

## Members' Library Service Request Form

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Originator	Diane Robertson
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Document Title	Marriage and Civil Partnership (Scotland) Act 2014 – THE QUALIFYING CIVIL PARTNERSHIP MODIFICATION (SCOTLAND) ORDER 2015 (DRAFT)

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**REPORT TO:** Members' Library Service

**MEETING DATE:**

**BY:** Head of Communities and Partnerships

**SUBJECT:** Marriage and Civil Partnership (Scotland) Act 2014 –  
The Qualifying Civil Partnership Modification (Scotland)  
Order 2015 (Draft)

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## **1 PURPOSE**

1.1 The purpose of the report is to note that the Scottish Government has written to Local Authorities seeking further views on proposed changes as part of the Marriage and Civil Partnership (Scotland) Act 2014 in relation to the qualifying civil partnership modification (Scotland) Order 2015 (draft).

## **2 RECOMMENDATION**

2.1 To note that the effect of the draft Order is to allow persons in a same sex civil partnership registered outwith Scotland to change that civil partnership into a marriage through having a marriage ceremony in Scotland (Appendix 1 and 2).

## **3 BACKGROUND**

3.1 A response has been prepared and submitted following consultation with the appropriate Registration and Legal staff with East Lothian Council in relation to how the proposed changes may impact on the delivery of Registration services. (Appendix 3).

1.3 No comments have been made at this time other than noting the proposals of the changes of the draft Order. This has been outlined in the response (Appendix 2).

## **4 POLICY IMPLICATIONS**

4.1 None.

## **5 EQUALITY IMPACT ASSESSMENT**

- 5.1 The report is not applicable to the wellbeing of equalities groups and an Equality Impact Assessment is not required.

## **6 RESOURCE IMPLICATIONS**

- 6.1 Financial –None  
6.2 Personnel - none  
6.3 Other – None

## **7 BACKGROUND PAPERS**

- 7.1 Letter to All Local Authority Managers responsible for Registration Services seeking views in response to the proposed changes of the Marriage and civil partnership (Scotland) Act 2014 (Appendix 1).  
7.2 Draft Scottish Statutory Instrument – 2015 No. Marriage Civil Partnership, Qualifying Civil Partnership Modification (Scotland) Order 2015  
7.3 Response to the Scottish Government outlining our views to the proposal to allow persons in a same sex civil partnership registered outwith Scotland to change that civil partnership into a marriage through having a marriage ceremony in Scotland (Appendix 3).

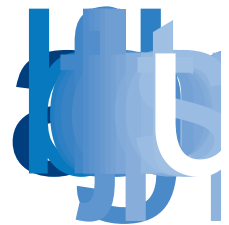
<b>AUTHOR'S NAME</b>	Diane Robertson
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<b>DATE</b>	6 <sup>th</sup> July 2015

**Justice Directorate**

Civil Law and Legal System Division

T: 0131-244 3322

E: [simon.stockwell@scotland.gsi.gov.uk](mailto:simon.stockwell@scotland.gsi.gov.uk)



To:

**The list of consultees at Annex A to the consultation paper.**



08 June 2015

Dear Consultee

**MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014  
CHANGING CIVIL PARTNERSHIPS REGISTERED OUTWITH SCOTLAND INTO  
MARRIAGE IN SCOTLAND  
THE QUALIFYING CIVIL PARTNERSHIP MODIFICATION (SCOTLAND) ORDER 2015  
(DRAFT)**

The attached consultation paper seeks views on a draft Order under the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”).

The draft is called The Qualifying Civil Partnership Modification (Scotland) Order 2015 (“the draft Order”).

The effect of the draft Order is to allow persons in a same sex civil partnership registered outwith Scotland to change that civil partnership into a marriage through having a marriage ceremony in Scotland.

This consultation follows a discussion paper issued by the Scottish Government<sup>1</sup>.

Please send any comments you may have on the attached consultation to me by **5 PM on Monday 6 July 2015**. Comments should be sent to:

Simon Stockwell  
Family and Property Law  
Scottish Government  
Room GW.15  
St Andrew’s House  
Regent Road  
EDINBURGH  
EH1 3DG

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<sup>1</sup> The discussion paper is at <http://www.gov.scot/Resource/0047/00472742.pdf>

Phone: 0131 244 3322

Email: [simon.stockwell@scotland.gsi.gov.uk](mailto:simon.stockwell@scotland.gsi.gov.uk)

Responses, and an analysis of the responses, may be published on the Scottish Government website.

Yours faithfully

SIMON STOCKWELL  
Family and Property Law

**MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014  
CHANGING CIVIL PARTNERSHIPS REGISTERED OUTWITH SCOTLAND INTO  
MARRIAGE IN SCOTLAND  
THE QUALIFYING CIVIL PARTNERSHIP (MODIFICATION) (SCOTLAND) ORDER 2015  
(DRAFT)**

**A consultation**

**Introduction**

1. This consultation, in line with section 9(3) of the 2014 Act, seeks comments on the draft Order. It also outlines key points raised by consultees who commented on the Scottish Government's Discussion Paper and contains the response by the Government on these points.

**Terminology**

2. This consultation refers throughout to "civil partnership". In countries outwith the UK, the equivalent of civil partnership is often called something else such as registered partnership or civil union. 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 (more details on this are at paragraphs 7 to 10 below). Therefore, for simplicity, this consultation refers to "civil partnership" even though other countries may use different terminology.

**The draft Order**

3. The draft Order is attached as a separate document.
4. The draft Order:
  - Extends the definition of "qualifying civil partnership" (on the civil partners who can marry in Scotland) to cover civil partnerships registered in England and Wales and Northern Ireland (including those registered overseas through the UK consular service and the UK armed forces) and civil partnerships registered overseas.
  - Modifies the Marriage (Scotland) Act 1977 ("the 1977 Act") so that persons in a civil partnership registered outwith Scotland seeking to marry do not have to provide an extract from the Scottish civil partnership register (which, clearly, they would not have). Instead, they would have to provide an equivalent. The draft Order also disappplies the need for a Certificate of No Impediment if the home jurisdiction will not issue such a certificate on the basis that they are already in a civil partnership (this specific issue was discussed in paragraphs 62 to 64 of the Discussion Paper).
  - Makes provision so that persons in a civil partnership registered outwith Scotland can only use the ceremonial route to change their relationship into a marriage in Scotland and not the administrative route which is one option available to couples in a civil partnership registered in Scotland. The rationale for this approach is outlined in paragraphs 11 to 16 below.
  - Makes provision so that the couple are treated as having been married to each other since 5 December 2005 or when their civil partnership was registered, whichever is the later. This provision reflects points made by respondents to the Discussion Paper, as outlined below. The inclusion of the 5 December 2005 date reflects that this is when Scotland started to provide legal recognition of same sex relationships.

A detailed note on the provisions in the draft Order is at Annex B.

**Question 1. Do you have any comments on the draft Order? If so, what are your comments?**

**No obligation**

5. The Scottish Government has already made it clear that there is no obligation on persons in an existing civil partnership to change their relationship into marriage if they do not wish to do so. That remains the position.

**Key points raised by consultees on the Discussion Paper, and the Government response**

6. Key points raised by consultees on the Discussion Paper, and the Government response, are outlined in the table below:

No.	Point made	Government response
1	Guidance will be needed for registrars	The Government agrees.  The Government will work closely with the Registrar General and registrars on the provision of suitable guidance.
2.	Guidance will be needed for couples who are considering changing their civil partnerships registered outwith Scotland into marriages in Scotland.	The Government agrees.  The issue is discussed further in paragraphs 21 to 23 and a draft of potential Government guidance is at Annex D
3.	There should be more research on the proposals.	Paragraphs 24 to 38 outline relevant points.
4.	There are a number of issues in relation to ending the original civil partnership, and any subsequent divorce.	Paragraph 39 of this consultation outline relevant points.
5.	There are no guarantees about the recognition of a marriage formed in Scotland by parties to a civil partnership registered outwith Scotland.	Paragraph 40 of this consultation outlines relevant points.
6.	The marriage should be treated in Scotland as having started when the original civil partnership was registered.	Having considered the points raised by consultees, the Government has now decided that provision along these lines should be made in the draft Order. There is more discussion in paragraphs 41 to 43 of this consultation.
7.	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 has considered this point fully and can understand why it has been made. However, the Government has decided not to follow the suggestion and, as a result, there is no provision of this nature in the draft Order. There is more discussion in paragraphs 44 and 45.

## **Eligibility of civil partners in a civil partnership registered outwith Scotland to change their relationship into a marriage in Scotland.**

### Civil partnerships from elsewhere in the United Kingdom

7. Civil partnerships were established across the UK by the Civil Partnership Act 2004. The draft Order makes provision so that couples in civil partnerships registered in England and Wales and Northern Ireland, including where the civil partnership was registered through the UK consular service or the UK armed forces, would be eligible to change their relationship into marriage in Scotland.

### Civil partnerships from outwith the United Kingdom

8. The draft Order makes provision so that couples in a relationship from outwith the United Kingdom which is treated as a civil partnership in Scotland may change their relationship to a marriage in Scotland. (Couples in an overseas same sex marriage are now recognised as being married in Scotland<sup>2</sup>).
9. Chapter 2 of Part 5 of the 2004 Act makes provision on overseas relationships being treated as civil partnerships in the United Kingdom and Scotland. To be treated in this way, civil partnerships must be:
  - Either a specified relationship or a relationship which meets general conditions.
  - Registered with a responsible authority outwith 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.
10. Under the 2004 Act, “a specified relationship” is a relationship listed in Schedule 20 to the Act, as amended. The current list is at Annex C. It is also possible for a relationship from outwith the UK to be treated as a civil partnership in Scotland if general conditions are met. The general conditions, contained in section 214 of the 2004 Act, are that under the law of the other jurisdiction:
  - The relationship may not be entered into if either of the parties is already a party to a relationship of that kind or is lawfully married.
  - The relationship is of indeterminate duration.
  - The relationship is not one of marriage.
  - The effect of entering into it is that the parties are treated as a couple either generally or for specified purposes but are not treated as married.

### Marriage ceremonies

11. The draft 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.
12. 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

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<sup>2</sup> Paragraph 197 of the Explanatory Notes to the 2014 Act provides more information:  
<http://www.legislation.gov.uk/asp/2014/5/notes/division/3/2/4>



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).

13. The registrar can check the details of the civil partnership registered in Scotland on their national IT system.
14. 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.
15. Marriage ceremonies for a couple changing a civil partnership registered outwith Scotland into a marriage will be along the same lines as the procedure set out in the 1977 Act for changing a civil partnership into a marriage by way of a ceremony. Therefore:
  - Notice of intention to marry would be given.
  - The usual marriage notice period would apply. (This increased earlier this year to 28 clear days).
  - Other barriers to marriage (eg too closely related) would continue to apply.
  - The usual fees would apply<sup>3</sup>.
  - The marriage could be civil or religious or belief (provided the relevant religious or belief body has opted into the solemnisation of same sex marriage).
16. More details on getting married in Scotland are on National Records for Scotland's website<sup>4</sup>.

#### Planned changes to the M10 (Marriage Notice) form

17. Paragraph 17 of the Discussion Paper noted that the M10 (Marriage Notice) form<sup>5</sup> may need to be amended to reflect that couples in a civil partnership registered outwith Scotland will be allowed to marry in Scotland. The Government and National Records for Scotland intend to make the changes outlined below to the M10 (Marriage Notice) form. Some of these changes are for clarification generally, rather than as a direct consequence of couples in a civil partnership registered outwith Scotland being able to marry in Scotland.
18. Box 32 of the form needs to be changed to reflect that the couple may be in a civil partnership registered outwith Scotland. We intend that the left hand box be changed to read as follows:

“ IF YOU ARE IN AN EXISTING CIVIL PARTNERSHIP

Is the relevant extract from the Scottish Civil Partnership register (your Civil Partnership certificate) or your Civil Partnership certificate from outwith Scotland enclosed?”

The right hand box would then be changed to read as follows:

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<sup>3</sup> Information on marriage fees is at <http://www.nrscotland.gov.uk/files/registration/rm1b-new-fees-16-12-2014.pdf>

<sup>4</sup> Information on getting married in Scotland is at <http://www.nrscotland.gov.uk/files/registration/rm1b-new-fees-16-12-2014.pdf>

<sup>5</sup> The current version of the M10 (Marriage Notice) form is at <http://www.legislation.gov.uk/ssi/2014/306/schedule/4/made>

“If you are unable to produce the extract from the Scottish Civil Partnership register relating to your Civil Partnership, or your Civil Partnership certificate from outwith Scotland, state the reason for not doing so. The registrar will require proof of the Civil Partnership”.

19. To improve clarity, we intend the words “if different from (b)” would be removed from boxes 14 (c) and (d) and 18 (c) and (d).

20. The current numbering in M10 is slightly awry as there is no box numbered 19. The revised form will correct the numbering.

### **Guidance for couples who are considering changing their civil partnerships registered outwith Scotland into marriages in Scotland.**

21. Many respondents to the Discussion Paper noted that guidance should be provided to couples who are considering changing their civil partnerships registered outwith Scotland into marriages in Scotland, given the uncertainties around the recognition of the marriage outwith Scotland.

22. The Government agrees that it should issue guidance. However, there will be limits on how much any guidance by central Government can say. The approach taken by jurisdictions outwith Scotland will vary and circumstances of individual couples will vary.

23. Taking account of these limitations, a draft of potential Government guidance is attached at Annex D. The Government intends to make this guidance available on relevant websites. In addition, registrars could draw couples’ attention to the guidance.

**Question 2. Do you have any comments on the draft guidance for couples? If so, what are your comments?**

### **The effect outwith Scotland of changing civil partnerships registered outwith Scotland into marriages in Scotland**

#### General

24. The Scottish Government cannot provide definitive answers to this issue, for a number of reasons:

- Private international law is complex and this is particularly true in relation to family law.
- Recognition of same sex relationships across the world varies and is still not as established as recognition of opposite sex relationships.
- Jurisdictions<sup>6</sup> across the world have taken different approaches in relation to changing civil partnerships into marriages.
- The position may change in a jurisdiction at any stage
- Other jurisdictions may not have a clear position.

25. However, the Scottish Government has raised the issue with some other jurisdictions and has also carried out some research of its own.

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<sup>6</sup> A jurisdiction is a territory which is a separate legal entity with a separate system of law. A whole country may be a single jurisdiction or each state or province within a country may be a separate jurisdiction.

## Elsewhere in the United Kingdom

26. As indicated in paragraphs 66 – 68 of the Discussion Paper issued on 6 March, the UK Government has established arrangements so that couples in a civil partnership registered in England and Wales may, if they wish, convert their relationship to a marriage in England and Wales<sup>7</sup>.

27. The Scottish Government is, of course, unable to make legislation to end a civil partnership registered in England and Wales for the purposes of English/Welsh law. Therefore, the advantage for civil partners registered in England and Wales in converting their civil partnership into a marriage in England and Wales is their status would be clear. Their civil partnership would be ended and they would be married in England and Wales (and in Scotland).

28. The Northern Ireland Executive has no plans to introduce same sex marriage. Therefore, should a couple in a Northern Irish civil partnership change it into a marriage in Scotland, it would not be recognised as a marriage in Northern Ireland.

## Outwith the United Kingdom

### *The Netherlands*

29. Article 88 of Book 10 of the Dutch Civil Code<sup>8</sup> provides that “Where a registered partnership has been ended outside the Netherlands by mutual consent of the partners, the ending will be recognised in the Netherlands if the registered partnership has been ended validly according to the law of that other State.”

30. The Scottish Government’s understanding is that:

- If the civil partnership is changed in Scotland according to Scots law into a marriage on the request of both partners, that decision is recognised in the Netherlands.
- The marriage would be treated in the Netherlands as having commenced when the partnership ends as a result of the change from partnership to marriage.
- Any subsequent divorce in Scotland would be recognised in the Netherlands.

### *Republic of Ireland*

31. Section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010<sup>9</sup> makes provision so that Irish Ministers may, by Order, declare that a class of legal relationship entered into by two parties of the same sex is entitled to be recognised as a civil partnership. As the Republic of Ireland has not yet established same sex marriage, the Scottish Government’s understanding is that a civil partnership which has changed into marriage in Scotland would continue to be treated as a civil partnership in Ireland and that any divorce of the marriage would be treated as ending the civil partnership.

32. There was a referendum in the Republic of Ireland on 22 May 2015 on same sex marriage and the majority voted in favour<sup>10</sup>.

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<sup>7</sup> More details of the conversion arrangements in England and Wales are at <https://www.gov.uk/convert-civil-partnership>

<sup>8</sup> The Dutch Civil Code, in English, is at <http://www.dutchcivillaw.com/civilcodebook01010.htm>

<sup>9</sup> <http://www.irishstatutebook.ie/2010/en/act/pub/0024/sec0005.html#sec5>

<sup>10</sup> Details of the referendum result in the Republic of Ireland are at <http://referendum.ie/results.php?ref=10>

## *Germany*

33. There is no same sex marriage in Germany and the German Civil Code provides that only a man and a woman can marry one another. Germany does have an equivalent of civil partnerships.

## *Austria*

34. There are no rules in Austria on how to deal with same sex marriages under foreign law.

## *Countries which have not established civil partnerships*

35. A number of countries have not established civil partnerships and, therefore, there are no civil partnerships registered in these countries which could change into a marriage in Scotland<sup>11</sup>.

## *Countries which have established civil partnerships but not same sex marriages*

36. Some countries have established civil partnerships but have not established same sex marriages. It is unlikely in most of these countries that a same sex marriage solemnised in Scotland would be recognised as a marriage.

## *Countries which have established same sex marriages but not civil partnerships*

37. Some countries have established same sex marriage but not civil partnership. Therefore, there are no civil partnerships registered in these countries which could change into a marriage in Scotland. Same sex marriages from outwith Scotland are recognised as marriages in Scotland.

## *Other countries where civil partnerships are ended by marriage*

38. In some other jurisdictions, being in a civil partnership is not a barrier to marriage and a civil partnership is ended when one of the couple marries somebody else or the couple marry<sup>12</sup>.

## **Ending the civil partnership in Scotland and any subsequent divorce**

39. There are a number of points the Government wishes to make on ending the civil partnership and on any subsequent divorce of the marriage:

- The draft Order at Annex B does not modify section 11(2)(a) of the 2014 Act. As a result, civil partnerships from outwith Scotland will be ended under the law of Scotland when they change into marriage.
- As indicated in the Discussion Paper, the Government is considering if an Order should be made under the 2014 Act so that the dissolution outwith Scotland of a

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<sup>11</sup> The EU provides information on the position across Member States:

[http://europa.eu/youreurope/citizens/family/couple/registered-partners/index\\_en.htm](http://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm)

<sup>12</sup> New York City, for example, advises that If “ either you or your Domestic Partner get married to each other or to another person, your Domestic Partnership is automatically terminated.”

[http://www.cityclerk.nyc.gov/html/marriage/domestic\\_partnership\\_reg.shtml](http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml) (last bullet). Similarly, the French Pacte civil de solidarité (Pacs) ends when one of the parties marries somebody else or they marry each other.

Scottish same sex marriage treated elsewhere as a civil partnership ends the marriage in Scotland. This issue is relevant generally for Scottish same sex marriages treated elsewhere as civil partnerships and then dissolved and not just where a civil partnership has been changed into marriage in Scotland<sup>13</sup>.

- The 2014 Act made provision so that Scotland can be a divorce jurisdiction of last resort for same sex marriages entered into in Scotland (see paragraph 3(3) of Schedule 1B to the Domicile and Matrimonial Proceedings Act 1973, as added by schedule 1 to the 2014 Act). This provision would apply, if necessary, to same sex marriages entered into in Scotland by parties to a civil partnership registered outwith Scotland.

### **Recognition of a marriage formed in Scotland by parties to a civil partnership registered outwith Scotland.**

40. The Government appreciates that there are no guarantees on how such a marriage will be recognised outwith Scotland. However, there are three points the Government would make:

- To an extent, that 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. However, the Government does not consider that, as a result, Scotland should take no action on the recognition of same sex relationships. The Scottish Government will continue to argue for the maximum possible legal recognition across the world of same sex relationships. It is, of course, a matter for each country to decide what, if any, recognition they will give to same sex relationships.
- As indicated elsewhere, the Government intends, as suggested by consultees, to issue guidance to advise couples that there is this lack of certainty.
- 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.

### **Backdating**

41. In the light of the responses to the Discussion Paper, the Government has concluded that, for the purposes of Scots law, civil partners who change their civil partnership registered outwith Scotland to marriages should be treated as married from the date they originally entered their civil partnership or from 5 December 2005, whichever is the later. (This is referred to in this consultation as “backdating”). The reason for the reference to 5 December 2005 is that is when civil partnerships were first introduced in Scotland/the UK. There was no legal recognition of same sex relationships in Scotland/the UK before then<sup>14</sup>.

42. The Government has concluded that we should backdate, for the following reasons:

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<sup>13</sup> Provision has already been made in Article 7 of the Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014 (SI 2014/3229) <http://www.legislation.gov.uk/ukSI/2014/3229/article/7/made> on the recognition of the dissolution of a Scottish same marriage deemed to be a civil partnership in Northern Ireland.

<sup>14</sup> See the provisions of section 215 of the Civil Partnership Act 2004.

- This will ensure that property acquired during the civil partnership is treated as “matrimonial property” in any subsequent divorce<sup>15</sup>.
- It treats, insofar as we are able to do so, civil partnerships registered outwith Scotland in the same way as civil partnerships registered in Scotland.
- On reflection, the argument about not backdating for the purposes of Scots law those overseas civil partnerships which provide only limited rights and responsibilities is not strong. The fact remains that we treat such relationships as civil partnerships in Scotland.

43. In terms of adding a note to the marriage register page, the Government proposes the following note could be added at the bottom, in the space for notes.

“This marriage was formed by two persons originally in a legal relationship registered outside Scotland. The couple are treated as married in Scotland from the date on which they registered that original legal relationship or from 5 December 2005, whichever is the later.”

**Question 3. Do you have any comments on backdating? If so what are your comments?**

### **Residency/connecting factor requirement**

44. Some consultees suggested that a “connecting factor” (eg of Scottish domicile or one year’s habitual residence) should be required, to limit the complexities in relation to recognition outwith Scotland. The courts have jurisdictional periods of this nature, in line with principles of international comity. There is an argument that the absence of a connecting factor could exacerbate the problems of international recognition of a Scottish marriage resulting from a change from a civil partnership registered outwith Scotland.

45. The Government recognises the strength of these arguments. On balance, though, the Government has not added provisions of this nature to the draft Order, for the following reasons:

- 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 general approach of treating people in the same way, wherever possible.

**Question 4. Do you have any comments on a connecting factor requirement? If so what are your comments?**

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<sup>15</sup> When a couple divorce in Scotland, property acquired for or during the marriage is regarded as “matrimonial property”. Provision is then made on how the court should apportion the “matrimonial property”.

## Gender recognition

46. The Gender Recognition Act 2004 (“the GRA”) allows transgender people to apply to the Gender Recognition Panel (“the GRP”) to change their legal gender. If successful, they acquire a full Gender Recognition Certificate (“GRC”), which affords them full recognition of their acquired gender for all purposes, including marriage.
47. The 2014 Act removes the requirement on married applicants to divorce first before applying for a full GRC.
48. When the Order is made to allow civil partnerships registered outwith Scotland to change into marriage in Scotland, the Scottish Government considers that a person who changes a civil partnership registered outwith Scotland into a marriage would be in a protected Scottish marriage for the purposes of the GRA and, therefore, could apply, following the marriage, under section 1(1) of the GRA to the GRP. The Scottish Government cannot say whether or not the GRC or the change into marriage will be recognised in the jurisdiction where the civil partnership was registered.

## Any other comments

49. There may be other points consultees wish to make.

**Question 5. Do you have any other comments? If so, what other comments would you like to make?**

## Conclusion

50. Please send any comments by **5PM on Monday 6 July 2015** to:

Simon Stockwell  
Family and Property Law  
Scottish Government  
Room GW.15  
St Andrew’s House  
Regent Road  
EDINBURGH  
EH1 3DG  
0131 244 3322

Email: [simon.stockwell@scotland.gsi.gov.uk](mailto:simon.stockwell@scotland.gsi.gov.uk)

For convenience, the questions in the consultation paper are:

**Question 1. Do you have any comments on the draft Order? If so, what are your comments?**

**Question 2. Do you have any comments on the draft guidance for couples? If so, what are your comments?**

**Question 3. Do you have any comments on backdating? If so what are your comments?**

**Question 4. Do you have any comments on a connecting factor requirement? If so**

**what are your comments?**

**Question 5. Do you have any other comments? If so, what other comments would you like to make?**

**Family and Property Law  
Scottish Government  
June 2015**



## **ANNEX A: LIST OF CONSULTEES**

Association of Registrars of Scotland (and Registrars across Scotland)  
Convention of Scottish Local Authorities  
Department for Work and Pensions (UK)  
Equality Network  
Faculty of Advocates  
Family Law Association  
Gender Recognition Panel  
Government Equalities Office (UK)  
Home Office (UK)  
Humanist Society Scotland  
Law Society of Scotland  
LGBT Youth Scotland  
Ministry of Justice (UK)  
Muslim Council of Scotland  
National Records of Scotland  
Northern Ireland Executive  
Religious Society of Friends (Quakers)  
Scotland for Marriage  
Scottish Churches Parliamentary Office  
Scottish Council of Jewish Communities  
Scottish Transgender Alliance  
Scottish Unitarian Association  
Stonewall Scotland

## **ANNEX B**

### **THE DRAFT QUALIFYING CIVIL PARTNERSHIP MODIFICATION (SCOTLAND) ORDER 2015 NOTES ON PROVISIONS**

#### **Introduction**

1. This Note has been prepared by the Scottish Government to assist consultees and to help inform debate on the draft Qualifying Civil Partnership Modification (Scotland) Order 2015. Where a provision is self-explanatory, no explanation is given in this note.

2. The following abbreviations are used in this note:

“CONI” means a Certificate of No Impediment to marriage;

“the 1977 Act” means the Marriage (Scotland) Act 1977;

“the 2004 Act” means the Civil Partnership Act 2004;

“the 2014 Act” means the Marriage and Civil Partnership (Scotland) Act 2014.

#### **Policy background**

3. At the moment, civil partners in a civil partnership registered in Scotland may, if they wish, change their civil partnership into a marriage. They can do this through having a marriage ceremony (section 8 of the 2014 Act made appropriate amendments to the 1977 Act) or by going through an administrative process laid down by regulations made under section 10 of the 2014 Act (the Marriage between Civil Partners (Procedure for Change and Fees) (Scotland) Regulations 2014 (SSI 2014/361) made appropriate provision)<sup>16</sup>.

4. For the purposes of changing civil partnerships into marriages, civil partnerships registered overseas through the UK armed forces and UK consuls are treated as having been registered in Scotland provided that the parties elected Scotland as the relevant part of the United Kingdom and details of the civil partnership have been sent to the Registrar General of Births, Deaths and Marriages for Scotland. (Section 5(7) of the 1977 Act, as added by section 8(3)(b) of the 2014 Act, refers).

5. The intention of the draft Qualifying Civil Partnership Modification (Scotland) Order 2015 is to allow civil partners in a relationship registered outside Scotland and treated as a civil partnership in Scotland to change their civil partnership into a marriage, if they wish, through having a marriage ceremony in Scotland.

#### **Article 3: meaning of qualifying civil partnership**

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

7. 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.

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<sup>16</sup> SSI 2014/361 is at <http://www.legislation.gov.uk/ssi/2014/361/contents/made>

8. 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 provided the conditions laid down in section 212 of the 2004 Act are met.

9. 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.

10. 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: process for notice of intention to marry**

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

12. 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.

13. 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.

14. Article 4(5) is a consequential drafting change as a result of the modification made by Article 4(6).

15. Article 4(6) relates to the submission of a 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.

16. There are exceptions from this requirement in certain circumstances. Article 4(6) 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: procedure for change of qualifying civil partnership into marriage**

17. This 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: effect of marriage between civil partners in a qualifying civil partnership**

18. 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

19. 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 they 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. They will no longer be treated as civil partnerships under Scots law when they marry in Scotland: instead, they will be marriages. Article 6 then disapplies section 11(2)(b) in these cases and provides that instead, for the purposes of Scots law, the couple are to be treated as having been married to each other since 5 December 2005 or, if later, the date the relationship was originally registered in the other jurisdiction.

20. The relevance of the date of 5 December 2005 is that this is when relevant provisions of the 2004 Act commenced and Scotland started to treat same sex relationships from overseas as civil partnerships, provided they met the conditions laid down in section 212 of the 2004 Act.

**Family and Property Law**  
**Scottish Government**  
**June 2015**

**ANNEX C: LIST OF SPECIFIED RELATIONSHIPS FROM OUTWITH THE UK TREATED AS CIVIL PARTNERSHIPS IN SCOTLAND BY VIRTUE OF SCHEDULE 20 TO THE 2004 ACT**

<b><i>Country or territory</i></b>	<b><i>Description</i></b>
Andorra	unió estable de parella
Argentina: Autonomous City of Buenos Aires	unión civil
Australia: Australian Capital Territory	civil partnership
Australia: New South Wales	a relationship registered under the Relationships Register Act 2010
Australia: Queensland	civil partnership
Australia: Tasmania	significant relationship
Australia: Victoria	registered domestic relationship
Austria	eingetragene Partnerschaft
Belgium	the relationship referred to as cohabitation légale, wettelijke samenwoning or gesetzliches zusammenwohnen
Brazil	união estável
Canada: Manitoba	the relationship referred to as common-law relationship or as union de fait
Canada: Nova Scotia	domestic partnership
Canada: Quebec	the relationship referred to as union civile or as civil union
Colombia	unión de hecho
Czech Republic	registrované partnersví
Denmark	registreret partnerskab
Ecuador	unión civil
Finland	the relationship referred to as rekisteröity parisuhde or as registrerad partnerskap
France	pacte civil de solidarité
Germany	Lebenspartnerschaft
Greenland	the relationship referred to as nalunaarsukkamik inooqatigiinneq or as registreret partnerskab
Hungary	bejegyzett élettársi kapcsolat
Iceland	staðfesta samvist
Ireland	civil partnership
Isle of Man	civil partnership
Jersey	civil partnership
Liechtenstein	eingetragene Partnerschaft
Luxembourg	the relationship referred to as partenariat enregistré or eingetragene Partnerschaft
Mexico: Coahuila	pacto civil de solidaridad
Mexico: Mexico City Federal District	sociedad de convivencia

Netherlands	geregistreerd partnerschap
New Zealand	civil union
Norway	registrert partnerskap
Slovenia	zakon o registraciji istospolne partnerske skupnosti
South Africa	civil partnership
Sweden	registrerat partnerskap
Switzerland	the relationship referred to as eingetragene Partnerschaft, as partenariat enregistré or as unione domestica registrata
United States of America: California	domestic partnership
United States of America: Colorado	the relationship between designated beneficiaries
United States of America: Connecticut	civil union
United States of America: Delaware	civil union
United States of America: Hawaii	civil union
United States of America: Hawaii	reciprocal beneficiary relationship
United States of America: Illinois	civil union
United States of America: Maine	domestic partnership
United States of America: Nevada	domestic partnership
United States of America: New Jersey	civil union
United States of America: New Jersey	domestic partnership
United States of America: Oregon	domestic partnership
United States of America: Rhode Island	civil union
United States of America: Vermont	civil union
United States of America: Washington	state registered domestic partnership
United States of America: Wisconsin	domestic partnership
Uruguay	unión concubinaria

It is also possible for an overseas relationship to be treated as a civil partnership in Scotland by meeting the general conditions laid down in the 2004 Act.

## ANNEX D: DRAFT GUIDANCE TO COUPLES

### CHANGING CIVIL PARTNERSHIPS REGISTERED OUTSIDE SCOTLAND INTO MARRIAGES

#### Introduction

Couples in a civil partnership registered outside of Scotland may wish to change their relationship into a marriage.

The country which originally registered your civil partnership may have established procedures to enable this to take place there.

It is also possible to change a civil partnership registered outside of Scotland into a marriage in Scotland although, as outlined below, the effect of doing this when you move outside of Scotland may not be clear

This guidance note outlines eligibility 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 should obtain their own independent legal advice on how the marriage formed in Scotland would be treated outside Scotland.

**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.

In relation to relationships registered outside of the United Kingdom, the relationship must be:

- Either 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.

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.

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. (This is now a minimum 28 clear days).
- Barriers to marriage (eg too closely related) apply.
- Fees apply.

- 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).

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

### No obligation

There is no obligation on couples to change their civil partnership into a marriage. It is entirely a decision for couples themselves.

### The effect of changing a civil partnership registered outside Scotland into a marriage in Scotland

Your marriage will be recognised as a marriage in Scotland. The Scottish legislation 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 on how your marriage will be treated 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 to seek clarity on your status. This could be expensive.

Areas where lack of clarity on civil status may have an effect on your rights and responsibilities include property law; succession (inheritance); and pensions.

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 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.



*Draft Order laid before the Scottish Parliament under section 9(2)(d) of the Marriage and Civil Partnership (Scotland) Act 2014, for approval by resolution of the Scottish Parliament.*

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D R A F T   S C O T T I S H   S T A T U T O R Y   I N S T R U M E N T S

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**2015 No.**

**MARRIAGE**

**CIVIL PARTNERSHIP**

**The Qualifying Civil Partnership Modification (Scotland) Order  
2015**

*Made*   -   -   -   -

*Coming into force in accordance with article 1*

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 9(1) and (2) and 11(5) and (6) of the Marriage and Civil Partnership (Scotland) Act 2014(a) and all other powers enabling them to do so.

In accordance with section 9(3) of that Act they have consulted with the Registrar General of Births, Deaths and Marriages for Scotland and such other persons as they considered appropriate on a copy of the proposed draft Order.

In accordance with section 9(2)(d) of that Act, a draft of this Order has been laid before, and approved by resolution of, the Scottish Parliament.

**Citation and commencement**

**1.** This Order may be cited as the Qualifying Civil Partnership Modification (Scotland) Order 2015 and comes into force on the day after the day on which it is made.

**Interpretation**

**2.** In this Order—

“the 1977 Act” means the Marriage (Scotland) Act 1977(b);

“the 2014 Act” means the Marriage and Civil Partnership (Scotland) Act 2014;

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(a) 2014 asp 5. The powers to make this Order are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). The Order is subject to the affirmative procedure by virtue of section 33(3) of that Act.

(b) 1977 c.15.

### **Meaning of qualifying civil partnership**

3.—(1) Section 5 of the 1977 Act (objections to marriage) is modified as follows.

(2) For subsection (6) substitute—

“(6) For the purposes of subsection (4)(b) a “qualifying civil partnership” is—

- (a) a civil partnership which was registered—
  - (i) in Scotland;
  - (ii) in England and Wales or Northern Ireland; or
- (b) an overseas relationship within the meaning of section 212 of the Civil Partnership Act 2004<sup>(a)</sup>; and
- (c) has not been dissolved, annulled or ended by death.”.

(3) In subsection 5(7), for “subsection (6)(a)” substitute “subsection (6)(a)(i)”.

(4) After subsection (7) insert—

“(8) A civil partnership which was registered outside the United Kingdom under an Order in Council made under Chapter 1 of Part 5 of the 2004 Act is to be treated for the purposes of subsection (6)(a)(ii) as having been registered in England and Wales or, as the case may be, Northern Ireland if—

- (a) the parties to the civil partnership elected England and Wales or, as the case may be, Northern Ireland as the relevant part of the United Kingdom under the Order; and
- (b) details of the civil partnership have been sent to the Registrar General for England and Wales or, as the case may be, the Registrar General in Northern Ireland.”.

### **Process for notice of intention to marry**

4.—(1) Section 3 of the 1977 Act (notice of intention to marry) is modified as follows—

(2) In subsection (1)(bb), for “section 5(6)” substitute “section 5(6)(a)(i)”;

(3) After subsection (1)(bb) add—

“(bc) If the person is in a qualifying civil partnership within the meaning of section 5(6)(a)(ii) or (b) with the other party to the intended marriage—

- (i) information equivalent to an extract from an entry in the civil partnership register; and
- (ii) such documentary evidence in support of that information, as the district registrar may require;”.

(4) In subsection (2) for “or (bb)” substitute “(bb) or (bc)”.

(5) At the end of subsection (5)(b) omit “or”.

(6) After subsection (5)(c) insert:—

“;or

- (d) if no such certificate has been issued only by reason of the fact that the law of the state in which the party is domiciled prevents the parties to a qualifying civil partnership from marrying.”.

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(a) 2004 c.33.

### **Procedure for change of qualifying civil partnership into marriage**

5. In section 10(7) of the 2014 Act (change of qualifying civil partnership into marriage) for “section 5(6) of the 1977 Act (inserted by section 8(3)(b) of this Act)” substitute “section 5(6)(a)(i) of the 1977 Act”.

### **Effect of marriage between civil partners in a qualifying civil partnership**

6. Where the civil partners are in a qualifying civil partnership within the meaning of section 5(6)(a)(ii) or (b) of the 1977 Act—

- (a) section 11(2)(b) of the 2014 Act does not apply; and
- (b) the civil partners are to be treated as having been married to each other since—
  - (i) 5th December 2005; or
  - (ii) if later, the date on which the qualifying civil partnership was registered.

St Andrew’s House,  
Edinburgh  
Date

*Name*  
A member of the Scottish Government

## **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order modifies the meaning of qualifying civil partnership in section 5(6) of the Marriage (Scotland) Act 1977 so as to include civil partnerships registered outside Scotland and makes amendments to the 1977 Act and the Marriage and Civil Partnership (Scotland) Act 2014 related to that modification. The effect of the Order is that parties to a civil partnership registered outside Scotland could, in the future, change their relationship into a marriage in Scotland.