

## EXPLANATORY MEMORANDUM

### THE MARRIAGE (SAME SEX COUPLES) ACT 2013 (CONSEQUENTIAL PROVISIONS) ORDER 2014

2014 No. 107

1. This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

#### 2. Purpose of the instrument

2.1 This Order makes amendments to subordinate legislation which are consequential on the coming into force of the Marriage (Same Sex Couples) Act 2013 (“the Act”), as well as in consequence of the Civil Partnership Act 2004 (“the 2004 Act”).

#### 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

#### 4. Legislative context

4.1 The Act received Royal Assent on 17th July 2013. It makes marriage of same sex couples lawful in England and Wales, substantially amending the Marriage Act 1949 and other related legislation.

4.2 The Marriage (Same Sex Couples) Act 2013 (Commencement No. 1) Order 2013 brought into force on 30th October 2013 certain provisions of the Act for the purpose of making subordinate legislation, as well as some other provisions. The Marriage (Same Sex Couples) Act 2013 (Commencement No. 2 and Transitional Provision) Order 2014 brings into force on 13th March 2014 the majority of the provisions of the Act extending marriage to same sex couples under the law of England and Wales. This Order comes into force on the same day to align with this.

4.3 This is one of a number of statutory instruments which are being laid before Parliament at the same time and which are necessary for implementation of the majority of the Act. They include, briefly, statutory instruments:

- making consequential and other amendments to primary and subordinate legislation in England and Wales<sup>1</sup>;
- allowing registration of religious buildings and appointment of authorised persons for marriage of same sex couples<sup>2</sup>;

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<sup>1</sup> This Order and the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014.

<sup>2</sup> The Marriage of Same Sex Couples (Registration of Buildings and Appointment of Authorised Persons) Regulations 2014.

- setting out procedures for registration of shared religious buildings for the solemnization of marriages of same sex couples<sup>3</sup>;
- setting out provisions on jurisdiction in the event of divorce or annulment of a marriage of a same sex couple<sup>4</sup>;
- setting out procedures for registration of military chapels for marriage of same sex couples<sup>5</sup>;
- setting out procedures for marriages in British consulates and overseas armed forces bases<sup>6</sup>;
- providing for graduated retirement benefit to be inheritable by a surviving same sex spouse<sup>7</sup>;
- making changes to particular public service pension schemes to provide survivor benefits for married same sex couples on the same basis as civil partners<sup>8</sup>.

## **5. Territorial extent and application**

5.1 This instrument extends to England and Wales only, with the exception of the amendments at paragraphs 18(2)(b), (3)(b) and 19 of Schedule 1 which also extend to Scotland.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The overall purpose of the Act is to make marriage of same sex couples possible under the law of England and Wales, and to ensure that married same sex couples are generally treated in the same way as married opposite sex couples, while making provision to protect religious freedom in relation to the solemnization of marriage. Parity of treatment is achieved in particular by the operation of section 11(1) and (2) of, and paragraphs 1 to 3 of Schedule 3 to, the Act (“the gloss”). The gloss provides that marriage has the same legal effect with regard to same sex couples as it has for opposite sex couples, and for the existing law of England and Wales to be interpreted so as to achieve that result. In some cases additional textual amendments are required to ensure that the correct result is obtained.

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<sup>3</sup> The Marriage of Same Sex Couples (Registration of Shared Buildings) Regulations 2014.

<sup>4</sup> The Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014.

<sup>5</sup> The Marriage of Same Sex Couples (Use of Armed Forces’ Chapels) Regulations 2014.

<sup>6</sup> The Consular Marriages and Marriages under Foreign Law Order 2014, and the Overseas Marriage (Armed Forces) Order 2014.

<sup>7</sup> The Social Security (Graduated Retirement Benefit) (Married Same Sex Couples) Regulations 2014.

<sup>8</sup> The National Health Service Pension Scheme Additional Voluntary Contributions, Compensation for Premature Retirement and Injury Benefits (Amendment) Regulations 2014, and the Police Pensions (Amendment) Regulations 2014.

7.2 There are some exceptions to this parity of treatment, most notably in relation to legislation concerned with pensions where the Government's policy is that married same sex couples should generally be treated in the same way as civil partners.

7.3 The paragraphs below describe the amendments in groups according to their purpose and effect. Some amendments feature in more than one group.

### ***Schedule 1: Consequential amendments to subordinate legislation***

#### *Amendment and repeal which secures equal treatment of all married couples and civil partners*

7.4 There are cases where existing legislation confers rights on women only, for historical reasons. The effect of the gloss in these cases could create results which are thought undesirable as, although the gloss would ensure the provision in question applies to all same sex couples, it would not have any effect on how legislation applies to opposite sex couples. The overall result of the gloss applying could therefore be undesirable as it could exacerbate existing differential treatment of men married to women and women married to men. Where the legislation in question is now obsolete and anachronistic, repealing the whole provision secures equal treatment of all couples in the simplest way.

7.5 The Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014 (which comes into force on 13th March 2014) amends section 6(9)(a) of the Metropolitan Carriage Act 1869 to allow for the transfer of a Hackney Carriage licence on the death of the licence holder to any surviving spouse or surviving civil partner. Paragraph 1 of Schedule 1 makes a corresponding change to the London Cab Order 1934. The Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014 also repeals section 6(9)(b) of that Act. This section provides that a woman who holds a Hackney Carriage licence and who marries while it is current may transfer it to her husband. Unless amended further, this right would not apply to men married to women or civil partners. The right to pass on a licence in this way is a gender-specific provision which is no longer thought to be necessary and so it is being repealed. Paragraph 1 of Schedule 1 makes a corresponding revocation to the relevant subordinate legislation, the London Cab Order 1934.

#### *Amendments to processes concerning registration of births, marriages and deaths*

7.6 A number of amendments in Schedule 1 are concerned with making necessary changes to forms and other records concerned with registration of births, marriages, civil partnerships and deaths to allow for the fact that a married couple may now be of the same sex. In some cases particular amendments are required following the changes to legislation made by the Act. These amendments are in paragraphs 2, 7, 8, 11, 27 and 38 of Schedule 1.

7.7 Paragraph 2 amends the Marriage (Authorised Persons) Regulations 1952 to make them applicable to marriages of same sex couples, and so that they do not refer expressly

to men and women. Paragraph 7 amends the Merchant Shipping (Returns of Births and Deaths) Regulations 1979 to recognise that, where a child has two female parents, they might now be married rather than being in a civil partnership. These changes follow the amendments to the Human Fertilisation and Embryology Act 2008 made by paragraphs 37 to 41 of Schedule 7 to the Act. Paragraph 8 amends the Registration of Marriages Regulations 1986. The amendments made by paragraph 8(2) and (3) reflect amendments made by the Act. The amendments made by paragraph 8(4) amend prescribed forms to reflect the fact that same sex couples can now marry. Paragraph 11 amends the Registration of Births and Deaths Regulations 1987 to reflect the fact that same sex couples can marry. Paragraph 27 amends the Registration of Marriages (Welsh Language) Regulations 1999 governing registration of marriage, mirroring the amendments made to the English language forms in paragraph 8(4). Paragraph 38 makes similar amendments to prescribed forms in the Civil Partnership (Registration Provisions) Regulations 2005.

*Amendments ensuring relevant legislation applies to all married couples regardless of gender*

7.8 As noted above, some provisions in existing legislation are drafted in gender-specific language. The effect of the gloss is to extend the effect of the provisions to all same sex couples, which means those people married to someone of the opposite sex not originally caught by the legislation are the only class of married people to which the legislation does not apply. For example, a legislative provision referring to “widows” is interpreted as referring to women formerly married to men, men formerly married to men and women formerly married to women, but not to men formerly married to women. Where such a result is undesirable, specific amendment is required so that all married people are treated alike. Such amendments are made in paragraphs 3, 4, 12, 13, 47(4), 49(4) and 51(4).

*Amendments defining “couple” or amendments to descriptions of relationships in similar terms*

7.9 Schedule 1 also contains a number of amendments to various definitions of “couple” in existing legislation. These definitions were commonly constructed on the assumption that only opposite sex couples could be married and that civil partnership was the only legal relationship available to same sex couples; therefore when they refer to same sex couples (whether in a legal relationship or cohabiting), they do so in terms which may now be confusing. The amendments in this group replace such definitions with new provisions, which make clear that the term “couple” includes married couples and civil partners living as members of the same household; it also includes opposite sex couples who are not married but are living together as if married, and same sex couples who are not married or in a civil partnership but are living together as if married. These amendments therefore ensure that all such couples are treated alike. These identical provisions are contained in paragraphs 6, 9, 10, 14 to 16, 20 to 22, 26, 28 to 30, 32, 37, 40, 41, 45, 54, and 55.

7.10 Schedule 1 also contains amendments to other descriptions of relationships, such as references to “partner” and “related partner” and couples who are living together, to ensure that the same result is achieved. These amendments are in paragraphs 17(2), (3), (5)(e)(ii), (f)(iii), (g) and (h), and (7)(b) and (c), 23, 24, 33, 35, 36, 42, 43, 47(2) and (3), 48(3) to (5), 49(2) and (3), 50(3) to (5), 51(2) and (3), 52(3) to (5), and 53.

*Amendments concerning couples who were not prevented from marrying or forming civil partnerships*

7.11 Some legislation concerned with pension rights for members of the armed forces provides that a surviving adult dependant of a member may be entitled to a pension in certain circumstances. In some cases the legislation provides that, in order to claim, a dependant who was not married to, or a civil partner of, the member has to comply with certain conditions: one of these is showing they were not prevented from marrying or forming a civil partnership. Given that same sex couples can now marry, the wording of these provisions needs to be updated. The amendments at paragraphs 34, 39, 46, 48(2), 50(2) and 52(2) of Schedule 1 make the necessary changes to legislation dealing with such pension rights.

*Other consequential amendments*

7.12 Paragraph 17 of Schedule 1 amends the Occupational Pension Schemes (Contracting-out) Regulations 1996 in various respects. Paragraphs 17(2), (3), (5)(e)(ii), (f)(iii), (g) and (h), and (7)(b) and (c) all make amendments to reflect the fact that same sex couples can marry. The amendments made by paragraphs 17(4), (5)(a) to (d), (e)(i), and (f)(i) and (ii), (6) and (7)(a) make specific provision for married same sex couples which are in consequence of amendments made in Schedule 4 to the Act. These Regulations currently only refer to benefits payable to widowers and surviving civil partners. The amendments insert references which, when interpreted in the light of paragraph 5 of Schedule 3, and paragraph 20 of Schedule 4, to the Act, ensure that married same sex couples are also covered. The amendments made by paragraphs 18(2)(a) and (3)(a) to the definition of “guaranteed minimum pension” in the Contracting-out (Transfer and Transfer Payments) Regulations 1996 need to be read in conjunction with the amendments in paragraph 19 of Schedule 4 to the Act, which amend the definition of “guaranteed minimum pension” in the Pension Schemes Act 1993 so that it now includes surviving same sex spouses.

7.13 Paragraph 31 amends the Open-Ended Investment Companies Regulations 2001 to ensure that the Regulations concerning particulars of directors can cater for a change of a name following a marriage of a same sex couple.

7.14 Paragraph 44 amends the Occupational Pension Schemes (Modification of Schemes) Regulations 2006, which make provision about how trustees of pension schemes can vary schemes so as to provide for entitlements to be given to new groups without this affecting the subsisting rights accrued by the current members of the scheme. When civil partnerships were introduced, the Regulations were amended specifically to

provide that payments could be made to civil partners. Similar amendments are needed now to cater for married same sex couples.

7.15 Paragraph 56 amends the Pensions Increase (Review) Orders for each of the years 1991 to 2013 (with the exception of 2010 when no such order was made). These amendments are necessary so that increases in the annual rate of the pensions of survivors of same sex spouses in public service pension schemes can be calculated correctly. The amendments also add a reference to civil partners, so that increases in the annual rate of the pensions of survivors of civil partners in public service pension schemes can be correctly calculated (see the following paragraph).

#### *Amendments consequential to the Civil Partnership Act 2004*

7.16 A trawl of existing legislation to identify amendments consequential to the Act also revealed some provisions which were inadvertently not amended as part of the implementation of the 2004 Act. This Order therefore puts this right by making the necessary amendments. Paragraph 5 of Schedule 1 makes such a change to the Merchant Shipping (Maintenance of Seamen's Dependants) Regulations 1972, which make provision about retention of certain costs by an employer on behalf of relevant authorities which have borne those costs during a seaman's employment on a ship; some of these costs may relate to those required to meet the needs of the seaman's spouse. As a result of the Act, this provision (in so far as it applies to England and Wales) applies in respect of all married couples, whether opposite sex or same sex. The amendment at paragraph 5 ensures that it now also applies in respect of civil partners. References to civil partners (to ensure equal treatment with married couples) are also added by paragraphs 1, 3, 4, 12, 13, 18(2)(b) and (3)(b), 19, 25, 47(4), 49(4), 51(4) and 56.

#### *Schedule 2: Amendments to Welsh subordinate legislation*

7.17 Schedule 2 contains amendments to Welsh subordinate legislation to ensure that it has the correct effect following the Act.

7.18 The amendments in Schedule 2 deal with situations where couples, being neither married nor in a civil partnership, are living together as if they were married. As with some of the legislative provisions referred to above, some of these provisions are drafted in terms which suggest that only opposite sex couples can be married and so these have been amended to make clear to the reader the intended effect of the legislation. The amendments made in each case replace or update terms such as "husband or wife" with terms which cover spouses of the same or opposite sex. References to civil partners are also inserted into the Selective Licensing of Houses (Specified Exemptions) (Wales) Order 2006 by paragraph 7.

## **8. Consultation outcome**

8.1 Prior to introduction of the Marriage (Same Sex Couples) Bill the Government carried out a consultation on how marriage of same sex couples should be introduced,

which ran for 13 weeks and closed on 14th June 2012. There were over 228,000 responses, of which 53% were in favour of the proposals, and a number of large petitions which were opposed to the proposals. This was followed by the publication of the Government response, “Equal marriage: The Government’s response”. Both the consultation and response documents are available at <https://www.gov.uk/government/consultations/equal-marriage-consultation>.

## **9. Guidance**

9.1 No guidance has been prepared specifically in relation to this Order as it is a largely technical instrument intended to ensure that the law works as envisaged in the Act. However, guidance has been issued by the General Register Office to registration service staff who will be involved with processes related to marriage of same sex couples. In addition, guidance on the Act will be produced by the Equality and Human Rights Commission.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is negligible – no cost has been identified for business. There may be some costs for religious organisations relating to places of worship being registered for marriages of same sex couples, but these will be at the same level as the fees for registration of buildings for marriage of opposite sex couples, and lower where the building is already registered for that purpose.

10.2 The impact on the public sector consists of costs which fall primarily on public bodies which need to adjust information technology systems or administrative processes to register same sex couples as married. These include the General Register Office, Department for Work and Pensions, Office for National Statistics, Her Majesty's Revenue and Customs, Ministry of Justice, and Her Majesty’s Courts and Tribunals Service. There may also be some familiarisation costs for local authorities who employ registrars to conduct civil marriage ceremonies.

10.3 An impact assessment has not been prepared for this instrument as no cost on business is foreseen, but an impact assessment was published alongside the Act, which remains current, and this is available at <https://www.gov.uk/government/publications/marriage-same-sex-couples-bill>.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 The operation of the Act will be subject to review after 5 years. Work is being undertaken to identify information which will be required in order to evaluate the

effectiveness of the Act and to put in place, where necessary, the means of gathering that information.

**13. Contact**

David Ware at the Department for Culture, Media and Sport Tel: 0207 211 6343 or email: [david.ware@culture.gsi.gov.uk](mailto:david.ware@culture.gsi.gov.uk) can answer any queries regarding the instrument.