

*These notes relate to the Lords Amendments to the Marriage (Same Sex Couples) Bill, as brought from the House of Lords on 15 July 2013 [Bill 94]*

# **MARRIAGE (SAME SEX COUPLES) BILL**

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## **EXPLANATORY NOTES ON LORDS AMENDMENTS**

### **INTRODUCTION**

1. These explanatory notes relate to the Lords Amendments to the Marriage (Same Sex Couples) Bill, as brought from the House of Lords on 16 July 2013. They have been prepared by the Department of Culture, Media and Sport in order to assist the reader of the Bill and the Lords Amendments and to help inform debate on the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. These notes, like the Lords Amendments themselves, refer to HL Bill [29], the Bill as first printed for the Lords.
3. These notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords Amendments.
4. All the Lords Amendments were in the name of the Minister.

### **COMMENTARY ON LORDS AMENDMENTS**

#### ***Lords Amendments 1 and 2***

5. Lords Amendments 1 and 2 would clarify that “compelled” in Clause 2 means “compelled by any means” and provide examples of ways in which a person protected by those provisions cannot be so compelled.

#### ***Lords Amendment 3***

6. Lords Amendment 3 would expand the definition of the governing authorities able to give consent to marriages of same sex couples for those of the Jewish religion, to reflect the current arrangements for the Jewish community.

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***Lords Amendments 4 to 8, 12 to 14, 20 and 21***

7. Lords Amendment 4 would provide that regulations made under Clause 9 (conversion of civil partnership into marriage) are to be made by the Secretary of State rather than the Registrar General, and Amendments 5 to 8, 12, 13 and 20 would be consequential to those. Amendment 14 would provide that these regulations are subject to the affirmative procedure on the first exercise of the power, and Amendment 21 would provide that regulations made on any subsequent exercise of the power are subject to the negative procedure.

***Lords Amendment 9***

8. Lords Amendment 9 would provide a signpost in Clause 11 to later provisions limiting the effect of the clause.

***Lords Amendments 10, 15, 26, 27 and 54***

9. Lords Amendment 10 would require the Secretary of State to arrange for a review of whether to allow belief organisations to solemnize marriages. Amendment 15 would provide that the order-making power is subject to the affirmative procedure. Amendments 26 and 27 would limit the extent of the amendments to England and Wales. Amendment 54 would change the long title of the Bill accordingly.

***Lords Amendments 11, 16, 27, 34 and 55***

10. Lords Amendment 11 would require the Secretary of State to arrange for a review of matters relating to survivors' benefits in occupational pension schemes, in particular survivors' benefits paid to widows and widowers of opposite sex marriages and to survivors of civil partnerships and same sex marriages; and in conducting such a review to consult such persons as he or she considers appropriate. It would also provide a power to amend England and Wales and Scottish legislation by order. Amendment 16 would provide that any such order is subject to the affirmative procedure. Amendment 27 would provide that this review clause and order-making power do not extend to Northern Ireland. Amendment 34 would enable this provision to come into force on the day on which the Act is passed. Amendment 55 would change the long title of the Bill accordingly.

***Lords Amendments 17, 18, 23, 29 to 31***

11. Lords Amendment 17 would require an order made under Schedule 2, paragraph 1(2) (treatment of English and Welsh marriages of same sex couples as civil partnerships in Scotland) to be subject to the affirmative procedure. Lords Amendment 18 would do likewise in respect of orders made concerning treatment of English and Welsh marriages of same sex couples as civil

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partnerships in Northern Ireland, and also orders made under paragraph 27 of Schedule 4 (contrary provision, allowing orders to be made for exceptions to be applied from the general rule that references to marriage in the law of England and Wales include marriage of same sex couples). Lords Amendment 23 would be a consequential, removing these powers from the list of powers subject to negative procedure. Amendment 29 would disapply the general extent provisions from an amendment, repeal or revocation made by the Bill, and Amendments 30 and 31 would make provision concerning the extent of such amendments, repeals and revocations.

***Lords Amendments 19, 45 and 46***

12. Lords Amendment 45 would provide that an Order in Council (in relation to marriages on armed forces bases overseas) may prohibit or permit solemnization of such marriages according to particular religious rites or usages. Such an Order may not allow solemnization of such marriages of same sex couples according to the rites of the Church of England or the Church in Wales. Amendment 46 would provide an order-making power to enable the Lord Chancellor to allow for the solemnization of marriages of same sex couples according to the rites of the Church in Wales, if the Governing Body of the Church in Wales decides that it wishes to conduct such marriages. Amendment 19 would provide that such an order is subject to the affirmative procedure.

***Lords Amendment 22***

13. Lords Amendment 22 would be a consequential amendment following Amendment 25 made at Report stage in the Commons. It would remove from the Bill a reference to the procedure for an order-making power which is no longer in the Bill. That power was previously replaced with a reference to “ecclesiastical law”.

***Lords Amendment 24***

14. Lords Amendment 24 would provide a power for the Secretary of State to sub-delegate to the Registrar General the power to make administrative regulations relating to the latter’s functions and limited to matters to do with Clause 9 (conversion of civil partnership into marriage) and Clause 14 (marriage according to the usages of belief organisations).

***Lords Amendments 25 and 50***

15. Lords Amendment 25 would provide a definition of “superintendent registrar” in the Bill. Amendment 50 would provide a definition of “England and Wales legislation” for the purpose of the Marriage Act 1949.

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***Lords Amendments 28, 32 and 47***

16. Lords Amendment 28 would provide that matters concerning marriages in overseas consulates and armed forces personnel overseas do not extend to Northern Ireland. Amendment 32 would provide that the repeal of the Foreign Marriage Act 1892 made by the Bill does not extend to Northern Ireland. Amendment 47 would be a consequential amendment to Amendment 28.

***Lords Amendments 33 and 41 to 44***

17. Lords Amendment 44 would insert a new Part 2 into Schedule 5 and enable certain applicants for gender recognition who were living in their acquired gender six years before the commencement of Clause 12 to benefit from the modified medical evidence requirement (as part of the gender recognition application) previously available under section 27 of the Gender Recognition Act 2004. Amendment 33 would provide that this provision does not extend to Northern Ireland. Amendments 42 and 43 would make clear that “consent” in the context of gender recognition of a married spouse means consent of their married partner to the marriage continuing. Amendment 41 would be a drafting change in consequence of Amendment 44.

***Lords Amendments 35 and 36***

18. Lords Amendments 35 and 36 would provide for regulations concerning registration of buildings and of shared buildings to be made by the Secretary of State and clarify the scope of the subject matter which may be covered in these regulations.

***Lords Amendment 37***

19. Lords Amendment 37 would be a technical amendment to ensure that Part 1 of Schedule 3 does not limit Clause 11(1) or (2).

***Lords Amendments 38 to 40***

20. Lords Amendments 38 to 40 would clarify the use of the term “declaration of validity”. Where the court has jurisdiction to make such a declaration, it can be a declaration as to the validity of a marriage when it began, or a declaration of the existence of a marriage on a specified date, or a declaration of the validity and entitlement to recognition of matrimonial orders obtained outside England and Wales.

***Lords Amendments 48, 49 and 52***

21. Lords Amendment 48 would provide that a marriage of a same sex couple conducted by the Church of England is void. This would also

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apply to the Church in Wales. Amendment 49 would provide, in the case of a marriage of a same sex couple conducted by any other religious organisation which has not opted in to conduct such marriages, that the marriage will be void where the couple knowingly and wilfully participates in it, knowing that no consent had been given. Amendment 52 would provide similarly in the case of deathbed marriages.

#### ***Lords Amendment 51***

22. Lords Amendment 51 would provide that where a governing authority of a religious organisation has given consent to marriage of same sex couples, that consent will not be affected purely by a change in the person or persons constituting that governing authority.

#### ***Lords Amendment 53***

23. Lords Amendment 53 would amend section 29JA of the Public Order Act 1986 to clarify that any discussion or criticism of marriage which concerns the sex of the parties will not be taken of itself to be threatening or intended to stir up hatred on the grounds of sexual orientation.

### **FINANCIAL EFFECTS OF THE LORDS AMENDMENTS**

24. Lords Amendment 4 may have a minor financial effect through transfer of the regulation-making function to the Secretary of State rather than the Registrar General.
25. Lords Amendments 10, 15, 26, 27 and 54 relating to a review of marriage by belief organisations may lead to costs arising from conducting the review and from any changes to the law as a result. Lords Amendments 11, 16, 27, 34 and 55 relating to a review of occupational pension schemes may also lead to costs arising from conducting the review and from any changes to the law as a result.

### **COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

26. Compatibility with the European Convention on Human Rights (“the Convention”) of the amendments tabled at Lords Committee and Report is considered below.

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***Meaning of ‘compulsion’ (Lords Amendments 1 and 2)***

27. Lords Amendments 1 and 2 would amend subsections (1) and (2) of Clause 2 of the Bill to clarify the meaning of the phrase “a person cannot be compelled”. The amendments were tabled to address concerns that were expressed during debates in both Houses about the extent of the protection provided by Clause 2. They would make clear that persons may not be compelled “by any means (including by the enforcement of a contract, or a statutory or other legal requirement)” to undertake specified conduct regarding religious marriage ceremonies of same sex couples. The amendments do not raise any additional issues under the Convention since they are simply a clarification.

***Gender recognition – fast track procedure (Lords Amendments 33 and 44)***

28. Lords Amendments 33 and 44 were tabled to meet a commitment which was made in Commons Committee by the Minister to “consider whether something can be done to assist the transsexual people who transitioned a long time ago”. Amendment 44 would insert new Part 2 in Schedule 5 to enable eligible applicants who transitioned a minimum of six years prior to the commencement of Clause 12 of the Bill to benefit from a modified evidence process. The modified evidence procedure would reduce the amount of medical evidence required to be submitted to the Gender Recognition Panel.
29. Eligible applicants would be those applicants who were in or are in protected marriages or civil partnerships at the time they make their application (defined by paragraph 14 of Schedule 5 as marriages or civil partnerships registered in England and Wales or marriages registered outside the UK). Additionally, eligible applicants would have to be habitually resident in England, Wales or Scotland, to reflect the wishes of Northern Ireland that these amendments should not extend to applicants resident in their territory.
30. The consequence of these amendments would be that applicants with marriages and civil partnerships registered in Northern Ireland or Scotland would not be eligible to apply under this modified evidence procedure, even if they meet the other conditions, because the Westminster Parliament cannot legislate in a manner which affects marriage or civil partnership law in Scotland or Northern Ireland without their consent. This should present no difficulty in relation to Scotland as they also propose to introduce a similar process for applicants in marriages and civil partnerships registered in Scotland.
31. No similar proposals are likely to be put forward in Northern Ireland, meaning that applicants whose marriage or civil partnership certificates were issued in Northern Ireland would not be eligible. However, it is not considered that this causes difficulty under the Convention in relation to these applicants because they would be in the same position as any other applicant for gender recognition resident in Northern Ireland. The European Court of Human Rights in the case of *Parry v United Kingdom* ([2006] ECHR 1157) has held

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that recognising a change of legal gender is a matter for individual States to determine.

32. Matters are more complicated in relation to applicants in protected marriages or civil partnerships who are resident in Northern Ireland, as they would not be eligible to apply under the modified procedure solely because they are resident in Northern Ireland. Whilst this may be regarded as a difference in treatment based on residence (a protected characteristic for the purposes of Article 14), it is considered on balance that the courts are likely to conclude that any difference in treatment would be justified. This is because the difference is required in order to respect Northern Ireland's choice not to allow applicants to apply under a modified evidence process within their jurisdiction. Applicants resident in Northern Ireland would still be entitled to apply for gender recognition under the normal evidence procedure in the Gender Recognition Act 2004.

***Gender recognition - spousal consent (Lords Amendments 42 and 43)***

33. Lords Amendments 42 and 43 would amend paragraphs 2 and 14 of Schedule 5 to clarify the meaning of the spouse's "statutory declaration of consent". The amendments are intended to address concerns expressed during the Committee and Report stages of the Bill in both Houses that the spouse's statutory declaration of consent was effectively consent to their trans spouse obtaining gender recognition. They would make clear that the spouse's statutory declaration of consent is purely consent to remaining in the marriage after the issue of a full gender recognition certificate. The amendments do not raise any additional issues under the Convention since they are simply a clarification.

***Use of religious services at armed forces marriages of same sex couples overseas (Lords Amendments 19, 45 and 46)***

34. Lords Amendments 19, 45 and 46 would amend paragraph 9 of Schedule 6 to the Bill to make similar provision to that in Clauses 1, 4 and 8 of the Bill. New sub-paragraph 9(2B) would specifically provide that the exercise of the order-making power about the solemnization of armed forces marriages of same sex couples according to certain religious rites may not include the rites of the Church of England or the Church in Wales (reflecting the position set out in Clause 1). In the event that the Governing Body of the Church of Wales resolves to allow the marriage of same sex couples according to its rites, new sub-paragraphs 9(4), (5) and (6) would give an order-making power to the Lord Chancellor to allow armed forces marriages of same sex marriages overseas (reflecting the order-making power in Clause 8). New sub-paragraphs 9(2C) and (2D) of the Bill would provide that solemnization of marriage according to rites other than those of the Church of England or Church in Wales cannot take place unless the relevant governing body has given written consent to the use of its rites.

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***Void marriages (Lords Amendments 48, 49 and 52)***

35. Lords Amendments 48, 49 and 52 would amend the Marriage Act 1949 (“the MA 1949”) to provide that marriages of same sex couples purported to be carried out according to the rites of the Church of England or Church in Wales would be void, as the law will not provide a lawful route for these marriages to have taken place. This would protect the position of those Churches, whilst ensuring that a purported marriage would not result in a ‘non-marriage’, with the result that the courts would not have jurisdiction to grant ancillary relief to the parties to the purported marriage who might have considered themselves married.
  
36. As regards other religious organisations, another amendment to the MA 1949 (new section 49A) would ensure that same sex couples would not be disadvantaged by a “rogue” individual who purports to marry them without the religion that (s)he represents having opted in. Marriages according to the rites of other religious organisations would only be void if the couple knew that the religious organisation had not opted in to conduct same sex marriages. This puts the opt-in requirement for religious organisations on the same footing as other formalities in marriage law (such as the requirement for notice to be given and certificates to be issued by the superintendent registrar). The effect would be that marriage would only be void for lack of an opt-in if the couple knew of it and married in wilful disregard of the fact that the religious organisation had not opted in. There would be potential engagement with Article 14 read with Article 12 (and potentially read with Article 1 of the First Protocol). However, these amendments would prevent non-compliance with the MA 1949 from affecting same sex couples who have considered themselves to be lawfully married differently from opposite sex couples in that situation, whilst balancing the protection of religious organisations which do not wish to conduct marriages of same sex couples. The same principles would apply to marriages of same sex couples conducted according to religious rites under the Marriage (Registrar General’s Licence) Act 1970.

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***Offences relating to stirring up hatred on grounds of sexual orientation: protection for discussion or criticism of marriage concerning the sex of parties to marriage (Lords Amendment 53)***

37. Part 3A of the Public Order Act 1986 (“the POA 1986”) creates a number of offences which relate to the possession or dissemination of material which is threatening, where the person possessing or disseminating the material intends to stir up hatred on the grounds of sexual orientation by so doing. Insofar as it contains offences related to stirring up hatred on the grounds of sexual orientation, it is considered to engage Articles 9(1) and 10(1) of the Convention. However the offences are considered to have the legitimate aims of protecting the rights of others to be free from abuse and the protection of public order and to be a proportionate response to those aims.
38. Part 3A of the POA 1986 contains section 29JA which provides that: “for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred”.
39. Lords Amendment 53 is intended to clarify the balance between the legitimate aims pursued by the offences in Part 3A of the POA 1986 and the rights set out in Articles 9(1) and 10(1) of the Convention. The purpose of Lords Amendment 54 to section 29JA of the POA 1986 would be to make equivalent provision in respect of discussion or criticism of marriage which relates to the sex of parties to marriage as is already made in relation to discussion or criticism of sexual conduct or practices.
40. To the extent that this provision removes any discouragement to discourse about marriage which relates to the sex of parties to marriage (where that discourse is not threatening and intended to stir up hatred), it could be argued that it has a positive effect on the Article 9 and 10 rights of those wishing to engage in this discourse. However, overall it is considered that the balance of the rights protected by the offences relating to stirring up hatred on the grounds of sexual orientation would be unaffected by the provision.

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