

Equalities, Human Rights and Civil Justice Committee

22nd Meeting, 2023 (Session 6), Tuesday 7 November 2023

Subordinate legislation

Note by the Clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
 - [The Marriage Between Persons of Different Sexes \(Prescribed Bodies\) \(Scotland\) Amendment Regulations 2023 \(SSI 2023/266\)](#) – Policy Note and links to relevant impact assessments are at [Annexe A](#).

The Marriage Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Amendment Regulations 2023 (SSI 2023/266)

2. These regulations add the Free Church of Scotland (Continuing) to the list of religious or belief bodies whose celebrants or recognised individuals are authorised to solemnise mixed sex marriage, without needing to obtain individual authorisations from the Registrar General of Births, Deaths and Marriages for Scotland.
3. Similar systems are in place in relation to the authorisation of celebrants to solemnise same sex marriage and to register civil partnership. The Free Church of Scotland (Continuing) have only asked to be prescribed for mixed sex marriage.

Delegated Powers and Law Reform Committee Consideration

4. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on 3 October 2023 and agreed that it did not need to draw the Parliament's attention to the instrument on any grounds within its remit. [Read the Official Report of the 27th meeting, 3 October 2023](#).

Equalities, Human Rights and Civil Justice Committee Consideration

5. SSI 2023/266 was laid on 21 September 2023 and referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to the negative procedure and due to come into force on 1 December 2023.
6. **The Committee is invited to consider any issues which it wishes to raise on this instrument and is required to report to the Parliament by 13 November 2023.**

Procedure for negative instruments

7. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
8. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
9. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
10. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
11. If the Parliament resolves to annul an SSI, then what has been done under authority of the instrument remains valid, but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book). Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
12. Each negative instrument appears on the Equalities, Human Rights and Civil Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant

concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

13. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Clerks to the Committee
November 2023

Annexe A

SSI 2023/266

The Marriage Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Amendment Regulations 2023

Scottish Government Policy Note

The above instrument is made by the Scottish Ministers in exercise of the powers conferred by section 8(1)(a)(ii) of the Marriage (Scotland) Act 1977 (“the 1977 Act”) and all other powers enabling them to do so. The instrument is subject to the negative procedure.

Purpose of the instrument

To prescribe the Free Church of Scotland (Continuing) so all of its celebrants are authorised to solemnise mixed sex marriage, without needing to obtain individual authorisations from the Registrar General of Births, Deaths and Marriages for Scotland.

Policy objectives

Under section 8(1)(a)(i) of the 1977 Act, Church of Scotland ministers and deacons are automatically authorised to solemnise mixed sex marriage.

There are a number of ways in which religious or belief celebrants from other bodies can be approved to solemnise mixed sex marriage:

- a religious or belief body may be prescribed by Scottish Statutory Instrument so that all of its celebrants, or persons recognised by the body as entitled to do so, may solemnise mixed sex marriage under section 8(1)(a)(ii) of the 1977 Act
- a religious or belief body may nominate persons to the Registrar General of Births, Deaths and Marriages for Scotland (“the Registrar General”) to be registered as celebrants for mixed sex marriage under section 9 of the 1977 Act
- the Registrar General may grant temporary authorisation to a member of a religious or belief body to solemnise mixed sex marriage under section 12 of the 1977 Act. Such temporary authorisation may be for a specific ceremony or ceremonies or may be for a period of time.

Similar systems are in place in relation to the authorisation of celebrants to solemnise same sex marriage and to register civil partnership. The Free Church of Scotland (Continuing) (FCC) have only asked to be prescribed for mixed sex marriage.

The Marriage Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/304) prescribes a number of bodies for the purpose of solemnising mixed sex marriage. This SSI amends SSI 2014/304 to add the FCC to this list of prescribed bodies. SSI 2014/304 has been amended previously to add Humanist Society Scotland to this list of prescribed bodies.

Annex A to this Policy Note lists the religious or belief bodies prescribed for the purpose of solemnising mixed sex marriage.

At the moment, the FCC nominate persons to the Registrar General to be registered as celebrants under section 9 of the 1977 Act. By virtue of this instrument, all celebrants recognised by FCC as entitled to solemnise marriage on its behalf will automatically be able to do so by virtue of FCC being prescribed.

A body can only be prescribed by the Scottish Ministers under the 1977 Act in relation to the solemnisation of mixed sex marriage if:

- it requests Scottish Ministers to prescribe it - section 8(1A)(a) of the 1977 Act refers. FCC have asked to be prescribed
- the Scottish Ministers are satisfied it is a “religious or belief body” under section 8(1)(a)(ii) of the 1977 Act. Under section 26 of the 1977 Act, the definition of a “religious or belief body” is “an organised group of people — (a) which meets regularly for religious worship, or (b) the principal object (or one of the principal objects) of which is to uphold or promote philosophical beliefs and which meets regularly for that purpose”. The Scottish Ministers are satisfied that FCC meets the definition of “religious or belief body” as it is an organised group of people which meets regularly for religious worship.

There is provision, not yet in force, in the 1977 Act that bodies must meet “qualifying requirements” which may be laid down by the Scottish Ministers in Regulations, before being prescribed. No qualifying requirements are yet in place: the Scottish Ministers will need to consult with religious and belief bodies and other interested parties before laying any down. As a result, the decision on whether to prescribe a religious or belief body which has made a request is entirely at the discretion of the Scottish Ministers.

In exercising their discretion to prescribe FCC, the Scottish Ministers have taken a number of factors into account, as outlined below, and have consulted with FCC and the Registrar General.

The track record of FCC in fulfilling the requirements in relation to marriage ceremonies in Scotland

It is the aim of the Scottish Ministers to ensure the continued reputation, dignity and solemnity of marriage ceremonies in Scotland. Therefore, the Scottish Ministers would not normally prescribe a religious or belief body unless celebrants belonging to the body have previously been registered or temporarily authorised by the Registrar General. The reason for this is that the Registrar General monitors the religious or belief bodies which nominate persons to be registered as celebrants or whose celebrants have temporary authorisation to ensure that they fulfil the requirements in relation to marriage ceremonies in Scotland.

The Scottish Ministers on the other hand do not monitor the religious or belief bodies which have been prescribed. These bodies are “self-policing”. On this basis, the Scottish Ministers, prior to prescribing a body, will wish to be satisfied that the body can demonstrate evidence of complying with the requirements in Scotland in relation to marriage ceremonies and, where necessary, of taking action against any celebrants who are not acting in compliance with those requirements. The Registrar General can, following a period of either registration or temporary authorisation, provide the Scottish Ministers with information on the record of the body:

- in complying with requirements; and
- in taking any action against celebrants who have not complied with the requirements

The Scottish Ministers consider that any new body should establish a track record of at least 3 years before it is prescribed. When bodies nominate persons to the Registrar General to act as celebrants, the nominations generally last three years. It is reasonable to check that no problems have arisen during at least one of these periods which would prevent a new body from being prescribed. This enables the Scottish Ministers to come to a decision on whether to prescribe the body or not. The Scottish Ministers are satisfied that FCC has the appropriate track record to be prescribed.

Whether a body is able to self-police

For bodies that are not prescribed by the Scottish Ministers, a process operates for the removal of a celebrant’s name from the register, under section 10 of the 1977 Act. The Scottish Ministers therefore consider it appropriate that a body satisfies them that, once prescribed, it will deal properly with any concerns about a particular celebrant and has an appropriate disciplinary process in place that allows for the suspension or dismissal of a celebrant if he or she meets the criteria set out in section 10, namely:

- is convicted of an offence under the 1977 Act;
- has, for the purpose of profit or gain, been carrying on a business of solemnising marriage
- is not a fit and proper person to solemnise marriage; or

- for any other reason should not be solemnising marriage.

The Scottish Ministers are satisfied that FCC can monitor the activity of its celebrants in relation to marriage ceremonies and has in place an appropriate disciplinary process in relation to its celebrants.

Celebrants must not for the purpose of profit or gain carry on a business of solemnising marriage

The Registrar General can remove a person from the register of approved celebrants if that person has, for the purpose of profit or gain, been carrying out a business of solemnising marriage. The Scottish Ministers consider it appropriate that the requirement not to carry on a business of solemnising marriage for profit and gain extends to celebrants of prescribed religious and belief bodies.

The Scottish Ministers recognise that there are a number of legitimate costs, which have to be met e.g. travel, training of celebrants and maintaining buildings.

However, the Scottish Ministers consider a distinction can be drawn between these types of costs and running a business for profit or gain to make money from ceremonies. If solemnising marriage were carried out as a business for profit and gain, the focus could shift away from the couple, their commitment to each other and their faith or belief and could detract from the reputation, dignity and solemnity of marriage ceremonies in Scotland.

The Scottish Ministers are satisfied that FCC celebrants do not for the purpose of profit or gain carry on a business of solemnising marriage.

Celebrants of a prescribed body must be properly trained to solemnise marriage

The Scottish Ministers are satisfied that FCC have an appropriate training programme and continuing professional development programme in place for its celebrants, including in relation to tackling sham marriage and forced marriage.

No other barriers to being prescribed

The Scottish Ministers are not aware of any other reasons why it would be inappropriate for FCC to be prescribed.

Transitional arrangements

As described above, currently all FCC celebrants are registered under section 9 of the 1977 Act. FCC require to write to the Registrar General seeking removal of its celebrants from the register of marriage celebrants (section 10(1)(b) of the 1977 Act). The Registrar General may then remove FCC celebrants from this Register (in exercise of her powers under section 10 of the 1977 Act) to enable a seamless transition to FCC celebrants being automatically able to solemnise mixed sex marriage, by virtue of FCC being prescribed in this instrument.

EU alignment consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

In preparing this instrument, the Scottish Government has consulted FCC and the Registrar General.

Impact assessments

A Business and Regulatory Impact Assessment (BRIA) has not been prepared for these regulations as no costs or savings fall on the private or voluntary sector, with the exception of FCC themselves. The (neutral) financial impact on FCC is outlined in the next section of this Policy Note.

An Equality Impact Assessment (EQIA) has been prepared: [The Marriage Between Persons of Different Sexes \(Prescribed Bodies\) \(Scotland\) Amendment Regulations 2023 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Financial effects

There are no significant financial effects arising from these Regulations.

FCC have indicated that the effect of these Regulations is cost neutral for them. Currently, FCC have to nominate persons to the Registrar General to be registered as celebrants. FCC note that once prescribed the process of nomination and associated paperwork would no longer be necessary but there would be increased responsibility for keeping records and providing general oversight.

The Registrar General has indicated that prescribing FCC means her staff would no longer need to review and process requests from FCC for their celebrants to be authorised under section 9 of the 1977 Act. This would save approximately 3-4 hours of staff time every 3 years.