EXPLANATORY MEMORANDUM

THE MARRIAGE (SAME SEX COUPLES) ACT 2013 (CONSEQUENTIAL AND CONTRARY PROVISIONS AND SCOTLAND) AND MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014 (CONSEQUENTIAL PROVISIONS) ORDER 2014

2014 No. [XXXX]

1. This explanatory memorandum has been prepared by the Government Equalities Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order replaces a previous draft order called the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) (No. 2) Order 2014 laid on 3 July 2014. The earlier Order has been withdrawn following reconsideration of elements of the Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 to address concerns raised by interested parties, which led to related changes being made to this Order. The amended Order also includes further changes which have been identified as being needed as a result of the passing of the Marriage and Civil Partnership (Scotland) Act 2014.

2.2 The purpose of the Order is first to make consequential amendments to primary legislation to support the second phase of implementation of the Marriage (Same Sex Couples) Act 2013 ("the Act") concerning the conversion of civil partnerships into marriages and enabling couples to remain married where one or both of the couple change legal gender in accordance with the procedure set out in the Gender Recognition Act 2004. The Order also makes provision to secure gender specific treatment in relation to an element of one armed forces pension scheme, contrary to the effect of section 11(1) and (2) of, and paragraphs 1 to 3 of Schedule 3 to, the Act ("the gloss"), and amends the Public Libraries and Museums Act 1964 to allow equal treatment of all couples and civil partners in matters under that Act concerning superannuation. Finally the Order makes some changes to the law of Scotland. It makes specific provision in consequence of the Marriage and Civil Partnership (Scotland) Act 2014 in a small number of cases, and also revokes article 5 of the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014 (S.I. 2014/560) which will not be required once Scotland has commenced section 4(1) of the Marriage and Civil Partnership (Scotland) Act 2014. It also makes associated transitional and saving provision as a result of the revocation.

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 made marriage of same sex couples lawful in England and Wales, substantially amending the Marriage Act 1949 and other related legislation. The bulk of the Act was brought into force on 13th March 2014. The Act also makes provision for the conversion of civil partnerships into marriages, and for married couples to remain married if one or both members acquire a new legal gender. These provisions were not brought into force at that time. This Order is one of a series of instruments which will implement these remaining provisions of the Act, the other orders under the affirmative procedure being the Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 and the Consular Marriages and Marriages under Foreign Law (No. 2) Order 2014. Further orders under the negative procedure will be laid in due course.

5. Territorial Extent and Application

5.1 This instrument extends to England and Wales. Articles 1, 4, 5, 6 and paragraph 4 of the Schedule, and articles 2 so far as it relates to that paragraph also extend to Scotland.

6. European Convention on Human Rights

The Rt. Hon. Nicky Morgan, Secretary of State for Education and Minister for Women and Equalities, has made the following statement regarding Human Rights:

In my view the provisions of the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) and Marriage and Civil Partnership (Scotland) Act 2014 (Consequential Provisions) Order 2014 are compatible with the Convention rights.

7. Policy background

7.1.1 The overall purpose of the Act is to make marriage of same sex couples possible in England and Wales, and to secure that same sex married couples are generally treated in the same way as opposite sex married couples. This is achieved by way of the gloss referred to in paragraph 2.2 above. The gloss provides that existing law in England and Wales has the same effect in relation to both same sex and opposite sex married couples and that existing legislation should be interpreted to that effect. Where this is not to be the case (for example in relation to pensions matters where a gender specific result is required), exceptions can be made, and in some cases textual amendments are required to ensure the correct result is obtained. Contrary provision of this kind was made in the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014, and this Order disapplies the gloss (Article 3) so that it will not affect certain provisions of the Reserve Forces Non Regular Permanent Staff (Pension and

Attributable Benefits Schemes) Regulations 2011. The textual amendments to the scheme to ensure it applies appropriately to same sex couples including couples where one member has changed legal gender, are to be made in an order subject to the negative procedure.

7.1.2 The Act also enables a couple to remain married (should they both wish) if one or both of them changes legal gender under the Gender Recognition Act 2004, and for a couple to convert their civil partnership into a marriage, and the Schedule makes provision as a consequence of those changes.

7.1.3 Finally, the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014 (made on 6th March 2014), provides, in article 5, that a marriage of a same sex couple under the law of England and Wales is to be treated as a civil partnership under the law of Scotland. Since then, the Marriage and Civil Partnership (Scotland) Act 2014 ("the Scottish Act") has received Royal Assent (on 12th March 2014), and now provides for marriage of same sex couples in Scotland. So as English and Welsh marriages of same sex couples will be recognised as such in Scotland, article 5 will no longer be needed. Article 4 of this Order therefore revokes article 5 of the earlier Order, from 16th December 2014, the date when the Scottish Act comes into force. Section 4(1) of that Act ensures that section 38 of the Family Law (Scotland) Act 2006 (which governs recognition of English and Welsh marriages in Scotland) includes recognition of marriages of same sex couples. Thereafter a marriage of a same sex couple in England and Wales will be recognised as a marriage in Scotland. The Order also makes transitional and saving arrangements in article 5 so that the change in treatment of the relationship as a result of revocation does not cause difficulty in relation to legal action or other matters affecting the relationship, and further makes some specific provision in consequence of the passage of the Scottish Act.

The Schedule: Consequential amendments to Acts of Parliament

Amendments which support the conversion of civil partnerships into marriages

7.1.4 Paragraph 1 amends the Wills Act 1837 to make provision about the effect of the conversion of a civil partnership into a marriage on a will. The provisions also ensure that a will made under English and Welsh law is not invalidated by a conversion into marriage under English and Welsh law or the change of a Scottish civil partnership into marriage under Scottish law. Marriages resulting from such conversions are excluded from the effect of section 18, which provides for the revocation of a will by marriage except in specified circumstances, and new section 18D provides that a conversion has no effect on a will or disposition in a will. New section 18D also preserves the previous application of section 18B(2) to (6) (which concerns the effect of a civil partnership on a will) to a will or disposition in a will where the civil partnership is subsequently converted into a marriage. Section 18D also provides that references in a will to a civil partnership or civil partners are to be read as references to a marriage or married couple following a conversion, subject to any contrary intention appearing from the will.

7.1.5 Paragraph 2 amends the Perjury Act 1911 to ensure that relevant offences under the criminal law relating to false statements with reference to marriage also apply in the same way to false statements with reference to conversion. Paragraph 10 makes similar provision amending the Forgery and Counterfeiting Act 1981.

7.1.6 Paragraph 3 amends the Marriage Act 1949. Section 45 is amended to reflect the fact that the Act inserted sections 44A to 44D into the Marriage Act 1949 and so an existing cross reference in section 45 needs to be updated. Section 46 of the Marriage Act 1949 provides for the holding of a religious ceremony after a civil wedding. The Act amended section 46 to refer to marriages of same sex couples, including marriages resulting from a conversion of a civil partnership into marriage. The draft Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 allow a registrar to complete a conversion at a wide range of venues, including a place where a section 46 ceremony is to be held. The protective "locks" provided by the Act already apply to section 46 services but, because section 46 must be interpreted broadly, so as to apply to all religions, specific textual amendments to section 46 are made to ensure that the Jewish and Quaker governing authorities are appropriately defined for that purpose, and to ensure that it is clear that this does not limit the application of section 46 to other religions (new subsections 4 and 5). The amendments also make clear that section 46 services can follow housebound, detained or deathbed conversions and conversions which are carried out in the armed forces overseas (a section 46 ceremony can already take place in an armed forces chapel in England and Wales if the relevant requirements are met).

7.1.7 Paragraph 4 amends the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 to ensure that provisions related to the registration of armed forces marriages include marriages resulting from conversions registered in England, Wales and equivalent provision in Scotland.

7.1.8 Paragraph 6 amends the Matrimonial Causes Act 1973 ("the 1973 Act") to make provision about treatment of marriages which result from the conversion of a civil partnership. Section 11 of the 1973 Act sets out the grounds on which a marriage is void and section 12 the grounds on which a marriage is voidable. As a marriage resulting from the conversion of a civil partnership is generally to be treated as having subsisted from the date the civil partnership was formed, in order to ensure the 1973 Act applies properly to these marriages, specific provision is made to except such marriages from the effect of sections 11 and 12 and to make provision for them in new section 12A.

7.1.9 Paragraph 7 amends the Domicile and Matrimonial Proceedings Act 1973 to ensure that paragraph 8 of Schedule 1 to that Act (obligatory stays of matrimonial proceedings) refers to the date of the marriage in a way that applies to all marriages, including those resulting from the conversion of a civil partnership.

7.1.10 Paragraph 9 amends the Legitimacy Act 1976 to ensure that section 1 (legitimacy of children of void marriages) applies appropriately to the children of a void marriage which resulted from the purported conversion of a void civil partnership.

7.1.11 Paragraph 12 amends section 124 of the Social Security Administration Act 1992, which provides for the sharing of information by the registration service for the purpose of certain welfare benefit enactments, so that it applies to a marriage resulting from the conversion of a civil partnership, as it does to other marriages, civil partnerships, births and deaths.

7.1.12 Paragraph 13 amends the Statistics and Registration Service Act 2007 to ensure that the Registrar General can disclose to the Office for National Statistics information about conversions of civil partnerships.

Amendments which provide equal treatment of all couples

7.1.13 Paragraph 5 amends Schedule 1 to the Public Libraries and Museums Act 1964 which makes provision concerning superannuation and other benefits on the transfer of staff, to allow equal treatment of all spouses and civil partners.

Amendments dealing with married couples one or both of whom acquires a new legal gender

7.1.14 Paragraph 8 amends the Social Security Pensions Act 1975. Section 59 of that Act deals with the index-linking of public service pensions. It includes provisions to prevent an element of in effect "double indexation" arising in relation to the guaranteed minimum pension ("GMP") payable to survivors of members of public service pension schemes. Double indexation of the GMP might in effect occur if it was increased by the legislation relating to public service pension schemes and was also in effect increased by the legislation which provides for the index-linking of state pensions. The amendments to section 59 ensure that public service pensions are still increased appropriately once it becomes possible for a couple to remain married when one of them changes legal gender. This will reflect the differing GMP entitlements of a woman who survives a spouse who was female as a result of a gender change which took place while they were married, and those of a woman who survives a female spouse in a case which does not involve a relevant gender change.

7.1.15 Paragraph 11 makes amendments to the Social Security Contributions and Benefits Act 1992 in consequence of the possibility that couples who are married may remain married where one or both undergo a change of legal gender. For historic reasons, women formerly married to men are given more generous state pension survivor benefits than (a) men formerly married to women (b) same sex married couples and (c) civil partners. Where a person entitled to a state pension was to acquire a new gender, that person and their spouse would move from being in a marriage of an opposite sex couple to a marriage of a same sex couple. This would alter the position of female spouses who had originally been married to men but who now are married to women and so the amendments to this Act ensure, by treating them in the same way as women married to men, that they do not experience such an alteration to their inherited entitlement.

Consolidation

7.2 No specific consolidation is planned as a result of this Order, which amends a number of pieces of legislation which are the responsibility of several Departments.

8. Consultation outcome

8.1 No specific consultation has been undertaken on this Order. However, the Government carried out a consultation on how marriage of same sex couples should be introduced prior to introduction of the Act, which ran for 13 weeks and closed on 14 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 for this order as it is a largely technical instrument. However, the General Register Office has produced guidance for staff involved in the conversion process, and the Gender Recognition Panel is updating its information for users, and internal guidance for government staff involved in relevant administrative tasks has been updated.

10. Impact

10.1 A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen over and above that identified in the Impact Assessment published when the Act received Royal Assent. This is available at https://www.gov.uk/government/publications/marriage-same-sex-couples-bill.

10.2 The impact on business, charities or voluntary bodies is negligible – no cost has been identified for business. The impact on the public sector consists of costs which fall primarily on public bodies which will need to put in place IT systems or administrative processes to process and record conversions of civil partnerships into marriages and make arrangements for married couples one of whom undergoes a change of legal gender. These include the General Register Office, Department for Work and Pensions, Office for National Statistics, Her Majesty's Revenue and Customs, and Her Majesty's Courts and Tribunals Service (including the Gender Recognition Panel). There are also some familiarisation costs for local authorities who employ registrars to conduct conversions.

11. Regulating small business

11.1 The legislation does not apply to small business, except that small firms of legal representatives will need to be aware of some amendments contained in it when they are advising on related matters.

12. Monitoring & review

12.1 The operation of the Act will be subject to review after 5 years.

13. Contact

David Ware at Government Equalities Office Tel: 020 7211 6343 or email: david.ware@geo.gsi.gov.uk can answer any queries regarding the instrument.