

MEMORANDUM ACCOMPANYING LEGISLATIVE CONSENT MOTION IN RESPECT OF THE MARRIAGE (SAME SEX COUPLES) BILL

Legislative Consent Motion

1. The draft motion which will be tabled by the Minister of Finance and Personnel is:

“That this Assembly agrees that the following provisions in the Marriage (Same Sex Couples) Bill, which relate to the treatment of same sex marriages in Northern Ireland and gender recognition, should be considered by the UK Parliament:

- Clauses 10(3), 12, 15(1) to (3) and 16,
- paragraph 2 of Schedule 2; and
- Schedule 5 (as introduced in the House of Commons on 24 January 2013).”

Background

2. This memorandum, which relates to the Marriage (Same Sex Couples) Bill (“the Bill”), is laid before the Assembly by the Minister of Finance and Personnel in accordance with Standing Order 42A(2).
3. The Bill was introduced to the House of Commons on 24 January 2013. The latest version of the Bill can be found at:

<http://services.parliament.uk/bills/2012-13/marriagesamesexcouplebill.html>

The Bill

4. Under the current law in the UK, a marriage will only be valid if it is between a man and a woman. However, in accordance with the Civil Partnership Act 2004 (“the CP Act”), a same sex couple may enter into a civil partnership by way of a civil ceremony.
5. In March 2012 the UK Government published a consultation which invited views on “Equal Civil Marriage”. On 11 December 2012 the Government confirmed that it would proceed with its proposal to introduce marriage for same sex couples. The Government also said it would -

- permit religious marriage ceremonies for same sex couples according to the rites of religious organisations which wished to conduct such ceremonies; and
 - provide protection for religious organisations and individuals who do not wish to conduct such ceremonies.
6. The Bill seeks to give effect to the UK Government's agreed policy. Its main purpose is to enable same sex couples in England and Wales to get married, either in a civil ceremony or, provided the religious organisation concerned is in agreement, on religious premises.
 7. Civil partnerships for same sex couples will continue to be available. However, the Bill allows for a civil partnership to be converted to a marriage.
 8. The Bill contains a number of other related provisions, including –
 - provisions which will amend the law relating to gender recognition.
 - provisions which relate to consular marriage and the marriage of service personnel overseas; and
 - consequential and interpretative provisions.

Provisions in the Bill which deal with a devolution matter

9. The UK Government has said it will proceed in accordance with the convention that the UK Parliament will not normally legislate with regard to devolved matters in Northern Ireland except with the agreement of the Northern Ireland legislature.
10. There are a number of provisions in the Bill, as introduced, which would trigger that convention. However, some of those provisions are not in keeping with the Northern Ireland policy position on same sex marriage. Accordingly, the legislative consent motion which has been set down by the Minister of Finance and Personnel only relates to the provisions in the Bill which are set out in Annex A to this memorandum.

Consequential/transitional provision

11. Clause 15 of the Bill will allow for the making of an order dealing with consequential/transitional matters. Clause 16 of the Bill sets out how orders and regulations will be made. Clause 16(6)(b) of the Bill has been amended to provide that the Secretary of State or the Lord Chancellor must obtain the consent of DFP before making an order or

regulations which would amend Northern Ireland legislation which is within the competence of the Assembly.

Status of English/Welsh same sex marriage

12. Paragraph 2(1) of Schedule 2 to the Bill provides for an English or Welsh same sex marriage to be treated as a civil partnership in Northern Ireland. Paragraph 2(2) of Schedule 2 allows for the making of an order which provides that an English or Welsh same sex marriage is not to be treated as a civil partnership or is to be treated as a civil partnership which is subject to conditions.

Gender Recognition

13. The Gender Recognition Act 2004 (“the GR Act”) sets out how a transsexual person can obtain legal recognition for his or her acquired gender. If a full gender recognition certificate (“GR certificate”) is issued, the person will be entitled to a new birth certificate and may marry a person who is the opposite gender to his or her acquired gender. However, if a person is married or in a civil partnership, an interim GR certificate will be issued and the person will then have 6 months in which to obtain a decree of nullity/nullity order. The court will issue a full GR certificate when the decree/order is made absolute/final.
14. With the introduction of same sex marriage in England and Wales there will be no need to end a marriage or civil partnership where there is a change of gender. Accordingly, Schedule 5 to the Bill provides for the amendment of the GR Act to allow an existing marriage which is registered in England or Wales or outside the UK (a “protected marriage”) or a civil partnership which is registered in England and Wales (“a protected partnership”) to continue, provided both parties are content to proceed on that basis. The statutory declaration which accompanies the application for a GR certificate will have to say whether the applicant is married or in a civil partnership, where the marriage/civil partnership took place and whether the spouse/civil partner consents to the marriage/civil partnership continuing. If there is no “declaration of consent” from the spouse/civil partner an interim GR certificate will issue.
15. Schedule 5 will also amend the GR Act to allow for the correction of errors and for applications to a court to quash the grant of a gender recognition certificate which has been obtained by fraud.
16. The GR Act is a UK-wide Act, but the law on gender recognition is a devolved matter. The amendments in Schedule 5 will impact on the law in Northern Ireland. However, if the gender recognition process results in a marriage becoming a same sex marriage, that marriage (the “protected marriage”) will come within the terms of paragraph

2(1) of Schedule 2 to the Bill and will, therefore, be treated as a civil partnership in Northern Ireland.

Need for the provisions

17. It is important to take account of the interface between the law in Northern Ireland and the law in England and Wales. By providing for English/Welsh same sex marriages to be treated as civil partnerships we are utilising an established legal framework (i.e. the CP Act) and treating those marriages in the same way that we treat overseas same sex marriages. Also, we must have appropriate procedures for handling applications for gender recognition certificates, including procedures for correcting errors, bearing in mind the changes which will be effected to the law in this area to take account of the availability of same sex marriage in England and Wales.

Reasons for utilising the Bill rather than an Act of the Assembly

18. The provisions which are referred to above will have to be commenced in conjunction with the other provisions in the Bill. Accordingly, it is considered appropriate for Westminster to legislate on these matters.

Human Rights and Equality

19. The UK Government has determined that the provisions in the Bill are compatible with the European Convention on Human Rights. No differential impacts have been identified as far as the Northern Ireland equality groupings are concerned.

Financial/Regulatory Impact

20. The UK Government has concluded that the Bill is unlikely to impose costs on businesses. It has identified some costs for the public sector. However, those costs largely arise because there will be a need to adjust IT systems and administrative practices to take account of the new law on same sex marriage. As Northern Ireland is not introducing same sex marriage, those costs will not arise in the Northern Ireland context.

Committee for Finance and Personnel

21. The Committee for Finance and Personnel has been advised that a legislative consent motion will be sought in relation to the provisions in Annex A.

DEPARTMENT OF FINANCE AND PERSONNEL
24 May 2013

ANNEX A

PART 3

FINAL PROVISIONS

15 Transitional and consequential provision

(1) The Secretary of State or Lord Chancellor may, by order, make such transitional, transitory or saving provision as the Secretary of State or Lord Chancellor considers appropriate in connection with the coming into force of any provision of this Act.

(2) The Secretary of State or Lord Chancellor may, by order, make such provision as the Secretary of State or Lord Chancellor considers appropriate in consequence of this Act.

(3) The provision that may be made by an order under subsection (1) or (2) includes provision amending UK legislation.

(4) Schedule 7 (transitional and consequential provision etc) has effect.

16 Orders and regulations

(1) Any power of the Secretary of State, Lord Chancellor or Registrar General to make an order or regulations under this Act is exercisable by statutory instrument.

(2) The following subordinate legislation may not be made unless a draft of the statutory instrument containing the legislation has been laid before, and approved by resolution of, each House of Parliament—

- (a) an order under section 8;
- (b) an order under section 15(1) or (2) which amends an Act of Parliament;
- (c) an order under paragraph 1 of Schedule 2 (except for an order which contains only provision under paragraph 1(2) of that Schedule).

(3) The following subordinate legislation is subject to annulment in pursuance of a resolution of either House of Parliament—

- (a) an order under section 11(5)(c);
- (b) an order under section 15(1) or (2) (unless it amends an Act of Parliament);
- (c) an order under paragraph 1(2) of Schedule 2 (unless the order also contains provision made under paragraph 1(1) of that Schedule);
- (d) an order under paragraph 2 of Schedule 2;

(e) an order under paragraph 27 of Schedule 4.

(4) An order or regulations made under this Act may—

- (a) make different provision for different purposes,
- (b) make transitional, transitory or saving provision, or
- (c) make consequential provision.

(5) Any power of the Secretary of State or Lord Chancellor under this Act to amend legislation by subordinate legislation includes power to repeal or revoke legislation (and any reference to the amendment of legislation by such an order or regulations is to be read accordingly).

(6) The Secretary of State or Lord Chancellor must—

- (a) obtain the consent of the Scottish Ministers before making any order under this Act containing provision which amends Scottish legislation if that provision would (if contained in an Act of the Scottish Parliament) be within the legislative competence of that Parliament;
- (b) obtain the consent of the Department of Finance and Personnel before making any order or regulations under this Act, except an order under section 19(1), containing provision which would (if contained in an Act of the Northern Ireland Assembly) be within the legislative competence of that Assembly.

10 Extra-territorial matters

(3) Schedule 2 (extra-territorial matters) has effect.

SCHEDULE 2

EXTRA-TERRITORIAL MATTERS

PART 1 ENGLISH & WELSH MARRIAGES OF SAME SEX COUPLES: TREATMENT IN SCOTLAND AND NORTHERN IRELAND

Northern Ireland

2 (1) Under the law of Northern Ireland, a marriage of a same sex couple under the law of England and Wales is to be treated as a civil partnership formed under the law of England and Wales (and accordingly, the spouses are to be treated as civil partners).

(2) The Secretary of State may by order—

- (a) provide for the treatment of a marriage as a civil partnership (by virtue of sub-paragraph (1)) to have effect subject to provision made by the order;
- (b) specify cases in which a marriage is not to be treated as a civil partnership by virtue of sub-paragraph (1).

PART 2

OTHER PROVISIONS RELATING TO MARRIAGE AND CIVIL PARTNERSHIP

12 Change of gender of married persons or civil partners

Schedule 5 (change of gender of married persons or civil partners) has effect.

SCHEDULE 5

CHANGE OF GENDER OF MARRIED PERSONS OR CIVIL PARTNERS

Introduction

1 The Gender Recognition Act 2004 is amended in accordance with this Schedule.

Evidence

2 Section 3 (evidence): after subsection (6) insert—

“(6A) If the applicant is married, an application under section 1(1) must include a statutory declaration as to whether the marriage is a marriage under the law of England and Wales, of Scotland, of Northern Ireland, or of a country or territory outside the United Kingdom.

(6B) If the applicant is married, and the marriage is a protected marriage, an application under section 1(1) must also include—

- (a) a statutory declaration of consent by the applicant’s spouse (if the spouse has made such a declaration), or
- (b) a statutory declaration by the applicant that the applicant’s spouse has not made a statutory declaration of consent (if that is the case).

(6C) If an application includes a statutory declaration of consent by the applicant’s spouse, the Gender Recognition Panel must give the spouse notice that the application has been made.”.

Successful applications

3 Section 4 (successful applications): for subsections (2) and (3) substitute—

“(2) The certificate is to be a full gender recognition certificate if—

- (a) the applicant is neither a civil partner nor married,
- (b) the applicant is a party to a protected marriage and the applicant’s spouse consents to the marriage continuing after the issue of a full gender recognition certificate, or
- (c) the applicant is a party to a protected civil partnership and the Panel has decided to issue a full gender recognition certificate to the other party to the civil partnership.

(3) The certificate is to be an interim gender recognition certificate if—

- (a) the applicant is a party to a protected marriage and the applicant’s spouse does not consent to the marriage continuing after the issue of a full gender recognition certificate,
- (b) the applicant is a party to a marriage that is not a protected marriage,
- (c) the applicant is a party to a protected civil partnership and the other party to the civil partnership has not made an application under section 1(1),
- (d) the applicant is a party to a protected civil partnership and the Panel has decided not to issue a full gender recognition certificate to the other party to the civil partnership, or
- (e) the applicant is a party to a civil partnership that is not a protected civil partnership.

(3A) If a Gender Recognition Panel issues a full gender recognition certificate under this section to an applicant who is a party to a protected marriage, the Panel must give the applicant’s spouse notice of the issue of the certificate.

(3B) Subsection (2)(c) is subject to section 5B.”.

Issue of full certificate after interim certificate: applicant married

4 After section 4 insert—

“Issue of full certificate after interim certificate: applicant married

4A Married person with interim certificate: issue of full certificate

(1) A Gender Recognition Panel must issue a full gender recognition certificate to a person in either of the following cases.

- (2) Case A is where, on an application by the person, the Panel is satisfied that—
- (a) an interim gender recognition certificate has been issued to the person;
 - (b) the person was a party to a protected marriage at the time when the interim gender recognition certificate was issued;
 - (c) the person is a party to a protected marriage; and
 - (d) the person's spouse now consents to the marriage continuing after the issue of the full gender recognition certificate.
- (3) Case B is where, on an application by the person, the Panel is satisfied that—
- (a) an interim gender recognition certificate has been issued to the person;
 - (b) the person was a party to a civil partnership at the time when the interim gender recognition certificate was issued;
 - (c) a conversion application has been made within the period of six months beginning with the day on which that certificate was issued;
 - (d) the conversion application has resulted in the civil partnership being converted into a marriage;
 - (e) the person is a party to that marriage; and
 - (f) the person's spouse consents to the marriage continuing after the issue of the full gender recognition certificate.
- (4) If, on an application under subsection (2) or (3), the Panel is not satisfied as mentioned in that subsection, the Panel must reject the application.
- (5) An application under subsection (2) must be made within the period of six months beginning with the day on which the interim gender recognition certificate is issued.
- (6) An application under subsection (3) must be made within the period of six months beginning with the day on which the civil partnership is converted into a marriage.
- (7) An application under subsection (2) or (3) must include a statutory declaration of consent made by the person's spouse.
- (8) An application under subsection (3) must also include—
- (a) evidence of the date on which the conversion application was made, and
 - (b) evidence of the conversion of the civil partnership into a marriage.

(9) If an application is made under this section, the Gender Recognition Panel must give the applicant's spouse—

- (a) notice of the application; and
- (b) if the Panel grants the application, notice of the issue of the full gender recognition certificate.

(10) In this section “conversion application” means an application for the conversion of a civil partnership into a marriage under regulations under section 9 of the Marriage (Same Sex Couples) Act 2013.

4B Application under section 4A: death of spouse

(1) In a case where an application is made under section 4A(2) or (3) and the applicant's spouse dies before the application is determined—

- (a) the application is to be treated as an application, made under section 5(2) in a case where a spouse has died, for a full gender recognition certificate to be issued; and
- (b) that application is to be treated as having been made at the time when the application under section 4A was made.

(2) The Gender Recognition Panel determining the application must specify the period within which the applicant is to produce the required evidence in support of the new application.

(3) In this section—

- “new application” means the application under section 5(2) which the person is, by virtue of subsection (1), treated as having made;
- “required evidence” means the evidence required by section 5(4).”.

Issue of full certificate after interim certificate: applicant no longer married or civil partner”.

Applications by both civil partners

5 After section 5A insert—

“Other provision about applications and certificates

5B Applications by both civil partners

(1) This section applies where the Panel decides to issue a full gender recognition certificate to a party to a protected civil partnership.

(2) The Panel must not issue the full gender recognition certificate to that person unless the Panel issues a full gender recognition certificate to the other party to the protected civil partnership.

(3) In such a case, the Panel must issue both certificates on the same day.

(4) Those certificates take effect at the beginning of the day on which they are issued.”.

Errors in certificates

6 Section 6 (errors in certificates)—

- (a) for the title substitute “**Errors**”;
- (b) for subsection (1) substitute—

“(1) Where a gender recognition certificate has been issued to a person, the person or the Secretary of State may make an application for—

- (a) an interim gender recognition certificate, on the ground that a full gender recognition certificate has incorrectly been issued instead of an interim certificate;
 - (b) a full gender recognition certificate, on the ground that an interim gender recognition certificate has incorrectly been issued instead of full certificate; or
 - (c) a corrected certificate, on the ground that the certificate which has been issued contains an error.”;
- (c) subsection (3): for paragraph (a) substitute—
- “(a) must grant the application if satisfied that the ground on which the application is made is correct, and”;
- (d) subsection (4): for “a corrected” substitute “a correct, or a corrected,”.

Applications: supplementary

7 Section 7 (applications: supplementary), subsection (1): after “1(1),” insert “4A,”.

Appeals etc

8 Section 8 (appeals etc)—

- (a) subsection (1): after “1(1),” insert “4A,”;
- (b) subsection (5): after “1(1),” insert “4A,”;
- (c) after subsection (5) insert—

“(5A) If an application under section 1(1), 4A, 5(2), 5A(2) or 6(1) is granted, the applicant’s spouse may apply to the High Court or Court of Session to quash the decision to grant the application on the grounds that its grant was secured by fraud.”;

(d) subsection (6): after “subsection (5)” insert “or an application under subsection (5A)”.

Change in gender of party to marriage

9 After section 11 insert—

“11A Change in gender of party to marriage

(1) This section applies in relation to a protected marriage if (by virtue of section 4(2)(b) or 4A) a full gender recognition certificate is issued to a party to the marriage.

(2) The continuity of the protected marriage is not affected by the relevant change in gender.

(3) If the protected marriage is a foreign marriage—

(a) the continuity of the marriage continues by virtue of subsection (2) notwithstanding any impediment under the proper law of the marriage;

(b) the proper law of the marriage is not affected by its continuation by virtue of subsection (2).

(4) In this section—

“foreign marriage” means a marriage under the law of a country or territory outside the United Kingdom;

“impediment” means anything which affects the continuation of a marriage merely by virtue of the relevant change in gender;

“proper law”, in relation to a protected marriage, means the law of the country or territory under which the marriage was entered into;

“relevant change in gender” means the change or changes of gender occurring by virtue of the issue of the full gender recognition certificate or certificates.”.

Registration

10 (1) Section 10 (registration): after subsection (1) insert—

“(1A) Where a full gender recognition certificate is issued to a person who is a party to—

(a) a marriage under the law of England and Wales, or

(b) a civil partnership under that law,

the Secretary of State must send a copy of the certificate to the Registrar General for England and Wales.”.

(2) Schedule 3 (registration), Part 1 (England and Wales): at end insert—

“Registration of marriages and civil partnerships

11A (1) The Registrar General may make regulations about—

- (a) the registration of qualifying marriages, and
- (b) the registration of qualifying civil partnerships.

(2) The regulations may, in particular, provide for the maintenance of—

- (a) a separate register in relation to qualifying marriages, and
- (b) a separate register in relation to qualifying civil partnerships.

(3) In this paragraph—

“qualifying civil partnership” means a civil partnership under the law of England and Wales in a case where a full gender recognition certificate has been issued to each of the civil partners;

“qualifying marriage” means a marriage under the law of England and Wales in a case where a full gender recognition certificate has been issued to one, or each, of the spouses.”.

Change in gender of civil partners

11 After section 11A (inserted by paragraph 9) insert—

“11B Change in gender of civil partners

The continuity of a civil partnership is not affected by the issuing of full gender recognition certificates (by virtue of section 4(2)(c)) to both civil partners.”.

Foreign gender change and marriage

12 Section 21 (foreign gender change and marriage)—

(a) after subsection (1) insert—

“(1A) Subsections (2) to (5) apply only in Scotland and Northern Ireland.”;

(b) subsection (2): for “Accordingly,” substitute “In accordance with subsection (1),”.

Prohibition on disclosure of information

13 Section 22 (prohibition on disclosure of information), subsection (2)(a):
after “section” insert “4A,”.

Interpretation

14 Section 25 (interpretation)—

(a) after the definition of “Gender Recognition Panel” insert—

““protected civil partnership” means a civil partnership under the law of
England and Wales;

“protected marriage” means—

(a) a marriage under the law of England and
Wales, or

(b) a marriage under the law of a country or
territory outside the United Kingdom,”;

(b) after the definition of “registered psychologist” insert—

““statutory declaration of consent”, in relation to the issuing of
a gender recognition certificate to a person, means a
statutory declaration by the person’s spouse or civil partner
that the spouse or civil partner consents to the
marriage or civil partnership continuing after the issue of a
full gender recognition certificate,”.