

POLICY NOTE

THE GENDER RECOGNITION (MARRIAGE AND CIVIL PARTNERSHIP REGISTRATION) (SCOTLAND) REGULATIONS 2016

SSI 2016/66

The above instrument is made by the Registrar General, with the approval of the Scottish Ministers, in exercise of the powers conferred by paragraph 20A (1) and (3) of Schedule 3 to the Gender Recognition Act 2004 (“the 2004 Act”). The instrument is subject to the negative procedure.

Policy Objectives

The Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”) made a number of changes to marriage and civil partnership law, including the introduction of same sex marriage. The 2014 Act made some amendments to the 2004 Act to reflect the introduction of same sex marriage, including provision so that persons in a marriage solemnised in Scotland¹ can obtain a full Gender Recognition Certificate (“GRC”) and stay married. A full GRC provides full legal recognition of an acquired gender.

The 2014 Act also amended the 2004 Act so that where a couple in a civil partnership registered in Scotland² both obtain a full GRC on the same day, they can remain in the civil partnership. Where only one party in a civil partnership is obtaining a full GRC, provision is made so that the civil partnership can be changed into a marriage, thus enabling the couple to stay in a legally recognised relationship. It is not possible for a couple in a civil partnership to remain in the civil partnership where only one of the parties is obtaining a full GRC, as there is no legal status of mixed sex civil partnership in Scotland.

Section 25 of the 2004 Act refers to a marriage solemnised in Scotland as a “protected Scottish marriage” and to a civil partnership registered in Scotland as “a protected Scottish civil partnership”.

The 2004 Act, as amended by the 2014 Act, makes provision on the continuity of marriages and civil partnerships following gender recognition. Section 11C(2) of the 2004 Act provides that “the continuity of the protected Scottish marriage is not affected by the issuing of a full gender recognition certificate”. Section 11D of the 2004 Act provides that “the continuity of a protected Scottish civil partnership is not affected by the issuing of full gender recognition certificates to both civil partners”.

The 2014 Act added paragraph 20A to Schedule 3 to the 2004 Act to enable the Registrar General, with the approval of the Scottish Ministers, to make regulations about the registration of qualifying Scottish marriages and civil partnerships following gender recognition. In paragraph 20A, a “qualifying Scottish marriage” is where a full GRC has

¹ Including marriages by UK consuls and UK armed forces overseas where the couple elected Scotland as the relevant part of the UK and details of the marriage are held by the Registrar General of Births, Deaths and Marriages for Scotland.

² Including civil partnerships registered outwith the UK by the UK consular service and the UK armed forces where the couple elected Scotland as the relevant part of the UK and details of the civil partnership are held by the Registrar General of Births, Deaths and Marriages for Scotland.

been issued to one or both of the parties to the marriage and a “qualifying Scottish civil partnership” is where a full GRC has been issued to each of the civil partners.

These regulations make appropriate provision under paragraph 20A to Schedule 3 to the 2004 Act accordingly.

Section 30 of the 2014 Act makes provision so that the Scottish Ministers can make regulations on renewed marriage or civil partnership ceremonies following gender recognition, if the couple wish to have such a ceremony. The Scottish Government intends to make regulations under section 30 in due course.

Background

Regulation 2 contains a number of definitions for the purposes of the Regulations.

Regulation 3 makes provision so that a couple in a marriage where one or both of the parties has obtained a full GRC can apply to the Registrar General for the marriage to be registered.

When a full GRC is issued to a person who is in a protected Scottish marriage (or a protected Scottish civil partnership), the Gender Recognition Panel is required, by section 10(1B) of the 2004 Act, to send a copy of the full GRC to the Registrar General. The Registrar General will then make contact with the couple about registration issues, outline the options available to them and include a copy of the application form at Schedule 1 to these Regulations.

This work by the Registrar General is along similar lines to existing work in relation to birth registration when a person who was born in Scotland obtains a full GRC³.

Regulation 4 makes provision on the new entry in the register of marriages⁴. This will generally, with an exception, reflect the details of the couple as they were when they married whilst taking account of their name(s) and gender(s) as shown in the full GRC(s).

The exception is where the new entry in the marriage register would show the couple to be in a same sex marriage before 16 December 2014, when same sex marriage was introduced in Scotland. Regulation 4 gives the couple the option of the entry showing they were in a same sex marriage before 16 December 2014, if they wish. If they do not wish this, regulation 4 makes provision so that changes are made to the new entry. These changes are:

- The date when the marriage took place on the entry is to be the date the Registrar General makes up the draft new entry, rather than the original date. [Regulation 4(4)(a)].
- The particulars (eg of the couple and of their parents) are generally to be as at the new date. Information on the witnesses will not be provided (as, for example, the witnesses to the marriage may have died) and, where the marriage was civil, the registrar’s details are to relate to a current registrar. [Regulation 4(4)(b)].

Regulation 5 reflects that the couple may now be in a same sex marriage. In these cases, the marriage entry can only show that it was a religious or belief marriage if, at the date the

³ This existing work is outlined at <http://nationalrecordsofscotland.gov.uk/registration/gender-recognition>

⁴ An extract from the register of marriages is what is usually referred to as the marriage certificate.

marriage is shown as solemnised on the new marriage entry, the celebrant was authorised to solemnise same sex marriage. This reflects that some religious or belief bodies have decided not to solemnise same sex marriages. In these cases, the marriage will be shown as a civil marriage solemnised by an authorised registrar in the registration office.

Regulation 6 relates to marriage solemnised outwith the United Kingdom by UK consuls and UK armed forces. Regulation 6 provides that the new marriage entry can only reflect that the marriage took place outwith the UK in certain circumstances:

- Where the marriage was carried out through the armed forces and the marriage is now mixed sex.
- Where, in the case of consular marriages, the home jurisdiction has confirmed it is content for UK consuls to solemnise mixed sex or same sex marriages and where, in the case of armed forces marriage, the home jurisdiction has confirmed it is content for UK armed forces to solemnise same sex marriages.

This regulation reflects a number of points:

- Consular and armed forces same sex marriages where the couple elected Scotland as the relevant part of the United Kingdom were not possible before 16 December 2014 (as they were not possible in Scotland before then). Therefore, the entry in the marriage register following gender recognition should not show that it was a consular or armed forces marriage if the marriage is now same sex and the marriage took place before 16 December 2014.
- Consular marriages (both mixed sex and same sex) always require the home jurisdiction to consent to UK consuls marrying UK nationals. Therefore, the entry in the marriage register following gender recognition should not show that it was a consular marriage if the home jurisdiction would not have consented to the marriage.
- The consent of the home jurisdiction is required for armed forces same sex marriages. Therefore, to protect this position the entry in the marriage register following gender recognition should not show that it was an armed forces same sex marriage if the home jurisdiction would not have consented to the marriage.
- Where it is not possible for the new entry to reflect that the marriage took place outside the UK, it will be shown as a civil marriage solemnised by an authorised registrar in Edinburgh.

As part of administrative practice, the Registrar General will agree the draft marriage register entry with the couple. Once it has been agreed, under regulation 7 the Registrar General will ask the relevant local authority to register the marriage accordingly. Although the bulk of the day to day work in this area will be carried out by the Registrar General, the registration will be formally carried out by the local authority district registrar, reflecting usual registration practice. The district registrar will be the one for the registration district referred to in the existing register of marriages entry or if the marriage took place outwith the United Kingdom the district registrar for Edinburgh..

Regulations 8 to 10 make provision on the registration of civil partnerships after both parties obtain a full GRC. There are fewer variables to take into account here, as civil partnerships have always been, and remain, for same sex couples only. As a result:

- there is no need for an equivalent of regulation 5. As there is no mixed sex civil partnership in Scotland, there cannot be cases where a couple had a religious or belief civil partnership when they were mixed sex through a celebrant who was not authorised to register same sex civil partnerships;
- there is no civil partnership equivalent of regulation 6. This reflects that the home jurisdiction does not need to consent to armed forces civil partnerships and in relation to consular civil partnerships the home jurisdiction must have consented at the time to same sex civil partnerships being carried out.

Regulation 8 makes provision so that a couple in a civil partnership where both of the parties has obtained a full GRC can apply to the Registrar General for the civil partnership to be registered. The procedures will be similar where a marriage is being registered following gender recognition. The application form in relation to civil partnerships is at Schedule 2 to these Regulations.

Regulation 9 provides that the entry in the register of civil partnerships must be the same as the existing entry, except that it must reflect the names and genders given on the full GRCs.

As part of administrative practice, the Registrar General will agree the draft civil partnership register entry with the couple. Once it has been agreed, under regulation 10 the Registrar General will ask the relevant local authority district registrar to register the civil partnership accordingly in the civil partnership register.

Regulation 11 makes provision on action which the Registrar General needs to take if the court revokes the full GRC on which the Registrar General has been relying. The Registrar General is required to cancel the new entry in the register of marriages or civil partnership register, whichever is applicable. He is also required to cancel any markings on the corresponding existing entry for the couple, which were made under the Gender Recognition (Marriage and Civil Partnership Registration)(Modification)(Scotland) Order 2016 to trace the connection between the existing entry and the new entry.

Regulation 12 makes provision, for the avoidance of doubt, that the registration of a qualifying Scottish marriage has no effect on the continuity of the marriage, as there may be cases where the new entry has a different marriage date from the existing entry relating to the same marriage in order not to “out” an individual following gender recognition. This provision simply reflects the current law in the 2004 Act, as amended by the 2014 Act, which makes provision on the continuity of marriages and civil partnerships following gender recognition. This is included as only applying to Scottish qualifying marriages as there are no changes to the civil partnership date for civil partnerships registered under these regulations.

Consultation

In preparing these regulations, the Scottish Government and the Registrar General have worked closely with the Equality Network and the Scottish Transgender Alliance.

Impact Assessments

No impact assessments were prepared for these Regulations. However, the Scottish Government prepared an Equality Impact Assessment⁵ (“EQIA”) for the introduction of the Bill which led to the 2014 Act to Parliament on 26 June 2013. This EQIA noted the benefits of the legislation to transgender people.

Financial Effects

No fees will be charged to the couple for registering the marriage or civil partnership following gender recognition. There will be a fee, in the usual way, for any extracts from the registers.

As there will be no fee for registering the marriage or civil partnership following gender recognition, there will be costs to National Records of Scotland (NRS). However, these costs are expected to be very low as the number of applications is expected to be very low: on current figures, we expect around 1 a month. Costs to local authorities will be very low as the bulk of the work will be carried out by NRS.

**Scottish Government
Justice Directorate
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⁵ <http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex/EQIA>