

# Civil Partnership (Scotland) Bill

[As Amended at Stage 2]

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## Supplementary Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with rule 9.7.10 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Civil Partnership (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2.

2. The contents of this Memorandum are the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. This supplementary memorandum should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

### Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

### New delegated powers

#### **Section 3A(1) – changing marriages to civil partnerships**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57A) as amended at Stage 2

**Parliamentary procedure: affirmative procedure if modifying primary legislation, otherwise negative procedure**

**Amended or new power: new**

## **Provision**

4. The provision will provide the Scottish Ministers with the power to make regulations that will enable married couples to change their relationship to a civil partnership.
5. At present, there are two routes through which a civil partnership can change to a marriage. The couple can marry each other (in much the same way as they would if they were not already in a formal relationship), or they can go through an administrative route run by local authority registrars.
6. Regardless of the route followed, the consequence is that the relationship is changed to a marriage.
7. Subsection (1) allows for the adoption of a similar approach for marriages changing to civil partnerships under which there could again be two routes available. The power conferred would allow regulations to make provision to enable the parties to a marriage to register as civil partners of each other without first having to divorce, and also to enable the parties to a marriage to change their marriage to a civil partnership in an alternative way to be provided for in the regulations, such as through an administrative procedure.
8. Subsection (2) sets out instances of the types of provision that could be made under subsection (1).
9. Subsection (2)(a), which falls to be read in conjunction with subsection (3), allows regulations to specify the classes of marriage that are eligible to be changed to civil partnerships.
10. Subsection (2)(b) allows regulations to provide for the ways in which marriages may be changed to civil partnerships under subsection (1)(b), such as by an administrative procedure corresponding to the procedure by which a civil partnership can be changed to a marriage.

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11. Subsection (2)(c) allows regulations to modify the Civil Partnership Act 2004 in its application to the process by which the civil partnership is formed and in its application to civil partnerships that have been formed through change from marriage. The power would allow the eligibility requirements of the Act to be modified where a couple wish to register as civil partners of each other, and to allow the definition of civil partnership to be extended to include marriages changed to civil partnerships by alternative means.

12. Subsection (2)(d) allows regulations to modify the definition of “qualifying civil partnership” in the Marriage (Scotland) Act 1977. Qualifying civil partnerships are civil partnerships that are eligible to be changed to marriages. Regulations will be able to provide for any changes to the definition necessitated by the introduction of change from marriage to civil partnership.

13. Subsection (2)(e) and (f) allow regulations to make provision about the effect of a marriage being changed to a civil partnership and about when the marriage is treated as having ended, and when the civil partnership is treated as having been formed. Regulations could thereby provide for a couple changing their relationship to be treated as if they had been in a civil partnership since the date of their original marriage, in line with the existing provisions for changing civil partnerships to marriages.

14. Subsection (2)(g) allows regulations to make provision about fees, such as the fee that would be payable by a couple seeking to change their marriage to a civil partnership through an administrative process provided for in regulations.

15. Subsection (3) allows provision to be made on which categories of marriages will be eligible for the administrative route. This would allow that route to be limited to couples whose marriages were solemnised and registered in Scotland, in line with the existing restrictions on changing civil partnership to marriages through the administrative route.

16. Such a restriction may be required because where details of the marriage are held on the registration system in Scotland, it is straightforward for those details to be used when the relationship is changed. Where the marriage was solemnised elsewhere, it will not have been recorded in Scotland so it may be more appropriate to require the couple to register as civil partners.

This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57A) as amended at Stage 2

17. Subsection (4) requires the Scottish Ministers to consult the Registrar General of Births, Deaths and Marriages before making regulations in this area. Consultation will ensure that any implications for the Registrar General of changing marriages to civil partnerships can be fully explored, and any necessary provisions put in place in the regulations. The Registrar General, for example, has responsibility for the IT system used for registration; for registration forms and public-facing guidance on registration; and directs local authority registrars in the performance of their functions.

### **Reason for taking power**

18. This amendment directly responds to the Stage 1 Report on the Bill by the Equalities and Human Rights Committee<sup>1</sup>.

19. The amendment of section 1 of the 2004 Act by section 1 of the Bill will mean that existing provisions in the Marriage and Civil Partnership (Scotland) Act 2014 on changing civil partnerships to marriages will apply to mixed sex civil partnerships in the same way they currently do to same sex civil partnerships. This is in line with the general approach in the Bill, which is to align mixed sex civil partnership to same sex civil partnership where possible.

20. The Equalities and Human Rights Committee, which led Parliament's scrutiny of this Bill, took extensive oral and written evidence in which changing marriages to civil partnerships was discussed.

21. Following this evidence, the Equalities and Human Rights Committee said in paragraph 125 of its Stage 1 report: "We support the principle that, for those that wish, it should be possible to convert from a marriage to a civil partnership in Scotland."

22. Taking a power to make regulations on changing marriages to civil partnerships is consistent with section 10 of the Marriage and Civil Partnership (Scotland) Act 2014. This provides the Scottish Ministers with the power to make regulations on the administrative route for changing qualifying civil partnerships to marriage. Taking a power will also allow Ministers to make provisions in relation to the effect of spouses registering

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<sup>1</sup> The Stage 1 report is at <https://sp-bpr-en-prod-cdneq.azureedge.net/published/EHRiC/2020/3/31/Civil-Partnership--Scotland--Bill-Stage-1-Report/EHRiCS052020R1.pdf>

This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57A) as amended at Stage 2

a civil partnership or using the administrative route to change a marriage to a civil partnership. Detailed provision on effect might, for example, be needed where the marriage was solemnised before civil partnerships were introduced in Scotland on 5 December 2005.

### **Choice of procedure**

23. In line with usual practice, the regulations will be subject to the affirmative procedure if they amend primary legislation. If they do not amend primary legislation, the regulations will be subject to the negative procedure. This is in line with section 10 of the Marriage and Civil Partnership (Scotland) Act 2014 on changing qualifying civil partnerships to marriages.

### **Section 3B(1) – recognition of marriages converted to civil partnership outwith Scotland**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: ‘affirmative procedure if modifying primary legislation, otherwise negative procedure**

**Amended or new power: new**

### **Provision**

24. This provision will provide the Scottish Ministers with the power to make regulations that will recognise marriages converted to civil partnerships under the laws of England and Wales or of Northern Ireland.

25. The power can be specifically used to make provisions in the following areas:

- For the civil partnership as converted to be treated in the law of Scotland as if the parties had registered as civil partners in England and Wales, or Northern Ireland

This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57A) as amended at Stage 2

- On the date that the marriage is to be treated as having ended, and the date that the parties are to be treated as having registered as civil partners.

### **Reason for taking power**

26. Section 2(5)(a) of the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 and section 8(5)(a) of the Northern Ireland (Executive Formation etc) Act 2019 provide for the Secretary of State to make regulations that would permit marriages formed in England and Wales or Northern Ireland, as the case may be, to convert to a civil partnership. Regulations under either Act are yet to be taken forward.

27. In terms of section 1 of the Civil Partnership Act 2004, a relationship formed in England, Wales or Northern Ireland is only a civil partnership where the parties register as civil partners of each other in accordance with the applicable Part of the Act. As regulations on converting marriages to civil partnerships are yet to be taken forward for either England and Wales or Northern Ireland, it is possible that conversions might be introduced that do not involve the parties to the relationship registering as civil partners of each other within the meaning of section 1 of the 2004 Act.

28. In relation to changing civil partnerships to marriages, it has been common across the UK to make provision so that the marriage is treated as having started when the civil partnership was first entered into. This is typically known as “backdating”. As regulations on converting marriages to civil partnerships are yet to be made for England and Wales or Northern Ireland, there is no certainty around what provision might be made for the date the marriage is to be treated as having ended, and the date that the civil partnership can be treated as having been registered.

29. This power in the Bill will provide the Scottish Ministers with the flexibility needed to ensure that marriages converted to civil partnerships in other parts of the UK are recognised in as civil partnerships in Scots law. This will include any provisions in relation to backdating.

### **Choice of procedure**

30. In line with usual practice, the regulations will be subject to the affirmative procedure if they amend primary legislation. If they do not amend primary legislation, the negative procedure seems appropriate. The regulations are reflecting provisions being made elsewhere in the UK and

This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57A) as amended at Stage 2

will ensure civil partnerships formed elsewhere in the UK by spouses converting their relationship are recognised as civil partners in Scotland. The regulations are not proposing changes that are particularly innovative in relation to Scotland.

## **Schedule 2, paragraph 6(5) – supplementary provisions on recognition of overseas dissolutions**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative**

**Amended or new power: new**

### **Provision**

31. The Civil Partnership Act 2004 (“the 2004 Act”) contains provisions on the recognition of overseas dissolutions of civil partnerships. Section 237<sup>2</sup> of the 2004 Act contains supplementary provisions. Subsection (2)(b)(ii) provides the Scottish Ministers with the power to make regulations that modify how the recognition provisions of the 2004 Act apply to cases where a civil partner is domiciled in a jurisdiction whose law does not recognise legal relationships between people of the same sex.

32. The validity of an overseas dissolution will normally only be recognised if one of the partners had a residence, domicile or citizenship connection with the country in which it was granted (see section 235 of the 2004 Act). Regulations under section 237(2)(b)(ii) allow that requirement to be relaxed where a party would not be able to obtain a dissolution in the country in which they are domiciled because the law of that country does not recognise legal relationships between two persons of the same sex.

33. There may also be circumstances in which a party to a mixed sex civil partnership is unable to obtain a dissolution in the country in which they are domiciled as that country does not recognise such relationships. The amendment to the existing power in the Bill would therefore allow

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<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2004/33/section/237>

This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57A) as amended at Stage 2

regulations under section 237(2)(b)(ii) to relax the conditions for recognition of overseas dissolutions in that situation as well

34. The Scottish Ministers have taken forward one instrument under the existing powers: The Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Separations) (Scotland) Regulations 2005<sup>3</sup>.

### **Reason for taking power**

35. The amendment to the existing powers in section 237 of the 2004 Act reflects the introduction of mixed sex civil partnership in Scotland as well as acknowledging that these relationships may not be recognised elsewhere.

36. The amendment also reflects one of the general policy aims of the Bill, which is to treat, where appropriate, mixed sex civil partnership in the same way as same sex civil partnership. Amending the existing section 237 powers to make reference to mixed sex civil partnerships is in line with that general approach, and will help ensure equality of treatment.

### **Choice of procedure**

37. The choice of negative procedure reflects what is already the procedure under the existing section 237 powers. The amendment to these powers in this Bill does not substantively alter the nature of those powers or the purposes for which they can be used: rather, the amendment simply allows the existing powers to be applied to mixed sex civil partnership as well as to same sex civil partnership. Accordingly, following the existing procedure seems appropriate.

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<sup>3</sup> <http://www.legislation.gov.uk/ssi/2005/567/contents/made>



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