

# MARRIAGE (SAME SEX COUPLES) ACT 2013

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS AND SCHEDULES

#### *Schedule 4 – Effect of extension of marriage: further provision*

##### **Part 1 – Private legal instruments**

111. This provision means that the introduction of marriage of same sex couples will not affect the meaning of any marriage-related reference in documents, such as wills, deeds and documents governing charities, drawn up prior to section 11 coming into force. Such references will be understood only in terms of marriage of opposite sex couples.
112. In future, after this Act comes into force, a reference to marriage in any new document may be understood as including marriage of same sex couples (depending on the precise terminology of the document).

##### *Examples*

- If a person has made a bequest to someone, before the Act comes into force, which is conditional on that individual becoming or being married, marriage will refer to marriage of opposite sex couples only.
- If the governing document of a charity, made before the Act comes into force, stipulates that the organisation will provide for someone who is a widow, that reference will only be to a woman who had previously been married to a man.

##### **Part 2 – Presumption on birth of child to married woman**

113. [Paragraph 2](#) makes clear that the common law presumption, that a child born to a woman during her marriage is also the child of her husband (often referred to as “the presumption of legitimacy”), is not extended to marriages of same sex couples by section 11. Therefore, where two women are married to each other and one of the parties to that marriage gives birth to a child, the other party will not be presumed to be the parent of that child by virtue of the common law presumption. There may be other ways in which the party to the marriage who does not give birth to the child is treated in law as the parent (for example, if that woman is treated as a parent as a result of the amendment made by paragraph 40 of Schedule 7 to this Act to section 42 of the Human Fertilisation and Embryology Act 2008), but in all such cases it is not the common law presumption that treats her as the parent of that child.

##### *Examples*

- A woman, who is married to a man, gives birth to a child. Her husband is presumed to be the father of that child by virtue of the common law presumption.
- A woman, who is married to another woman, has a child by way of artificial insemination. Her wife is not presumed to be the parent of that child by virtue of the common law presumption. Under section 42 of the Human Fertilisation and

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Embryology Act 2008 her wife is treated as the parent of that child, unless it is shown that she did not consent to the insemination.

- A woman, who is married to another woman, has a child by way of natural conception with a man. Her wife is not presumed to be the parent of that child by virtue of the common law presumption. The man is the father of that child.

### **Part 3 – Divorce and annulment of marriage**

114. **Paragraph 3** adds a new subsection 1(6) in the Matrimonial Causes Act 1973. Section 1 of that Act sets out various facts for proving that a marriage has broken down irretrievably (the ground for divorce), including in subsection 1(2) (a) that one of the parties to the marriage has committed adultery and the other finds it intolerable to live with that party. New subsection 1(6) maintains the existing definition of adultery and provides that only conduct between one party to the marriage and a person of the opposite sex may constitute adultery. This applies to both opposite sex and same sex couples.
115. **Paragraph 4** amends section 12 of the Matrimonial Causes Act 1973. The effect of this amendment is that non-consummation (either by reason of incapacity or wilful refusal) cannot be a ground on which a marriage of a same sex couple is voidable. The provisions for opposite sex couples remain unaltered.

#### *Examples*

- A man married to a woman has an affair with another man. His wife cannot cite adultery as a fact for divorce, but can rely on unreasonable behaviour instead.
- A man married to another man has an affair with a woman. His husband can cite adultery and that he finds it intolerable to live with his husband as a fact for divorce.
- A man married to another man refuses to have sexual intercourse with his husband. His husband cannot apply for annulment of the marriage because of his wilful refusal to consummate. However, after one year of marriage, he may apply for divorce because his husband has behaved in such a way that he cannot reasonably be expected to live with him.

### **Part 4 – Matrimonial proceedings**

116. Same sex couples who marry in England and Wales but remain or become habitually resident or domiciled in another country may not be able to end their marriage in that country if it does not recognise the existence of the relationship. Part 4 therefore amends the Domicile and Matrimonial Proceedings Act 1973 to provide a "jurisdiction of last resort" so that those same sex couples who are unable to divorce or obtain other matrimonial orders in the country which would normally have jurisdiction are able to have their case heard in the courts in England and Wales. "Jurisdiction" means a court's authority to deal with the case. The courts in England and Wales will be able to assume jurisdiction if the couple were married in England or Wales and where it is the interests of justice to do so.
117. **Paragraph 6** amends section 5 of the Domicile and Matrimonial Proceedings Act 1973 to set out which provisions in respect of jurisdiction in matrimonial causes do not apply to marriages of same sex couples, which are instead dealt with in Schedule A1. It also amends section 5 to provide that Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973, which relates to stays of proceedings, will apply to marriages of opposite sex and same sex couples. **Paragraph 7** amends section 6 of that Act to insert reference to Schedule A1. **Paragraph 8** inserts Schedule A1 to that Act. **Paragraph 1** of Schedule A1 sets out the jurisdiction of the court in proceedings for orders relating to the ending of a marriage (divorce, judicial separation, nullity of marriage or because one of the couple is dead) and orders relating to declarations of validity.

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118. Paragraph 2 of Schedule A1 provides that the court is able to deal with divorce, judicial separation and nullity cases either (a) where the court has jurisdiction because of regulations made under paragraph 5 of Schedule A1 (see below), or (b) when no court has that jurisdiction and either of the married same sex couple is domiciled in England and Wales when the case starts, or (c) when the same sex couple married under the law of England and Wales, no court has the paragraph 5 jurisdiction and it appears to the court in the interests of justice for it to deal with the case. In nullity cases the court additionally has jurisdiction if either of the couple died before the case started and was domiciled in England and Wales on the date of death or had been habitually resident in England and Wales throughout the year ending with the date of death.
119. The court also has jurisdiction to deal with divorce, judicial separation or nullity for the same marriage when proceedings are pending under sub-paragraphs (1) or (2).
120. Paragraph 3 of Schedule A1 provides that the court has jurisdiction to deal with an application by one of a couple for an order which ends their marriage on the ground that their spouse is dead, provided that at the time the application was made the High Court did not have jurisdiction under the Presumption of Death Act 2013 to hear an application for a declaration that the applicant's spouse is presumed dead, the two people concerned married under the law of England and Wales and it appears to the court to be in the interests of justice to deal with the case.
121. Paragraph 4 of Schedule A1 says the court has jurisdiction to deal with an application for a declaration of validity if either party to the marriage concerned is domiciled in England and Wales on the date the case starts, was habitually resident in England and Wales throughout the year before the date the case starts, or died before that date and at death was either domiciled in England and Wales or had been habitually resident in England and Wales throughout the year ending with the date of death, or the two people concerned married under the law of England and Wales and it appears to the court to be in the interests of justice to deal with the case.
122. Paragraph 5 of Schedule A1 enables the Lord Chancellor to make regulations about the jurisdiction of the courts to deal with divorce, judicial separation and nullity cases and about the recognition of such orders for a married same sex couple. These regulations would apply where one of the couple: is or has been habitually resident in a Member State of the European Union (EU), or is an EU national, or is domiciled in a part of the UK or the Republic of Ireland. The regulations may correspond with the terms of Council Regulation (EC) No 2201/2003 (known as Brussels IIa) on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. Brussels IIa deals with marriage of opposite sex couples. The provisions on recognition of judgments can apply retrospectively. A statutory instrument containing these regulations will be subject to the affirmative resolution procedure.
123. Paragraph 6 of Schedule A1 sets out the meaning of "declaration of validity" in that Schedule as: a declaration as to the validity of a marriage, a declaration as to whether a marriage existed on a particular date, or a declaration as to the validity of matrimonial orders obtained outside England and Wales.
124. Paragraph 10 of Schedule 4 to the Act makes transitory provision to ensure that the provisions on the court's jurisdiction to hear presumption of death proceedings will function under section 19 of the Matrimonial Causes Act 1973 if this Act were to come into force before the entry into force of the Presumption of Death Act 2013 and until the Presumption of Death Act 2013 comes into force.

## **Part 5 – State pensions**

125. [Part 5](#) makes provision about a person's entitlement to state pension based on a current or deceased spouse's or civil partner's National Insurance record. This entitlement is

payable by way of a “Category B pension” under the Social Security Contributions and Benefits Act 1992.

126. Under section 48A of that Act, a married person or civil partner may be entitled to a lower-rate basic state pension based on the spouse’s or civil partner’s National Insurance record while the spouse or partner is alive, and up to a full basic pension and a proportion of the spouse’s or civil partner’s additional (earnings-related) state pension after their death. However, for married men and civil partners, entitlement is restricted to those whose wives or partners were born on or after 6 April 1950. Paragraph 11(1) replicates this restriction for a person who is married to a person of the same sex. However, paragraph 11(2) provides that the restriction does not apply to a woman married to another woman whose spouse was her husband immediately before obtaining a gender recognition certificate. In this situation, she would retain entitlement to state pension based on her spouse’s National Insurance contributions, even if the latter was born before 6 April 1950. Paragraph 11(3) amends subsection (2ZA) of the Social Security Contributions and Benefits Act 1992, which defines which contribution condition the person’s spouse is required to satisfy depending on when he or she reaches state pension age. The amendment clarifies that the condition applicable to a person who reached state pension age before 6 April 2010 can be relevant only where the spouse is a man married to a woman or (as provided by new (2ZA) and (2ZB)) had been born a man who would have reached pension age in her birth gender before that date.

*Examples*

- Sandra (born 1949) and Mary (born 1951) get married. Mary only came to live in the UK in her forties and had built up only 50% of a full basic state pension, worth £55.07 a week at current rates, by the time she reached state pension age in March 2013. This is £10.93 less than the full standard rate of basic pension for a married person or civil partner (£66). As Sandra was born before 6 April 1950, when the couple marry Mary will not be able to have her basic state pension increased to £66 using Sandra’s National Insurance record.
  - Stephen (born in 1949) and Michelle (born 1951) married in 1980. Michelle did not return to work after having their children and is entitled to only 50% of a full basic state pension on her own contribution record. When Stephen qualifies for state pension in 2014, Michelle will be able to have her basic state pension increased to £66. Stephen (now known as Stephanie) is granted a full gender recognition certificate, and the couple remain married. Although Stephanie was born before 6 April 1950, Michelle will remain entitled to the £10.93 top-up she receives from Stephanie’s contributions as this is what she would have been entitled to had Stephanie not obtained a gender recognition certificate.
127. Under section 48B of the Social Security Contributions and Benefits Act 1992, a spouse or civil partner who is widowed over state pension age<sup>1</sup> may be entitled to a Category B pension comprising basic pension plus a proportion of the deceased’s additional (earnings-related) state pension. Widowers and surviving civil partners cannot qualify under this provision if they reached state pension age before 6 April 2010. Instead, they may qualify under section 51 (see below), provided their late wife or partner died when also over state pension age. The practical effect of this restriction is now limited to instances where the widower or surviving civil partner reached state pension age before 6 April 2010 and the deceased spouse or partner dies while still under state pension age. The restriction, in relation to widowers, is made by paragraph 3(3) of Schedule 4 to the Pensions Act 1995, which will be read as applying to widowers of marriages of same sex couples by virtue of section 11 of this Act. Paragraph 12(1) of Schedule 4 applies an equivalent restriction to women married to women. However, paragraph 12(2) exempts from this restriction women whose female spouses were formerly their

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<sup>1</sup> Section 48B also makes provision for Category B pension for a spouse widowed under state pension age before 9 April 2001. Entitlement to Category B pension for a married person or civil partner widowed under pension age on or after that date is dealt with under section 48BB.

husbands. Paragraph 12(3) makes provision corresponding to that made by paragraph 11(3) relating to the applicable contribution condition to be met by the deceased spouse.

128. As noted in the previous paragraph, section 51 of the Social Security Contributions and Benefits Act 1992 provides a Category B pension for a widower or surviving civil partner who reached state pension age before 6 April 2010 and is widowed when both members of the couple are over state pension age. Section 51 does not apply to widowers or civil partners who reach pension age on or after 6 April 2010, as that entitlement is picked up by either section 48A or 48B. Paragraph 13(2) of Schedule 4 inserts a new subsection (1ZA) into section 51 of that Act, which extends it to include the surviving spouse of a marriage of a same sex couple, so that it may provide a Category B pension where the survivor's pension age is before 6 April 2010 and both are over pension age at the date of widowhood. Paragraph 13(5) and (6) provide that this does not apply to surviving spouses who reached pension age on or after 6 April 2010 or to women whose female spouses were formerly their husbands as they will qualify under either section 48A or 48B.
129. Apart from the above elements of derived entitlements, a surviving spouse or civil partner may also be entitled to half the deceased's graduated retirement benefit (GRB) – a form of earnings-related pension that could be accrued between 1961 and 1975. Widowers and surviving civil partners who reached state pension age before 6 April 2010 may inherit GRB only if both parties are over state pension age when the spouse or civil partner dies. The provisions for GRB inheritance are in section 37 of the National Insurance Act 1965. Section 62 of the Social Security Contributions and Benefits Act 1992 provides the powers to amend the GRB provisions. Paragraph 14(2) of Schedule 4 inserts new powers into section 62 to enable regulations to be made extending section 37 of the National Insurance Act 1965 to men and their late husbands and to women and their late wives on the same terms as currently apply to widowers and surviving civil partners. Subsections (3) and (4) have the effect that a woman who was married to a transsexual woman remains entitled to half the GRB of the deceased without restriction – as if her spouse had not changed legal gender.

#### *Examples*

- Teresa (born in 1949) and Angela (born in 1954) get married. Angela would have reached state pension age in 2020 but she dies in 2019. She had built up £20 additional (earnings-related) state pension in the current state pension scheme. The maximum inheritable amount would be one-half, but as Teresa reached state pension age before April 2010 she will not be entitled to inherit any of Angela's additional state pension. However, under separate rules that apply equally to widows, widowers and surviving civil partners, if her own basic state pension is less than the full rate of £110.15 (at current rates) she may still be able to have this increased up to the full rate, using Angela's contributions<sup>2</sup>.
  - Sarah (born in 1949) and Richard (born in 1955) married in 1990. Richard (now known as Ruth) is granted a full gender recognition certificate and the couple remain married. However, Ruth dies in 2020, before reaching state pension age in 2021. She had built up £40 additional state pension and £1.50 GRB in the current state pension scheme. Although Sarah reached state pension age before April 2010, she will still be able to inherit half Ruth's additional state pension and GRB, as this is what she would have been entitled to had Ruth not obtained a gender recognition certificate.
130. Adult dependency increases (ADIs) are an increase of state pension that could be awarded under sections 83 to 85 of the Social Security Contributions and Benefits Act 1992 and may be payable to a man in respect of a dependent wife; a wife in respect of

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<sup>2</sup> Under the Government's proposals for reforming the state pension, a person who reaches state pension age before the reforms are introduced in April 2016 will still be able to qualify for the state pension based on the contributions their spouse or civil partner made into the current scheme, under the current rules.

a dependent husband; or a person in respect of another adult (not their spouse) who has the care of the pensioner's dependent child. ADIs were abolished from 6 April 2010, but people who were already entitled to an ADI before that date continue to receive it under transitional rules. Under the changes which the Act introduces, a married couple will be able to remain married when one member changes their legal gender. Paragraph 15 provides that an adult dependency increase continues to be payable where the parties to the marriage are still married but no longer husband and wife.

131. Paragraph 16 provides that where a couple have converted their civil partnership to a marriage under section 9 of the Act, this cannot give rise to entitlement to state pension by virtue of being treated as married in the period preceding the conversion.

## **Part 6 – Occupational pensions and survivor benefits**

132. Paragraph 18 of Schedule 9 to the Equality Act 2010 provides that it is not discrimination because of sexual orientation to restrict access to a benefit, facility or service that would be available to a person who was married to someone who is in a civil partnership, in relation to rights accrued before 5 December 2005 (the date the Civil Partnership Act came into force). This means that an occupational pension scheme as a minimum only has to provide survivor benefits to civil partners on rights accrued since that date. Paragraph 17 removes the word “married” from sub-paragraph (1) and inserts a new sub-paragraph (1A) into paragraph 18 of Schedule 9 to the Equality Act 2010. This extends the exception so that it also applies to same sex couples in the same way as to civil partners. Sub-paragraph (1A)(c) and (1B) provide that this does not apply to people who were in a marriage with a person of the opposite sex but who are now in a marriage of a same sex couple as a result of one spouse changing legal gender.

### *Examples*

- An example of an employment benefit provided by reference to marital status is an occupational pension scheme which pays benefits to an employee's spouse on the death of the employee, but does not similarly compensate an unmarried employee's partner.
  - A scheme which pays out to surviving married partners must also pay out to surviving same sex spouses and surviving civil partners in respect of any employee service since 5 December 2005 (when the Civil Partnership Act came into force).
  - A member of an occupational pension scheme is married to a person of the opposite sex. The husband or wife changes legal gender and the marriage changes to a marriage of a same sex couple. In this case the survivor would retain the expectation of survivor benefits they would have had in a marriage of an opposite sex couple.
133. Paragraphs 18 to 26 of Schedule 4 amend the Pension Schemes Act 1993 to extend requirements on occupational pension schemes that are or have been contracted out to provide survivor benefits to widows or widowers of a marriage of a same sex couple. In particular, section 17 of the Pension Schemes Act 1993 requires schemes to provide that if the scheme member (the “earner”) dies leaving a widow, widower or surviving civil partner, the survivor will be entitled to a guaranteed minimum pension under the scheme. Paragraph 20 of Schedule 4 inserts new subsections (2)(d) and (e) into section 17 and amends subsections (4) to (6) so that the guaranteed minimum pension provisions apply to same sex married partners as they do for civil partners. Section 8(2) of the Pension Schemes Act 1993 defines “guaranteed minimum pension” for the purposes of that Act. Paragraph 19 extends the definition of guaranteed minimum pension to include an earner's surviving same sex spouse's guaranteed minimum.
134. Widows and widowers of marriages of same sex couples will be entitled to any guaranteed minimum pension accrued after April 1988. However, an exception is made for a woman in a marriage of a same sex couple whose spouse was her husband immediately before obtaining a gender recognition certificate - a “relevant gender

change case”. In such cases widows will be treated like widows of men for the purpose of inheritance of the guaranteed minimum pension.

135. Schemes may convert members’ rights to a guaranteed minimum pension into an ordinary scheme pension. Under section 24D of the Pension Schemes Act 1993, the scheme must provide post-conversion benefits that include survivors’ benefits. Paragraph 21 amends section 24D to require schemes to provide these survivors’ benefits to widows or widowers of marriages of same sex couples. Widows or widowers of marriages of same sex couples will be entitled to the same benefits as surviving civil partners, except as with inheritance of the guaranteed minimum pension where a woman was married to a woman in a relevant gender change case. In these cases a widow will be entitled to a pension of at least half the value of any pension accrued by the earner from April 1978 to April 1997.
136. Section 37 of the Pension Schemes Act 1993 prohibits alterations to the rules of a contracted-out scheme unless the alteration is of a prescribed description and except in prescribed circumstances. Section 37(3) prohibits such alterations by schemes that were formerly contracted-out so long as any person is entitled to receive benefits for the period when the scheme was contracted-out. Section 37(4) limits the application of section 37(3) where the person entitled is a widower or surviving civil partner to only such cases as may be prescribed. Paragraph 22 amends section 37(4) and inserts new subsections (5) and (6) to extend this limitation to include widows and widowers of marriages of same sex couples except for widows in a relevant gender change case.
137. In order to benefit from the exception made for relevant gender change cases, widows will need to produce evidence of their spouse having changed legal gender to support their claim. Paragraph 23 inserts new section 38A (Regulations about relevant gender change cases) into the Pension Schemes Act 1993 to enable regulations to be made to specify the detail of what information may need to be provided or other conditions that may be met before schemes are obliged to treat these widows as if they were widows of marriages of opposite sex couples. Under subsection 38A(3) regulations may also specify what schemes must do if the required information is not provided or the conditions are not met for this special exception to apply.
138. Section 46(1) of the Pension Schemes Act 1993 provides for the reduction of social security benefits where a person is also entitled to a guaranteed minimum pension. Section 47(1) limits the application of section 46(1) in relation to individuals who are entitled to a guaranteed minimum pension by virtue of being the widower or surviving civil partner of an earner in certain circumstances. Section 47(1) does not make any provision about widows, who are currently provided for under section 46(1). The policy intention is that survivors of marriages of same sex couples be treated in the same manner as surviving civil partners in respect of their guaranteed minimum pension entitlement. Paragraph 24 of Schedule 4 gives effect to this policy by making provision for widows of marriages of same sex couples in section 47(1).
139. Section 84 of the Pension Schemes Act 1993 makes provision about which method of revaluation is to be used to revalue pension benefits. Subsection (5) is amended by paragraph 25 of Schedule 4 to make reference to the guaranteed minimum of surviving same sex spouses.
140. Schedule 3 of the Pension Schemes Act 1993 makes further provision about each of the methods of revaluing accrued pension benefits. Paragraph 1(1E) defines “the accrued benefit” for the purposes of paragraph 1, which provides further detail on the final salary method of revaluation. Sub-paragraph (b) is amended by paragraph 26 of Schedule 4 to make reference to the guaranteed minimum of surviving same sex spouses.

#### *Examples*

- A survivor of a marriage of a same sex couple makes an application to a pension scheme for a survivor benefit. The deceased was a member of a contracted-out

pension scheme with a guaranteed minimum pension. The scheme is required to pay a survivor benefit of half the guaranteed minimum pension based on accruals back to April 1988.

- A widow who was married to a woman in a relevant gender change case makes an application to a pension scheme for a survivor benefit. The deceased was a member of a contracted-out pension scheme with a guaranteed minimum pension. If the widow can provide the scheme with the required evidence that her spouse was her husband immediately before obtaining a gender recognition certificate, the scheme will be required to pay a survivor benefit of half the guaranteed minimum pension based on accruals back to April 1978.

## **Part 7 – Provisions which limit equivalence of all marriages etc**

141. Certain provisions of the Act (referred to in these notes as the “equivalence provisions”) have a wide general effect. These provisions are:
  - section 11(1) and (2) (which provide for marriage to have the same effect in law in relation to same sex couples that it has in relation to opposite sex couples and for the law of England and Wales to have effect accordingly) and Schedule 3 (which supports section 11(1) and (2) by making specific provision about the interpretation of legislation);
  - section 9(6)(b) (which provides that, where a marriage is converted into a civil partnership, the marriage has effect as if it had subsisted since the date when the civil partnership was formed).
142. In some cases, the wide general effect of the equivalence provisions goes too far, and so would produce results which are not in line with the policy. It is therefore necessary to ensure that the wide general effect of the equivalence provisions does not apply in particular circumstances, or applies in a different way from normal.
143. Some of these cases are already dealt with in the preceding provisions of Schedule 4. Other cases like this may be dealt with by an order under paragraph 27(3). The legislation which deals with cases like this is referred to as “contrary provision”.
144. Sub-paragraphs 27(1) and (2) ensure that, where cases like this are dealt with by contrary provision, that provision overrides the wide general effect of the equivalence provisions.

### *Examples*

- An Act of Parliament provides that a benefit is to be given to a widow who meets prescribed requirements. The effect of section 11(1) and (2), combined with Schedule 3, means that the benefit would also be available to a person in a marriage of a same sex couple (of either sex) whose spouse had died. However, a man who was married to a woman and whose wife had died would not be entitled to the benefit. In this instance the equivalence provisions go too far, and the Act conferring the benefit could be excluded from their effect by the making of contrary provision.