POLICY NOTE

THE QUALIFYING CIVIL PARTNERSHIP MODIFICATION (SCOTLAND) ORDER 2015

SSI 2015/

The above instrument is made in exercise of the powers conferred by section 9(1) and (2) and 11(5) and (6) of the Marriage and Civil Partnership (Scotland) Act 2014 ("the 2014 Act"). The instrument is subject to the affirmative procedure.

Note on terminology

This policy note refers throughout to "civil partnerships". In countries outwith the UK, the equivalent of civil partnerships are often called something else such as registered partnerships or civil unions. However, the Civil Partnership Act 2004 ("the 2004 Act") makes provision so that overseas same sex relationships are treated as civil partnerships in Scotland, so long as certain criteria are met. Therefore, for simplicity, this policy note refers to "civil partnerships" even though other countries may use different terminology.

Policy Objectives

The 2014 Act introduces same sex marriage and makes provision so that civil partnerships can be changed into marriages. It also makes other changes to marriage and civil partnership law.

Under the 2014 Act couples in a civil partnership registered in Scotland[1] can choose, if they wish, to change their civil partnership into a marriage. Couples may do this by having a marriage ceremony in Scotland (section 8 of the 2014 Act made relevant amendments to the Marriage (Scotland) Act 1977 ("the 1977 Act")) or by going through an administrative process established by regulations[2] made under section 10 of the 2014 Act.

However, these arrangements only extend to civil partnerships registered in Scotland and the Bill which led to the 2014 Act did not, when it was introduced, make any provision for civil partnerships registered outwith Scotland to change to marriages into Scotland. This issue was considered in the Stage 1 report on the Bill by the Equal Opportunities Committee, which recommended provision should be made[3]. Following a debate at Stage 2, a Government amendment was agreed so that an Order could be made to enable civil partnerships registered outwith Scotland to change to marriages in Scotland. That amendment is now section 9 of the 2014 Act and this Order is made under section 9 and powers under section 11.

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[1] Including civil partnerships registered outwith the UK by the UK consular service and the UK armed forces where the couple elected Scotland as the relevant part of the UK and details of the civil partnership are held by the Registrar General of Births, Deaths and Marriages for Scotland.

[2] The Marriage between Civil Partners (Procedure for Change and Fees) (Scotland) Regulations 2014 are at http://www.legislation.gov.uk/ssi/2014/361/contents/made

[3] The Stage 1 report on the Bill is at http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/Reports/eoR-13-05w-rev2.pdf Please see paragraphs 216 to 226 and paragraph 247 for the discussion and recommendation on civil partnerships registered outwith Scotland being able to change into marriages in Scotland.

The Order makes provision so that couples in a civil partnership registered outwith Scotland can change their civil partnership to a marriage in Scotland through having a marriage ceremony. The administrative route will not be available to such couples. The reasons for that are:

- The administrative route is designed to be a straightforward way of allowing couples already in a civil partnership registered in Scotland to change their relationship to marriage here. The registrar will already have undertaken checks when the couple first entered their civil partnership here (and eligibility to enter a civil partnership in Scotland and enter a same sex marriage in Scotland are on the same lines).
- The registrar can easily, and reliably, check the details of the civil partnership registered in Scotland on their IT system.
- The registrar will need to check with a civil partnership registered outwith Scotland that there are no other barriers to marriage (eg too closely related). This could take some time and so following usual marriage notice procedures and periods seems sensible.

Background

Article 3 makes a number of modifications to section 5 of the 1977 Act.

Article 3(2) modifies the meaning of "qualifying civil partnership" set out in section 5(6) of the 1977 Act by substituting a new definition. The effect is to allow relationships registered in England and Wales, Northern Ireland or overseas and treated as civil partnerships in Scotland to change their relationship into a marriage in Scotland, if they so wish.

Civil partnerships in England and Wales and Northern Ireland are registered under the 2004 Act which applies across the United Kingdom and so are treated as civil partnerships in Scotland. Overseas relationships are treated as civil partnerships in Scotland so long as the provisions laid down in Chapter 2 of Part 5 of the 2004 Act are met.

Article 3(4) makes further provision so that civil partnerships registered overseas through the UK armed forces and UK consuls are treated as having been registered in England and Wales or Northern Ireland provided that the parties elected England and Wales or Northern Ireland as the relevant part of the United Kingdom and details of the civil partnership have been sent to the appropriate Registrar General.

Article 3(3) makes a consequential amendment to section 5(7) to take account of the substituted definition so that civil partnerships registered overseas through the UK armed forces and UK consuls where the couple elected Scotland continue to be treated as having been registered in Scotland.

Article 4 makes a number of modifications to section 3 of the 1977 Act.

Article 4(2) modifies section 3(1)(bb) of the 1977 Act so that the requirement to provide an extract from the Scottish civil partnership register to the district registrar only applies to qualifying civil partnerships registered in Scotland. Article 4(3) then adds a new section 3(1)(bc) to provide that parties in a qualifying civil partnership registered outside Scotland must provide the district registrar with equivalent information to an extract and evidence in support of this.

Article 4(4) then modifies section 3(2) of the 1977 Act. Section 3(2) makes provision so that a person submitting notice of intention to marry who cannot provide a relevant document may instead make a declaration to the district registrar and provide other information and evidence that the registrar may require. The modification made by article 4(4) extends this to include cases where the person giving notice is, for one reason or another, unable to provide an equivalent of the extract from the civil partnership register.

Article 4(5)(a) is a consequential drafting change as a result of the modification made by Article 4(5)(b).

Article 4(5)(b) relates to the submission of a Certificate of No Impediment (CONI). Under section 3(5) of the 1977 Act, a person submitting notice of intention to marry who is not domiciled in the United Kingdom is required to submit a CONI issued by the jurisdiction in which he or she is domiciled. The CONI indicates that the person is not subject to any legal incapacity, in terms of the law of that jurisdiction, which would prevent the person from marrying.

There are exceptions from this requirement in certain circumstances. Article 4(5)(b) adds to these exceptions so that a CONI is not required if one would not be issued because the law of the other jurisdiction prevents couples in a civil partnership from marrying each other in Scotland.

Article 5 modifies section 10(7) of the 1977 Act so that only civil partners in a civil partnership registered in Scotland can use the administrative route to change their civil partnership into marriage.

Article 6 makes provision on the effect of marriage between civil partners in a qualifying civil partnership.

Section 11(2) of the 2014 Act makes provision on the effect of changing a qualifying civil partnership into a marriage. Section 11(2)(a) says that the qualifying civil partnership ends on the date on which the marriage was solemnised or the change under section 10(1) of the 1977 Act took effect. Section 11(2)(b) says that the civil partners are to be treated as having been married to each other since the date on which the qualifying civil partnership was registered.

The modification of the definition of qualifying civil partnership in section 5(6) of the 1977 Act means that section 11((2)(a)(i) will apply. Where there is a relevant relationship registered outwith Scotland the civil partnership will be treated as ending on the date on which the marriage is solemnised under the 1977 Act. Section 11(2)(a)(ii) is not relevant to these relationships as they cannot use the administrative route under section 10(1) of the 1977 Act to change their civil partnership into a marriage.

Article 6 then makes provision to qualify the effect of section 11(2)(b) which provides that civil partners are regarded as being married from the date their civil partnership is registered. Article 6 provides that if the civil partnership is an overseas relationship then they will only be regarded as being married from the date that the overseas relationship was registered as having been entered into if that date is on or after 5 December 2005. If the overseas

relationship was registered as having been entered into before that date they will be regarded as being married since 5 December 2005.

The relevance of the date of 5 December 2005 is that this is when relevant provisions of the 2004 Act commenced and Scotland, and the UK as a whole, started to treat same sex relationships from overseas as civil partnerships, so long as they met the provisions laid down in Chapter 2 of Part 5 of the 2004 Act.

Article 6 does not apply in cases where the civil partnership was registered in England and Wales or Northern Ireland. This is because section 11(2)(b) does not need to be modified in these cases as there will be no civil partnerships registered in England and Wales or Northern Ireland before 5 December 2005, given that the relevant provisions of the 2004 Act, which applies across the UK, commenced on 5 December 2005.

The Order does not make any changes to section 11(3) of the 2014 Act. At the moment, section 11(3) makes provision so that section 11(2)(b) applies to UK consular and UK armed forces civil partnerships where the couple elected Scotland as the relevant part of the UK. In future, by virtue of the definition of "qualifying civil partnership" in section 5(6) of the 1977 Act as amended by Article 3(2) of this Order, section 11(3) will also ensure that section 11(2)(b) applies to UK consular and UK armed forces civil partnerships where the couple elected England and Wales or Northern Ireland as the relevant part of the UK. This is appropriate as there will be no UK consular and UK armed forces civil partnerships registered before 5 December 2005.

Consultation

As outlined above, section 9 of the 2014 Act was added by way of Government amendment at Stage 2.

The Government has consulted twice in this specific area. First of all, the Government issued a discussion paper on 6 March 2015 on the overall policy[4]. Secondly, the Government, in line with section 9(3) of the 2014 Act, consulted the Registrar General and other persons on a draft of the Order[5].

The table below outlines key points raised during the consultation process, and the Government's response.

No.	Point made	Approach by Government.
1	Guidance will be needed for registrars.	The Government, working with National Records of Scotland, is preparing guidance for registrars to go into the registrars' handbook.
2.	Guidance will be needed for couples who are considering changing their civil partnership registered outwith Scotland into	The Government is preparing guidance for couples. The latest draft is at Annex A of this Policy Note.

[4] The Discussion Paper is at http://www.gov.scot/Resource/0047/00472742.pdf
[5] This consultation paper is at http://www.gov.scot/Resource/0047/00479412.pdf , with a draft of the Order at http://www.gov.scot/Resource/0047/00479414.pdf

	a marriage in Scotland.	
3.	There are no guarantees about the recognition outwith Scotland of a marriage formed in Scotland by a couple in a civil partnership registered outwith Scotland. This type of point led some consultees to express concerns about the draft Order generally.	• To an extent, possible lack of recognition is true of same sex relationships generally. When a same sex couple marry in Scotland, there is no guarantee whether the relationship will be recognised in other jurisdictions. It may be recognised as a marriage or as a civil union or it may not be recognised at all. The Scottish Government will press for maximum possible recognition – but it is a decision for other jurisdictions. • As indicated above, the Government is preparing guidance to for couples seeking to change their civil partnership registered outwith Scotland into marriage This guidance makes it clear to couples that there is no guarantee how their marriage will be treated outwith Scotland and that they may wish to obtain independent legal advice accordingly.. • Family law is becoming increasingly international as people move to different jurisdictions to, for example, work. This suggests that provision allowing persons in a civil partnership registered outwith Scotland to change that relationship into a marriage in Scotland is a recognition of growing mobility.
4.	The marriage should be treated in Scotland as having started when the original civil partnership was registered.	The Order is drafted accordingly. However, as indicated above, Article 6 provides that if the civil partnership is an overseas relationship then the couple will only be regarded as being married from the date that the overseas relationship was registered as having been entered into if that date is on or after 5 December 2005. If the overseas relationship was registered as having been entered into before that date they will be regarded as being married since 5 December 2005. The reason for the reference to 5 December 2005 is that is when civil partnerships were first introduced in

		Scotland (and the UK as a whole). There was no legal recognition of same sex relationships in Scotland (and the UK as a whole) before then
5.	There should be a "connecting factor" such as a residence requirement in Scotland before couples can change their civil partnership registered outwith Scotland to a marriage in Scotland.	The Government considered this point very carefully but decided not to introduce a "connecting factor" as: • Any residence period chosen would be arbitrary. • If a couple married (and possibly married in good faith) and it turned out subsequently that they had not met the connecting factor requirement, it's not clear what would happen to the marriage. • A connecting factor would not be in line with Scots registration practice as we have no marriage residence requirements at the moment. • A connecting factor would introduce a differentiation between couples in a civil partnership registered outwith Scotland and couples in a civil partnership registered in Scotland. This goes against the Scottish Government's general approach of treating people in the same way, wherever possible.

Impact Assessments

No impact assessments were prepared for this Order. However, the Scottish Government prepared a Business and Regulatory Impact Assessment[6] and an Equality Impact Assessment[7] 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[8].

[6] http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex/BRIA
[7] http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex/EQIA
[8] The Accompanying Documents are at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx

Financial Effects

Couples seeking to have a marriage ceremony in Scotland to change their civil partnership registered outwith Scotland into marriage will need to pay the usual marriage ceremony fees[9].

The main difference between civil partnership and marriage in Scotland in terms of rights and responsibilities is that, in some cases, survivor benefits in pensions may be based on more years' service in relation to marriage when compared with civil partnership. In this regard, the Government is treating same sex married couples in the same way as civil partners. That will also be the case in terms of a same sex marriage formed by a couple who were in a civil partnership registered outwith Scotland.

Scottish Government
Justice Directorate
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[9] Details on marriage ceremony fees are at http://www.nrscotland.gov.uk/files//registration/rm1b-leaflet.pdf

ANNEX A: GUIDANCE FOR COUPLES

DRAFT GUIDANCE TO COUPLES

CHANGING CIVIL PARTNERSHIPS REGISTERED OUTSIDE SCOTLAND INTO MARRIAGES

Introduction

Couples in a same sex civil partnership registered outside of Scotland may wish to change their relationship into a marriage in Scotland There is no obligation on couples to change their civil partnership into a marriage. It is entirely a decision for couples themselves.

For convenience, this guidance note refers to "civil partnership", which is the term used in Scotland and in the rest of the United Kingdom. However, a number of same sex relationships registered outwith the UK are treated as civil partnerships in Scotland even though they may be called something else (eg "registered partnership" or "civil union") where they were originally registered.

The country which originally registered your civil partnership may have established procedures to enable this to change to marriage in that country. You may wish to consider this option as it may provide greater certainty generally about your legal status. The effect outside Scotland of changing your civil partnership into a marriage recognised by Scots law may not be clear.

This guidance note outlines eligibility requirements to change a civil partnership registered outside of Scotland into a marriage and the procedures to follow. It also suggests that couples considering taking this step may wish to obtain their own independent legal advice on how the marriage formed in Scotland would be treated outside Scotland. Any such advice may need to cover both how the marriage would be treated in the country that originally registered the civil partnership and how the marriage would be treated in another country.

Couples from outwith the European Economic Area and Switzerland may be subject to UK immigration controls. Further information is available from National Records of Scotland's website and from the Gov.UK website.

The Scottish Government, National Records of Scotland and Scottish local authority registrars cannot provide any advice to couples on how the marriage would be treated outside Scotland.

Eligibility

To change a civil partnership registered outside of Scotland into a marriage here, the relationship must be treated as a civil partnership in Scotland.

Civil partnerships registered in England and Wales and Northern Ireland are also civil partnerships in Scotland.

For relationships registered outside of the United Kingdom, the relationship must meet all of the following criteria:

- Either be a specified relationship or a relationship which meets general conditions
- Registered by a responsible authority outside of the United Kingdom.
- Formed by two people of the same sex.
- Formed by two people who are neither married nor already in a civil partnership.

- The couple must have been able to enter into the civil partnership under overseas law and must have complied with all necessary requirements overseas. If one or both of the couple were domiciled in a part of the United Kingdom, they must have met UK requirements on eligibility to enter into a civil partnership.

A "specified relationship" is one where specific provision has been laid down in legislation so that it is treated as a civil partnership in the United Kingdom, including Scotland.

In practice, this means that most same sex registered partnerships, civil unions or similar relationships which have been registered outwith the UK are treated as civil partnerships in Scotland.

To change a civil partnership registered outside of Scotland into a marriage here, couples need to go through a marriage ceremony. Therefore:

- Notice of intention to marry must be given.
- A marriage notice period applies. (A minimum of 28 clear days).
- Barriers to marriage (eg too closely related) apply.
- Fees apply. These fees will be the same as for any other marriage ceremony in Scotland.
- The marriage ceremony may be civil or religious or belief (provided the relevant religious or belief body has opted into the solemnisation of same sex marriage).

You will need to provide the registrar with your civil partnership certificate.

The local authority registrar can provide further details of the requirements in relation to the ceremony.

<u>The effect of changing a civil partnership registered outside Scotland into a marriage in Scotland</u>

Your marriage will be recognised as a marriage in Scotland. The formation of a marriage ends your civil partnership for the purposes of the law of Scotland and treats you as married from 5 December 2005 or the date your civil partnership was registered, whichever is the later. The reason for the reference to 5 December 2005 is that is when same sex relationships were first given legal recognition in Scotland.

There is no guarantee of your marriage being recognised in your home country or in any other country. Therefore, you may wish to obtain your own independent legal advice on the effect in your home country or any other country of changing a civil partnership registered outside Scotland into a marriage in Scotland. In particular, you may wish to check whether any uncertainty on your civil status might require you to go to court in another country to seek clarity on your status.

Areas where lack of clarity on civil status may have an effect on your rights and responsibilities include property law; succession (inheritance); and pensions. There could also be an effect on others (eg on any children you may have).

Other points you may wish to consider in relation to changing your civil partnership into marriage in Scotland include:

- Your home country or any other country may still regard you as being in a civil partnership.

- Your home country or any other country may not recognise you as being in a legal relationship (for example, if the country sees your civil partnership as having been ended but the country does not provide for marriage for same sex couples).
- Your home country or any other country might treat the marriage formed in Scotland as a new relationship which may be entitled to some form of recognition, but only from the date the marriage was formed.
- If you should subsequently divorce or dissolve your relationship, there may be uncertainty as to whether this divorce or dissolution would be recognised across the world. This could stop you from subsequently re-marrying, or entering a new civil partnership.
- If you should subsequently divorce or dissolve your relationship outwith Scotland, any financial provision may be affected by the fact that the relationship was changed into marriage in Scotland.
- If your home country or any other country do not recognise the marriage in Scotland, and you should subsequently divorce or dissolve your relationship, it is possible that there could be court proceedings on ending the relationship in more than one country.

THE SCOTTISH GOVERNMENT
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