EXPLANATORY MEMORANDUM TO

THE MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014 AND CIVIL PARTNERSHIP ACT 2004 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2014

2014 No. [XXXX]

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

This Order contains provision which is necessary or expedient in consequence of the Marriage and Civil Partnership (Scotland) Act 2014 ("the 2014 Act"). The Order also contains provision relevant to the Civil Partnership Act 2004 ("the 2004 Act"). It will update existing UK legislation to give the 2014 Act full effect and ensure similar treatment for Scottish same sex couples and transgender people across Great Britain. It will also allow for same sex marriages solemnised in Scotland to be recognised as civil partnerships in Northern Ireland.

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

3.1 This Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113(2), (3), (4), (5) and (7) of the Scotland Act 1998 ("the 1998 Act"). Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament which contains provisions which are necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament.

3.2 Additionally, this Order is also to be made in exercise of the powers conferred by section 259(1) of the 2004 Act. Section 259 of the 2004 Act provides for subordinate legislation to be made in the UK Parliament which contains provisions in connection with civil partnership.

3.3 This Order is subject to affirmative resolution procedure in the UK Parliament.

4. Legislative Context

4.1 This Order is primarily to be made in consequence of the 2014 Act which was passed by the Scottish Parliament on 4th February and gained Royal Assent on 12th March 2014. The 2014 Act introduces same sex marriage and the religious and belief registration

of civil partnership in Scotland; allows transgender people who married in Scotland to stay married and obtain a full Gender Recognition Certificate and makes other changes to marriage and civil partnership law in Scotland.

4.2 The 2014 Act is broadly equivalent to the Marriage (Same Sex Couples) Act 2013 ("the 2013 Act"), which introduced same sex marriage in England and Wales. The 2013 Act is being implemented in two phases, the first phase having been done through SI 2014/560 and SI 2014/107. The Government has announced that further Orders will implement the second phase by 10th December 2014.

4.3 This Order makes similar consequential provision for Scotland, in relation to reserved matters (e.g. pensions), as is contained in SI 2014/560 and 2014/107. This is because the 2013 and the 2014 ASP enact similar propositions and give rise to similar consequential provision. See paragraphs 7.2-7.14 for more detail.

4.4 In addition to the amendments this Order will make in consequence of the 2014 Act (detailed in section 7), the Order will also rely on powers in the 2004 Act to pick up certain missed references to civil partnerships in reserved legislation extending to Scotland.

4.5 The overall intention of the Order as regards extent of the provisions and modifications is to ensure that they have the necessary extent to give full effect to the provision or modification, but that extent does not go wider than is needed. As noted below, in a number of places extent excludes Northern Ireland, to reflect that same sex marriage is not lawful in Northern Ireland. Extent is Scotland only where the same modifications have already been made for England and Wales.

4.6 Articles 4 and 5 and Schedules 1 to 3 - which provides a statutory gloss for the reserved law of Scotland, contrary provision to that gloss and modifications consequential on that contrary provision - have Scottish extent. This is because a similar gloss in the 2013 Act already extends to England and Wales. Orders to be laid in the UK Parliament implementing the second phase will also make consequential provision for Scotland in consequence of that gloss in relation to certain armed forces pension schemes, as well as the Royal Mail pension scheme. That will replicate changes that were made for England and Wales by SI 2014/107.

4.7 Article 6 - which concerns treatment of Scottish same sex marriages in Northern Ireland – has Northern Irish extent only, as the provision is only needed in that jurisdiction.

4.8 Article 7 – which concerns recognition of the dissolution of a deemed civil partnership (deemed in accordance with article 6) – has UK extent because the article concerns recognition anywhere in the UK.

4.9 Articles 8 to 11 have Scottish extent only because the same provisions for reserved pensions law have already been made for England and Wales by the 2013 Act.

4.10 Article 12 extends to England and Wales and Scotland because of the possibility that a couple, who have changed their civil partnership to a marriage in accordance with Scots law, could live in England or Wales, not just Scotland, whilst the relevant GB pensions legislation applies to them.

4.11 Articles 13 to 28 (Chapters 1 to 3 of Part 5) concern consular and armed forces marriage between civil partners. All these articles extend to England and Wales and Scotland only. This reflects the fact that same sex marriage is not lawful under Northern Irish law.

4.12 Schedule 4 – which makes modifications to two reserved Acts about pensions – has Scottish extent only. This reflects that very similar modifications are about to be made for English and Welsh law by subordinate legislation made under the 2013 Act.

4.13 Schedule 5 makes modifications to various primary legislation. Almost all the modifications have Scottish extent only. This is because the legislation has already been modified for England and Wales by subordinate legislation made under the 2013 Act. The three exceptions are as follows. Paragraph 15(6) inserts new sections into the Gender Recognition Act 2004 to protect the continuity of Scottish marriages in England and Wales. This requires England and Wales only extent as the 2014 Act already makes such provision as a matter of Scots law. Paragraph 16 modifies the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 on a UK basis. This is because the relevant power of arrest needs to be usable in any part of the UK not just in Scotland. The amendments to the Equality Act 2010 in paragraph 19 extend to England and Wales and Scotland only, because that Act has mostly GB extent only, and same sex marriage is not lawful in Northern Ireland so the various protections provided for celebrants etc. by the modifications are not needed for that jurisdiction.

4.14 Schedule 6 makes modifications to various subordinate legislation. All the modifications have Scottish extent only. This is because the legislation has already been modified for England and Wales by subordinate legislation made under the 2013 Act.

5. Territorial Extent and Application

5.1 Articles 1 to 3, 7, 29, and, paragraphs 15 (7) and 16 of Schedule 5 extend to England and Wales, Scotland and Northern Ireland.

5.2 Articles 12 to 28, paragraph 2(7) of Schedule 4 and paragraphs 15(1), (2), (3), (4) and 19 of Schedule 5 extend to England and Wales and Scotland only.

5.3 Paragraph 15(6) of Schedule 5 extends to England and Wales only.

5.4 Articles 4, 5, 8 to 11, and Schedules 1, 2, 3, Schedule 4 (except paragraph 2(7)), Schedule 5 (except paragraphs 15(1), (2), (3), (4), (6) and (7), 16 and 19) and Schedule 6 extend to Scotland only.

5.5 Article 6 extends to Northern Ireland only.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

> *"In my view the provisions of the Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014 are compatible with the Convention rights."*

7. Policy background

7.1 This Order will amend the Equality Act 2010, to protect celebrants and others who do not wish to take part in same sex marriage and the registration of civil partnerships. This includes protection for armed forces chaplains overseas, should they be asked to solemnise the marriage of a same sex couple who elect Scotland as the relevant part of the United Kingdom.

7.2 The Order introduces a statutory "gloss" for the reserved law of Scotland so that references to marriage (and related expressions) in legislation which would be outwith the competence of the Scottish Parliament means both opposite sex and same sex marriage, unless contrary provision is made.

7.3 It makes provision for Scotland along similar lines to Part 5 (state pensions) and Part 6 (occupational pensions and survivor benefits) of Schedule 4 to the 2013 Act although paragraph 17 of Schedule 4 already extends to Scotland and no further provision is needed). Similarly, the Order makes provision for Scotland along similar lines to the following paragraphs of Schedule 7 to the 2013 Act -

- paragraphs 29 and 30 (Social Security Contributions and Benefits Act 1992),
- paragraphs 31 and 32 (Pension Schemes Act 1993) and
- paragraphs 37 to 41 (Human Fertilisation and Embryology Act 2008)

7.4 Additionally, the Order makes provision for Scotland along similar lines to the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014 (SI 2014/560), insofar as this Order covers reserved matters. Similarly, provision is made for Scotland along similar lines to the Marriage (Same Sex Couples) Act 2013 (Consequential Provisions) Order 2014 (SI 2014/107), insofar as this Order covers reserved matters.

7.5 Paragraph 5 of Schedule 5, and paragraph 3 of Schedule 6 to the Order make equivalent provision for Scotland as contained in the Social Security (Graduated Retirement Benefit) (Married Same Sex Couples) Regulations 2014 (SI 2014/176). Those regulations make provision about same sex spouses' inheritance of their deceased spouse's graduated retirement benefit. Those regulations only extend to England and Wales.

7.6 Provision is made in the Order so that same sex marriages registered in Scotland are recognised as civil partnerships in Northern Ireland.

7.7 The Order makes provision on the conversion overseas by UK consuls and by the Ministry of Defence of civil partnerships registered in Scotland (including consular and armed forces civil partnerships where the couple elected Scotland as the relevant part of the United Kingdom in which their civil partnership is to be registered). However, this Order does not make provision relating to the fees payable in connection with conversions. The Foreign and Commonwealth Office will make any necessary provision for consular conversions in a Consular Fees Order made under Consular Fees Act 1980 powers.

7.8 The Order makes provision on civil partnerships registered in Scotland changing to marriages overseas through UK diplomatic posts or through the Ministry of Defence. Section 9 of the 2013 Act allows regulations to be made on couples in an England and Wales civil partnership being able to convert their relationship to a marriage. These regulations can cover conversions overseas through UK diplomatic posts or through the Ministry of Defence. Section 8 of the 2014 Act makes provision allowing a civil partnership registered in Scotland (as defined in section 8(3)) to be changed into a marriage by means of a ceremony, and section 10 of that Act allows for change to take place by means of an administrative procedure. It would not have been within the legislative competence of the 2014 Act to make provision about consular or armed forces procedures for changing Scottish-registered civil partnerships to marriages but such provision is expedient as a result of the 2014 Act making same sex marriage (and change of civil partnership to marriage) lawful in Scotland. The intention is that the same service should be offered to civil partners by the FCO and the MoD regardless of where in Great Britain the civil partnership was registered. The service will not extend to civil partnerships registered in Northern Ireland. The section 104 Order makes provision so that couples in a civil partnership registered in Scotland will be able, when certain conditions are met, to change their civil partnership to a marriage through UK diplomatic posts or through the Ministry of Defence.

7.9 UK diplomatic posts overseas will be able to change civil partnerships registered in Scotland to marriages when these conditions are met:

- At least one of the parties to the civil partnership must be a UK national.
- The local jurisdiction must have confirmed in writing to the Foreign and Commonwealth Office that they have no objections to such changes taking place in their jurisdiction.

- The parties must have resided in the consular district for at least 28 days.
- The parties must attend the consular premises in person and must provide evidence of the civil partnership.

7.10 Ministry of Defence officials overseas will be able to change civil partnerships registered in Scotland to marriages when these conditions are met:

- The local jurisdiction must have confirmed in writing to the Ministry of Defence that they have no objections to such changes taking place in their jurisdiction.
- At least one of the parties must be a member of Her Majesty's forces serving in the overseas jurisdiction or a civilian subject to service discipline serving in the overseas jurisdiction or a child living overseas with such a person.
- The parties must attend before the Ministry of Defence official in person and must provide evidence of the civil partnership.

7.11 With respect to provision relating to transgender people, the Order will establish the alternative grounds for applications to the Gender Recognition Panel by long-term transitioned people in a protected Scottish marriage or protected Scottish civil partnership who are resident in England or Wales.

7.12 The Order will make provision so that the spouse and civil partner of a transgender person resident in England and Wales but who has obtained a Gender Recognition Certificate under the 2014 Act can apply to the High Court in England and Wales or Northern Ireland to quash the decision to grant the application on the grounds that its grant was secured by fraud.

7.13 The Order will ensure full recognition in England and Wales and Northern Ireland of transgender people who married or entered their civil partnership in Scotland and obtain a full Gender Recognition Certificate under the 2014 Act.

7.14 The Order will ensure the repeal of section 21(2) to (5) of the Gender Recognition Act 2004 has full extent across Great Britain.

8. Consultation outcome

8.1 Although there has been no public consultation specific to the amendments of this Order, the UK Government and Northern Ireland Executive departments with responsibility for the legislation which this Order affects have been consulted during the drafting of this Order. All amendments contained in this Order have the approval of the relevant departments.

8.2 With regard to wider consultation, the Scottish Government ran *The Registration of Civil Partnerships Same Sex Marriage - A Consultation*, from 2nd September 2011 to 10th December 2011. This consultation sought views on the possibility of allowing religious ceremonies for civil partnerships and the possible introduction of same sex marriage. On 25th July 2012 the Scottish Government published its analysis of the

responses to its consultation. This analysis can be viewed via the following link: http://www.scotland.gov.uk/Publications/2012/07/5671

8.3 Following the above consultation and analysis, the Scottish Ministers announced in July 2012 their decision to introduce same sex marriage and the religious registration of civil partnership in Scotland. The Scottish Government then ran *Marriage and Civil Partnership Bill – a consultation*, from 12th December 2012 to 20th March 2013. This sought views on the detail of the legislation which would introduce same sex marriage and the religious registration of civil partnership in Scotland. It covered not only the introduction of same sex marriage but the detail of protections in relation to religious bodies and celebrants, freedom of speech and education. It also sought views on other changes to marriage law. On 27th June 2013 the Scottish Government published the findings of the independent analysis of responses to this consultation. There were 15,064 consultation responses. Over 99% of responses were submitted by individual members of the public rather than organisations or groups. This analysis can be viewed via the following link: http://www.scotland.gov.uk/Publications/2013/06/2782/0

9. Guidance

This Order stands alone, guidance is not necessary.

10. Impact

10.1 This instrument has no impact of a regulatory nature on the private sector or civil society organisations and will not impose or reduce costs

10.2 There will be no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

The effect of this Order is purely consequential. It does not create new policy or frameworks and therefore no monitoring or review of the effects of this Order are required.

13. Contact

Emma Lopinska at the Scotland Office (Tel: 0131 244 9016; or email: emma.lopinska@scotlandoffice.gsi.gov.uk) can answer any queries regarding the instrument.