EXPLANATORY MEMORANDUM

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

2014 No. 3061

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 The purpose of the Order is four-fold. First it makes changes to legislation (other than Acts of Parliament) as a consequence of marriage being extended to same sex couples. Secondly it makes consequential amendments to such legislation as a result of it becoming possible to convert a civil partnership into a marriage. Thirdly the Order makes amendments to such legislation as a result of the fact that the Marriage (Same Sex Couples) Act 2013 ("the 2013 Act") allows a couple to stay married when one or both of them changes legal gender and both spouses agree to stay married. The majority of the amendments in this category relate to public service pension schemes in England and Wales, and similar amendments are made for Scotland as a consequence of the Marriage and Civil Partnership (Scotland) Act 2014 ("the 2014 Act"). Finally it makes certain amendments as a consequence of changes to legislation concerning consular marriage.

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

3.1 None

4. Legislative Context

4.1 This Order makes provision under the 2013 Act and the 2014 Act.

4.2 The 2013 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. Most of the provisions of the 2013 Act were brought into force on 13th March 2014. The 2013 Act also makes provision for the conversion of civil partnerships into marriages, and for married couples to remain married if one or both of the parties to the marriage changes legal gender. These provisions were not brought into force at that time.

4.3 The 2014 Act was passed by the Scottish Parliament on 4th February 2014 and received Royal Assent on 12th March 2014. The effect of its provisions in Scotland is similar to that of the 2013 Act in England and Wales. The 2014 Act makes marriage of

same sex couples lawful in Scotland and makes provision relating to procedures for marriage and for the registration of civil partnerships. It also makes provision about married persons and civil partners changing legal gender. The Scottish Government has agreed that it would be efficient and effective for the UK Government to make some of the consequential amendments required as a result of the 2014 Act for Scotland. As these are amendments to reserved legislation resulting from an Act of the Scottish Parliament, the Order cites section 104 of the Scotland Act 1998 as one of its enabling powers.

4.4 The Order also makes two small amendments to secondary legislation for England and Wales as a result of the Civil Partnership Act 2004. The amendment made at paragraph 5 also extends to Scotland.

4.5 This Order is one of a series of instruments which will implement the remaining provisions of the 2013 Act. This Order follows three draft instruments subject to the affirmative procedure. These are: the draft Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014, which set out the process for couples to convert their civil partnership into a marriage; the draft Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) and Marriage and Civil Partnership (Scotland) Act 2014 (Consequential Provisions) Order 2014, which makes consequential amendments to primary legislation; and the draft Consular Marriages and Marriages under Foreign Law (No. 2) Order 2014, which makes changes to secondary legislation about marriage certificates and certificates of no impediment for couples from the UK wishing to marry overseas. Other related instruments will also be made.

5. Territorial Extent and Application

5.1 This instrument extends to England and Wales. Paragraphs 2, 4 and 5 of Schedule 1 also extend to Scotland, as does Schedule 4. Schedule 2 to the Order extends to Scotland only.

6. European Convention on Human Rights

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

7. Policy background

7.1 The overall purpose of the 2013 Act is to extend marriage to same sex couples in England and Wales, and to secure that same sex married couples are generally treated in the same way as opposite sex married couples.

7.2 This Order and the related instruments listed at 4.5 implement provisions of the 2013 Act which are mainly concerned with enabling couples to convert their civil partnership into a marriage and enabling couples to remain married (if they both wish to) if one or both of them change legal gender.

Amendments in Schedule 1 consequential on extending marriage to same sex couples and allowing conversion of civil partnerships into marriages

7.3 Paragraph 1 makes provision remedying a previously missed consequential amendment to the Marriage (Authorised Persons) Regulations 1952 which follows on from the provision made in the 2013 Act about the process for registering military chapels for marriages of same sex couples.

7.4 Paragraph 2 amends the Service Departments Registers Order 1959. The amendment makes provision ensuring the 1959 Order applies to marriages resulting from conversions and changes from civil partnerships to marriages under Scottish law and also makes an amendment to reflect provision made by the Overseas Marriage (Armed Forces) Order 2014.

7.5 Paragraphs 3 and 7 make provisions about recording and sharing information about conversions of civil partnerships into marriages. Paragraph 3 amends the Registration of Births, Deaths and Marriages Regulations 1968 which make provision for registrars to send information to the Registrar General, to make clear that they cover marriages resulting from conversions. Paragraph 7 makes provision concerning the particulars required when registering the birth of a child. It amends the Registration of Births and Deaths Regulations 1987 to ensure these apply appropriately in the case of mothers who are party to a marriage which results from the conversion of a civil partnership.

7.6 Paragraph 4 ensures recognition in the Social Security (Credits) Regulations 1975 of the fact that same sex couples can live together as if they were a married couple. This amendment ensures the same rules apply to same sex couples as to opposite sex couples in cases where National Insurance credits for a person who had previously received a bereavement benefit should cease due to that person living with another person as though they were a married couple. The amendment also enables unmarried same sex partners to qualify for parenting credits.

7.7 Paragraphs 6 and 10 amend the Registration of Marriages Regulations 1986 and the Civil Partnership (Registration Provisions) Regulations 2005 to reflect the fact that same sex couples can now marry but opposite sex couples still cannot enter a civil partnership. The amendments ensure that the fact that one member of a couple has changed legal gender will not be revealed by the registration of a party's previous marital or civil partnership status unless the couple consent.

7.8 Paragraph 9 amends the Special Guardianship (Wales) Regulations 2005 to ensure that processes in Wales concerning consideration of suitability of couples to be special guardians of children under the Children Act 1989 apply appropriately in respect of marriages resulting from a conversion of a civil partnership.

Amendments in Schedule 1 relating to civil partnerships

7.9 Paragraphs 5 and 8 insert previously omitted references to civil partners in the Social Security (Widow's Benefit, Retirement Pensions and Other Benefits) (Transitional) Regulations 1979 and the Standards Committees (Wales) Regulations 2001 respectively. The first amendment is to ensure that civil partners are taken properly into account in relation to state pension entitlement based on the pre-1975 contributions of a former civil partner; the second concerns eligibility for membership of Welsh local government standards committees.

Amendments to pension schemes in Schedules 1, 2 and 3

7.10 The majority of other amendments in the Order make changes to certain pension schemes, which are set out in legislation, which are required in the event a married member of one of those schemes changes legal gender and remains married. One of the outcomes of this situation is that the couple will now be a same sex married couple rather than an opposite sex married couple.

7.11 It is Government policy that married same sex couples should generally be treated in the same way as civil partners in relation to pensions[1] . Most pension schemes provide for survivor benefits for the surviving spouse or surviving civil partner of a scheme member following the scheme member's death. Survivor benefits depend on the service of the scheme member.

7.12 For historical reasons some women who were married to men receive more advantageous survivor benefits than men who survive their wives. For the latter, their entitlement to survivor benefits is usually calculated on the basis of their late wife's service from 1988 onwards, whereas women who survive their husbands can claim entitlements taking account of earlier periods of their late husbands' service. Civil partners and married same sex couples are treated in the same way as widowers of women and therefore their survivor benefits will also be calculated only in respect of service of their deceased spouse or civil partner post-dating 1988. Therefore if a couple move from being an opposite sex married couple to being a same sex married couple due to one of the couple changing legal gender, then there may be a loss of survivor pension expectation. For example:

A male scheme member is married to a woman and has pensionable service prior to 1988. His wife therefore has an expectation of survivor benefits taking account of this service. The scheme member changes legal gender and both spouses agree that the marriage should continue. In the event of the scheme member's death, the scheme member's wife would lose her expectation of survivor benefits taking account of service prior to 1988.

[1] Note: Under section 16 of the Marriage (Same Sex Couples) Act 2013 the Government recently published a statutory review of survivor benefits provided in occupational pension schemes. This is available at the link.

https://www.gov.uk/government/publications/occupational-pension-schemes-review-of-survivor-benefits

7.13 It is Government policy that a person whose spouse changes legal gender should not suffer any financial detriment as a result of their spouse's decision to change legal gender. The amendments to the various public service pension schemes therefore ensure that where a spouse of a scheme member would lose more advantageous survivor benefits because of the member's change in legal gender (which will in most cases affect a woman who was married to a male scheme member who then changed legal gender to female), the spouse will in fact be treated as if that change in legal gender had not occurred, so there is no loss of expectation. If a scheme provides for more generous survivor benefits for men married to female scheme members, those men will also be protected from losing these if their wives change legal gender to male.

7.14 Part 2 of Schedule 1 provides for this exception to take effect in relation to public service pension schemes in England and Wales and Schedule 2 does this in relation to certain public service pension schemes in Scotland (relating to the Armed Forces and the Royal Mail and schemes relating to particular bodies carrying out functions in the area of transport). Several of the amendments in Schedule 2 are made as a consequence of the fact that the 2014 Act enables same sex couples in Scotland to marry.

7.15 At the request of the Church of England, Schedule 3 makes amendments to the Church of England's pension schemes contained in various Measures and one set of Regulations. The 2013 Act made no change to the definition of marriage contained in the Canons of the Church of England or in ecclesiastical law generally and it remains for the Church to determine its doctrine of marriage and the implications of that doctrine for its internal affairs. Nevertheless, it is necessary that pension schemes including those of the Church of England comply with European Union law. The amendments in Schedule 3 ensure that the Church of England's pension schemes are consistent with that requirement, as has been done for other pension schemes enshrined in law.

Amendments to legislation concerning consular marriages

7.16 Article 5 and Schedule 4 make provision required as a result of changes in the law on consular marriage in England and Wales and Scotland. This provision is consequential upon the repeal of the Foreign Marriage Act 1892 and ensures that the Registrars General for England and Wales and Scotland may issue certified copies of consular marriage entries registered under previous legislation as well as certified copies of certificates of marriages under foreign law which were deposited with them under the previous legislation. The previous legislation still applies in Northern Ireland.

7.17 Paragraph 3 of Schedule 4 ensures that, despite the repeal of the Foreign Marriage Act 1892 in England and Wales, the Registrar General for England and Wales will pass on to the Registrar General for Northern Ireland any consular marriage register entries which show that the couple elected Northern Ireland as the relevant part of the United Kingdom for the purposes of their marriage.

Consolidation

7.18 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 UK Government carried out a consultation on how marriage of same sex couples should be introduced in England and Wales prior to introduction of the 2013 Act, 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.

8.2 The Scottish Government ran a consultation to seek views on the possible introduction of same sex marriage in Scotland and the possible introduction of religious ceremonies for civil partnerships. The consultation ran between 2nd September and 9th December 2011 and 77,508 responses were received. The Scottish Government then consulted on the draft Marriage and Civil Partnership (Scotland) Bill between 12th December 2012 and 20th March 2013 and 15,064 responses were received. The documents relating to both consultations are available at http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex/consultations.

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 is producing guidance for staff involved in converting civil partnerships into marriages. The Foreign and Commonwealth Office will likewise provide information to all British embassies and consulates. 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 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 through the Government website at https://www.gov.uk/government/publications/marriage-same-sex-couples-bill. There are no foreseen costs for business.

10.2 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 manage and record conversions of civil partnerships into marriages and make arrangements for married couples where one partner or both changes legal gender. These include the General Register Office, Department for Work and Pensions, Office for National Statistics, Her Majesty's Revenue and Customs, Her Majesty's Courts and Tribunals Service (including the Gender Recognition Panel), and the operators of the public service pension schemes amended by the Order. There are also some familiarisation costs for local authorities who employ registrars to conduct conversions of civil partnerships into marriages.

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

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 2013 Act will be subject to review after 5 years.

13. Contact

13.1 Ada Simpson at the Government Equalities Office Tel: 0207 211 6427 or email: ada.simpson@geo.gsi.gov.uk can answer any queries regarding the instrument.