

POLICY NOTE

THE MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014 (COMMENCEMENT NO. 3, SAVING, TRANSITIONAL PROVISION AND REVOCATION) ORDER 2014

SSI 2014/287 (C. 28)

The above instrument was made in exercise of the powers conferred by section 35 and section 36 of the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”). The instrument is subject to the negative procedure.

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 (“GRC”).

This third Commencement Order brings into force all of the remaining provisions of the 2014 Act with the exception of provisions relating to religious and belief bodies satisfying qualifying requirements set out in regulations and provisions which increase certain notice periods from 14 to 28 days. This Order also makes transitional and savings provisions and revokes some regulations which no longer have effect.

Provisions on the qualifying requirements are not being commenced at this stage as the Government considers that further detailed consultation is required with religious and belief bodies and other interested parties¹. In particular, the Government needs to consider how any qualifying requirements would work for smaller bodies and what requirements could be applied to all religious and belief bodies seeking to solemnise marriage and register civil partnerships. The Government intends to carry out a full public consultation in the first half of 2015 on potential qualifying requirements.

This third Commencement Order follows the second Commencement Order, SSI 2014/212 as amended by SSI 2014/218. The second Commencement Order, as amended, commenced 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 brought into force sections 6, 12(1), 12(2)(a) and (b), 13(1), 13(2)(e), 14(1), 14(2), 24(1), 24(13) and (15) and 29 of and paragraph 1(1) and (4) of schedule 1 and paragraphs 1, 7, 9(2)(b), 15 and 17 of schedule 2 to the 2014 Act for the purposes of making secondary legislation.

The first Commencement Order commenced sections 7, 19, 20, 22, 23, 27 and 32 of the 2014 Act.

Details on this third Commencement Order are outlined below.

¹ The Government has issued an initial discussion paper which is at <http://www.scotland.gov.uk/Resource/0045/00459045.pdf>

Article 4 makes transitional and savings provisions in respect of the solemnisation of marriages in connection with the coming into force of sections 12 to 14 of the Marriage (Scotland) Act 1977 (“the 1977 Act”). The saving provision in article 4(1) relates to notices of intention to marry submitted to a district registrar under section 3(1) of the 1977 Act before 16 December 2014. The intention is that marriages between persons of different sexes notified before 16 December 2014 can be solemnised by a body that was prescribed under the Marriage (Prescription of Religious Bodies) (Scotland) Regulations 1977 in force at the time the notice was submitted. Under the 1977 Act, a marriage may be solemnised by a minister, clergyman, pastor or priest of a religious body that is prescribed in these regulations.

The transitional provision in article 4(2) ensures that any person currently registered to solemnise marriages under section 9 of the 1977 Act or granted a temporary written authorisation under section 12 is regarded as registered or authorised to solemnise marriages between persons of different sexes only. Section 9 of the 1977 Act currently allows religious bodies that are not prescribed under the 1977 Regulations to nominate members of their body to be registered to solemnise marriages. Section 12 allows any person to be granted a temporary written authorisation to solemnise marriages.

The transitional provision in article 4(2) which allows existing registrations and authorisations to continue is subject to the exception set out in article 4(3) to cover the circumstances where a person will become entitled to solemnise marriages between persons of different sexes through the prescription of their body under regulations that are made under section 8 of the 1977 Act as amended by the 2014 Act. In those circumstances, it is not necessary for the existing nomination or authorisation to continue to have effect under article 4(2). The effect of the transitional provision is that existing authorisations of such celebrants fall on 16 December 2014.

Article 5 makes transitional and savings provisions in respect of overseas same sex marriages. Such overseas marriages are currently treated in Scotland as civil partnerships but will be recognised as marriages from 16 December 2014 when section 26 of the 2014 Act comes into force.

However, article 5(1) provides that this will have no effect on court proceedings in Scotland concerning such marriages where those proceedings were issued under any provision of the Civil Partnership Act 2004 (“the 2004 Act”) or the Family Law (Scotland) Act 1985 (“the 1985 Act”) before 16 December 2014. This is subject to article 5(2) which provides that any such proceedings for occupancy of the family home or exclusions orders under the 2004 Act are to be regarded as proceedings for occupancy or exclusion of the matrimonial home.

Articles 5(3) and 5(4) make transitional and savings provisions for existing court decrees and orders under the 1985 Act and the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (“the 1981 Act”) in relation to overseas marriages that are now treated as marriages. This is equivalent to provision that is made in section 11(7) and (8) of the 2014 Act for civil partners who marry or change their civil partnership into a marriage. A decree of aliment under the 1985 Act will continue to have effect and an occupancy or exclusion order in relation to a family home will be regarded as an order under the 1981 Act in relation to the matrimonial home.

Article 6 formally revokes regulations approving places at which civil marriages may be solemnised. These regulations ceased to have effect when section 21 of the 2014 Act was

commenced on 1 September 2014. Previously, a civil marriage ceremony could only take place in a registration office or at an approved place (places approved by the local authority). Section 21 changed 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.

Article 3 and the Schedule commence the provisions outlined below.

The Order commences section 1. Section 1 amends the 1977 Act in relation to the “forbidden degrees” (persons too closely related to marry) to simplify them (no changes of substance were made) and to reflect same sex marriage.

The Order commences section 2. Section 2 amends the 1977 Act to remove the legal impediment to marriage when both parties are of the same sex. It also makes it clear that when one or both of the parties are domiciled outwith Scotland, it is still possible for them to enter into a same sex marriage here even if such a marriage would be void in their home jurisdiction

The Order commences section 3. Section 3 amends section 3 of the 1977 Act to introduce gender neutral terminology; makes provision so that a person previously in a civil partnership which ended on the other party’s death and who now wishes to marry should supply the death certificate of the other party to the civil partnership and makes provision so there is no need to supply a Certificate of No Impediment (CONI) where a certificate would not be issued by a person’s home jurisdiction just because the parties to the marriage are of the same sex.

The Order commences section 4(1) to (7) and (11) to (15). Section 4 makes provision on references to marriage and related expressions in legislation and private documents. Under section 4(1) to (6), references to marriage and related expressions in existing devolved legislation will be “glossed”, so that they cover both opposite sex and same sex marriage unless any contrary provision is made. Under section 4(15), references in future devolved legislation subject to the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) will be “glossed” by the definitions added to ILRA. Under section 4(11) to (13), references in future private documents will be “glossed”, subject to any contrary provision in the private documents.

The Order commences section 5. Section 5 makes provision on permanent and incurable impotency (so that the rule of law on voidable marriages only applies to opposite sex marriage) and on adultery (so that for the purposes of divorce law it continues to mean sexual intercourse between a man and a woman outwith the marriage).

The Order commences section 6 and schedule 1. Schedule 1 is about jurisdiction of the Scottish courts in cases (eg divorce) relating to same sex marriage.

The Order commences section 8. Section 8 makes provision so that couples in a civil partnership registered in Scotland (including armed forces and consular civil partnerships where the couple elected Scotland as the relevant part of the United Kingdom) can, if they wish, change their relationship to a marriage through having a civil or religious or belief marriage ceremony.

The Order commences section 11(1) to (4) and (7) to (9). Section 11 makes provision generally on the effect of changing civil partnerships to marriages, whether through the

ceremonial route (section 8) or through the administrative route (section 10). Under section 11, the civil partnership ends when the couple enter into the marriage and the civil partners are treated as having been married to each other since the date on which the civil partnership was registered.

The Order commences section 12(1), 12(2)(a), 12(2)(b), 12(2)(c), (3) and (4). The provisions:

- Separate the authorisation process for opposite sex marriage from the authorisation process for same sex marriage.
- Put belief bodies on the same footing as religious bodies.
- Make it clear that the Act does not place any duty on religious or belief bodies and their celebrants to take part in same sex marriage.

The Order commences section 13(1), 13(2)(a) to (c) and (f) to (l) and (3) to (5). These provisions have the following effect:

- Subsection (2)(a) extends the existing nomination process to belief bodies and ensures that the existing process just covers opposite sex marriage.
- Subsection (2)(b) establishes a nomination process for same sex marriage.
- Subsection (2)(c) amends section 9(2) of the 1977 Act, on when the Registrar General should reject a nomination, to reflect the extension of the nomination process to belief bodies and the introduction of same sex marriage.
- Subsection (2)(f) amends the marriage declarations for opposite sex couples so that a gender neutral version is available as well as the traditional “husband and wife” version.
- Subsection (2)(g) adds marriage declarations for same sex couples.
- Subsection (2)(h) reflects the introduction of same sex marriage and also gives the Registrar General the power to restrict any nominee to solemnising marriages in specific places.
- Subsection (2)(i) is a consequential amendment to reflect the introduction of same sex marriage.
- Subsection (2)(j) makes provision so that the register of approved celebrants is in two parts: one for opposite sex marriage and the other for same sex marriage.
- Subsection (2)(k) and (l) are consequential amendments reflecting the extension of the nomination process to belief bodies.

The Order commences section 14(1), 14(2)(a) and (b) and 14(3).

Section 14(2)(a) of the 2014 Act clarifies that temporary authorisation may only be granted to members of religious or belief bodies.

The provisions being commenced in relation to section 14(2)(b) provide that temporary authorisation for a period may be for opposite sex marriage only or same sex marriage only or both and provide that temporary authorisation for a period for same sex marriage may only be granted where the religious or belief body is prescribed for same sex marriage or has nominated celebrants to the Registrar General.

Section 14(3) clarifies the offence under section 24(2)(c) of the 1977 Act of solemnising a marriage not covered by a temporary authorisation.

The Order commences section 15 which makes a number of consequential amendments to reflect that the Act puts belief bodies, belief celebrants and belief marriage ceremonies on the same footing as religious bodies, religious celebrants and religious marriage ceremonies.

The Order commences section 16, which makes provision on the protection of freedom of expression.

The Order commences most of the provisions contained in section 24 of the Act.

Section 24(2) amends section 85 of the 2004 Act to reflect the introduction of religious and belief civil partnerships.

Section 24(3) makes changes relating to the table of forbidden degrees

Section 24(4) amends section 87 of the 2004 Act to reflect the introduction of religious and belief civil partnerships.

Section 24(5) provides a definition of “district registrar” for the purposes of section 88 of the 2004 Act. It includes provision to cover cases where the civil partnership is to be registered in Scottish waters by an approved religious or belief celebrant.

Section 24(6) provides a definition of “district registrar” for the purposes of sections 89, 90, 91, 92 and 94 of the 2004 Act.

Subsection 24(7)(a) makes an amendment to increase consistency in 2004 Act terminology.

Section 24(7)(c) is consequential on subsequent changes.

The provisions of section 24(8) which are being commenced make amendments to increase consistency in 2004 Act terminology; make consequential changes and make it clear that a request for early registration can be made electronically.

Section 24(9) makes provisions on objections. It clarifies where the civil partnership book can be seen and reflects the introduction of religious and belief civil partnerships.

Section 24(10) amends section 93 of the 2004 Act on the place of registration of civil partnerships so that section 93 only extends to civil ceremonies. This reflects the introduction of religious and belief civil partnerships. In particular, amendments are made so that the ban on civil partnerships taking place in religious premises will, in future, only extend to civil ceremonies.

Section 24(11) makes provision on the date and place of religious or belief registration of civil partnerships, reflecting their introduction.

The provisions of section 24(12) which are being commenced make amendments consequential on other changes and adds provision to reflect the introduction of religious and belief civil partnerships.

Section 24(13) makes provision on who can register a civil partnership, including religious and belief celebrants.

Section 24(14) amends section 95 of the 2004 Act. Section 24(14)(a) reflects the introduction of religious and belief celebrants. Section 24(14)(b) makes provision on the return of the civil partnership schedule, following the introduction of religious and belief registration of civil partnerships. Section 24(14)(c) and (d) make provision on registering the civil partnership, following the introduction of religious and belief registration.

Section 24(15) makes provision on the powers of the registrar to require delivery of the civil partnership schedule. This reflects the introduction of religious and belief registration of civil partnerships.

Section 24(16) is a consequential provision reflecting the introduction of religious and belief civil partnerships.

Section 24(17) makes consequential changes to section 96 of the 2004 Act on a civil partnership with former spouse.

Section 24(18)(b) makes it clear that any objections to the issue of a Certificate of No Impediment may be made electronically.

Section 24(19) amends offence provisions under section 100 of the 2004 Act.

Section 24(20) makes provision on Parliamentary procedure for regulations.

Section 24(21) adds definitions to the 2004 Act.

Section 24(22) simplifies the table of forbidden degrees.

The Order commences section 26. Section 26 makes changes to the 2004 Act to remove overseas same sex marriages from the list of relationships recognised as civil partnerships in Scotland. In future, overseas same sex marriages will be recognised in Scotland as marriages.

The Order commences section 29 and schedule 2 to the Act, insofar as not already commenced. The changes made by schedule 2 to the Gender Recognition Act 2004 allow married people to obtain a full GRC and stay married. It also allows persons in a civil partnership to obtain a full GRC and stay in the civil partnership, if both parties acquire a full GRC on the same day.

The Order commences section 31. Section 31 provides that divorce on the grounds of the issue of an interim GRC cannot be obtained when the Gender Recognition Panel issues a full GRC after the issue of an interim GRC but could still be obtained when the sheriff issues a full GRC after the issue of an interim GRC. The relevant circumstances under which a sheriff may issue a full GRC following the issue of an interim GRC are contained in section 4E of the Gender Recognition Act 2004, as inserted by paragraph 5 of schedule 2 to the 2014 Act.

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>

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

The expected costs of introducing same sex marriage and related changes are low, given the general similarity between the rights and responsibilities of civil partners and of same sex married couples.

The Financial Memorandum for the Bill noted that there could be costs of:

- up to £163,800 a year in relation to public sector pension schemes, if there is an increase in the overall number of registered same sex unions;
- one-off costs of £200,000 for National Records of Scotland to update systems, forms and extracts.
- up to £264,000 in total for the Scottish Legal Aid Board, if there is an increase in the overall number of registered same sex unions (and in subsequent divorces).

Minsters have now decided that there should be no charge in the first year for changes from civil partnerships to marriages through the administrative route, so long as the civil partnership was originally entered into when same sex marriage was available. This may lead to additional costs of around £150,000. Marriage extracts (certificates) will continue to be charged for in the usual way.