sex marriage. Accordingly, the Order also commences paragraph 1(4) of schedule 1.
- Section 9 which allows Ministers to modify the definition of “qualifying civil partnership” so as to allow civil partnerships registered outwith Scotland to change their relationship to a marriage in Scotland.
- Section 10 which allows Ministers to establish through regulations made under the 2014 Act an administrative route to change civil partnerships into marriage. These regulations would be in addition to the provisions of section 8 under which civil partners can, if they wish, change their relationship into marriage through having a marriage ceremony.
- Section 11(5) and (6) which allow Ministers to make contrary provision to section 11(2)(b) of the 2014 Act which provides that when civil partners change their

relationship to marriage the civil partnership ends and the civil partners are to be treated as having been married to each other since the date on which the civil partnership was registered.

- Section 12(2)(a) and (b). These allow Ministers to make regulations under the 1977 Act to prescribe religious and belief bodies so that their celebrants are authorised to solemnise opposite sex or same sex marriage. They also allow Ministers to make regulations on qualifying requirements for such bodies to meet. Article 3(1) of the Order makes saving provision so that the existing Regulations made under the current provisions of the 1977 Act (the Marriage (Prescription of Religious Bodies) (Scotland) Regulations 1977 (SI 1977/1670)) remain in force. The Government intends to amend those Regulations to update the list of religious or belief bodies whose celebrants are authorised to solemnise opposite sex marriage.
- Section 13(2)(e) which allows Ministers to make regulations under the 1977 Act on qualifying requirements for bodies nominating persons to the Registrar General to act as celebrants.
- Section 14(2) which allows Ministers to make regulations under the 1977 Act on qualifying requirements for temporary celebrants.
- Section 18(2)(a) which allows different forms of Marriage Schedules to be prescribed by regulations under the 1977 Act. For example, a different form may be needed for same sex marriage.
- Section 24(13) which allows Ministers to make regulations under the Civil Partnership Act 2004 (“the 2004 Act”) in relation to prescribing religious or belief bodies so their celebrants can register civil partnerships and in relation to laying down qualifying requirements for prescribed bodies, for bodies nominating celebrants to the Registrar General to register civil partnerships and for temporary celebrants.
- Section 24(15) which allows the Registrar General to prescribe forms under the 2004 Act requiring delivery of the civil partnership schedule.
- Section 29, to enable orders and regulations to be made under provisions of the Gender Recognition Act 2004, as amended by schedule 2 to the 2014 Act. Accordingly, the Order also commences the following provisions of schedule 2: paragraph 7 of schedule 2 (on a more streamlined procedure for civil partners to obtain gender recognition); paragraph 9(2)(b) of schedule 2 (on the Registrar General making regulations on the registration of marriage and civil partnership following gender recognition); paragraph 15 of schedule 2 for the purpose of making an order on alternative evidence to be accepted by the Gender Recognition Panel where the person seeking gender recognition transitioned some time ago and paragraph 17 of schedule 2 for the purpose of making an order on additional evidence to be supplied to the Gender Recognition Panel where the person seeking gender recognition transitioned some time ago.
- Section 30. This enables Ministers to make regulations under the 2014 Act on the solemnisation of a renewed marriage and the registration of a renewed civil partnership following gender recognition.
- Section 33 which allows regulations under the Registration of Births, Deaths and Marriages (Scotland) Act 1965 which prescribe the form of register of marriages to make different provision for different cases or circumstances. For example, a different form for a register entry may be needed for same sex marriage.

Consultation

Between 2 September and 9 December 2011, the Scottish Government consulted on the registration of civil partnership and same sex marriage: <http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex/consultations>

The Scottish Government then consulted on the draft Marriage and Civil Partnership (Scotland) Bill from 12 December 2012 until 20 March 2013: <http://www.scotland.gov.uk/Publications/2012/12/9433>

The Scottish Government wrote to all local authorities on 10 April 2014 to seek views on commencing section 21 of the 2014 Act on 1 September 2014. This letter followed a meeting organised by National Records of Scotland on 1 April 2014, attended by registrars across Scotland. There was wide-spread support from local authorities for commencing section 21 on 1 September.

Impact Assessments

No impact assessments were prepared for this Commencement Order. However, the Scottish Government prepared a Business and Regulatory Impact Assessment <http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex/BRIA> and an Equality Impact Assessment <http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex/EQIA> for the Bill's introduction to Parliament on 26 June 2013. Accompanying documents were also produced for the Bill in line with the Parliament's Standing Orders: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx>

Financial Effects

There are some financial implications in relation to section 21, allowing civil marriage ceremonies to take place anywhere agreed by the couple and the registrar, other than religious premises, and moving away from the licensing of "approved places". As indicated in paragraphs 47 to 49 of the Financial Memorandum for the Bill [http://www.scottish.parliament.uk/S4_Bills/Marriage%20and%20Civil%20Partnership%20\(Scotland\)%20Bill/b36s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Marriage%20and%20Civil%20Partnership%20(Scotland)%20Bill/b36s4-introd-en.pdf) the move away from licensing is expected to reduce licensing fees income to the 32 councils by a total of £150,000 to £200,000 but, at the same time, authorities will be relieved of the burden of carrying out a licensing function.

**Scottish Government
Justice Directorate
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