



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to

**to the Scottish Government consultation on changing civil partnerships registered
outwith Scotland to marriage in Scotland, in terms of section 9 of the Marriage
and Civil Partnership (Scotland) Act 2014**

Introduction

The Faculty of Advocates welcomes the opportunity to comment on the consultation on changing civil partnerships registered outwith Scotland to marriage in Scotland. We are, however, disappointed not to have been given a more adequate timeframe within which to prepare our response given the importance and complexity of the proposals contained in the consultation paper.

Having examined the proposals in the time available, we have come to the conclusion that far from serving the interests of same-sex couples and promoting equality, these

particular proposals risk confusing the status of such couples, leaving them with a different and irreconcilable status in different jurisdictions, to their personal and financial detriment. There will also be confusion about rights and obligations flowing from their status that will adversely affect third parties in relation to areas such as succession. The ‘marriage’ on offer under this proposal may well not be ‘equal’. We are concerned that the move to legislate is premature and ill-considered.

General comments

The discussion paper recognises that while the Scottish Government can legislate on how a civil partnership or marriage formed outwith Scotland will be treated under Scots law, it cannot legislate for how transforming a civil partnership effected elsewhere into a marriage in Scotland will affect how the civil partnership or marriage will be treated in the jurisdiction in which the civil partnership was originally formed. There appears to have been no attempt to undertake any research capable of providing information to guide legislators, nor, if the proposal becomes law, the prospective spouses and their families. There are two major areas of concern. One relates to how the home jurisdiction (where the civil partnership was entered into) or any other jurisdiction would treat a relationship changed from civil partnership into marriage in Scotland. A couple may still be recognised as being in a civil partnership in the home jurisdiction and in some other countries even though they have changed their civil partnership into a same sex marriage in Scotland. The other arises if the relationship fails. It is unclear what steps might be necessary to dissolve the union/marriage effectively in all relevant jurisdictions. If the Scottish marriage is later dissolved (having been changed from a civil partnership

registered outwith Scotland), the couple may be considered as being in continuing civil partnership in the home jurisdiction or in other jurisdictions. The potential implications flowing from these issues are matters of great concern.

Property implications

It is important to note that it is not just an individual's status in terms of a relationship that would be affected by what is proposed in the consultation document but also status in relation to money and property. In many jurisdictions, for example, marriage involves community of property. We are concerned that the impact of the proposals on such community of property may not have been fully researched or investigated. If a Scottish marriage ends a civil union in another jurisdiction where such a union has resulted in community of property, what are the property implications of the marriage? What are the property implications if the marriage in Scotland is dissolved but the civil partnership is still recognised in the country in which it was constituted, or in other jurisdictions?

Alimentary implications

There is also an issue relating to 'maintenance' or 'aliment'. How will rights to support be affected by a Scottish marriage? In the event of breakdown of the relationship parties could potentially find, for example, that there are ongoing alimentary rights or obligations in the original home jurisdiction, although the subsequent marriage in Scotland has been brought to an end and final orders granted. Courts dealing with the financial consequences of breakdown of the relationship will be faced with complex financial

issues if there is potential for more than one jurisdiction to become involved. There is a serious risk of inconsistent decisions.

Divorce/Dissolution

If a Scottish marriage is not recognised in another jurisdiction, then it cannot be dissolved there. Jurisdiction in divorce is governed as between EU member states by Council Regulation (EC) No 2201/2003. In the absence of jurisdiction under the Regulation a party may divorce in Scotland if domiciled here. If this proposal proceeds then there is a risk that the marriage created cannot be dissolved because no state has jurisdiction to entertain divorce proceedings. Were it possible to divorce in Scotland there is a lack of clarity as to how other jurisdictions, including the couple's home jurisdiction, would view a divorce in Scotland, following a change of a civil partnership into a marriage. If the home state continued to regard the couple as civil partners then, as indicated above, parties divorced in Scotland may still have property and alimentary rights and obligations to one another in the original home jurisdiction, or in any other jurisdiction to which they subsequently moved.

It is also unclear what the situation would be for a same sex couple who moved back to their home jurisdiction after changing their civil partnership into a marriage in Scotland, and who then later separated and ended their civil partnership in their home jurisdiction in accordance with the law of that jurisdiction. How would that affect their marriage in Scotland? The same ambiguity would exist if they moved to a third or fourth jurisdiction.

The dissolving of marriages which are the result of changing a civil partnership registered outwith Scotland into a marriage are likely to be extremely complicated, and quite different from ending a marriage ordinarily constituted in Scotland. As mentioned above, this is not consistent with the 'equality' aims of the proposal.

Effect of difference over 'backdating'

The consultation paper proposes that there would be a difference in terms of 'backdating' for couples in a civil partnership registered in Scotland who change their relationship into marriage as compared to couples in in a civil partnership registered outwith Scotland who change their relationship into marriage in Scotland. Under section 11 of the Marriage and Civil Partnership (Scotland) 2014 Act, when a couple in a civil partnership registered in Scotland change their relationship into a marriage in Scotland, the couple are to be treated as having been married to each other since the date on which the civil partnership was registered. However, when the couple are in a civil partnership registered outwith Scotland, which they change to a marriage in Scotland, it is proposed that the same 'backdating' would not apply. Such persons would be deemed to have been married for the period of the marriage only, and not for the preceding period during which they were in civil partnership which was constituted outwith Scotland. While we can understand the basis of the reasoning for this (as set out in paragraph 49 of the consultation paper), this will have potentially serious implications in the event of a Scottish divorce and determination of financial provision under the Family Law (Scotland) Act 1985.

The first principle for financial provision under the 1985 Act is that the net value of the property acquired during the marriage or partnership is shared fairly, with an effective presumption for equal sharing in the absence of special circumstances. It is proposed that in the case of these marriages the value of property acquired during the partnership will not be shared. This is different from the position where domestic civil partnerships become marriages. The difference in treatment is likely to have an adverse effect on one of the 'spouses'. It does not constitute equal treatment with purely domestic cases.

No connecting factor

The consultation paper proposes that there will not be any connecting factor, such as a residence requirement, for people wishing to change a civil partnership constituted outwith Scotland into a marriage in Scotland. There is no residence requirement in Scots law for marriage with people being free to come to Scotland to marry and return to their home jurisdiction. It is suggested by the Scottish Government in the consultation paper that setting a residence requirement for changing a civil partnership constituted outwith Scotland into a marriage would therefore be unusual and would limit some people from changing their civil partnership into a marriage in Scotland. The consultation paper suggests that setting such a residence requirement would differentiate between couples marrying for the first time and couples changing a civil partnership into a marriage and on that basis they do not favour the setting of any such requirement.

With respect, this argument fails to acknowledge the consequences of the proposal for the parties and their families. The ‘marriage’ proposed is not going to be a universally recognised status. It will give rise to what may be characterized as a ‘limping’ marriage or civil union, yet is to be offered universally, without limitation. If a state proposes to create an unusual status such as this, it is usual to require some sort of connecting factor. Given what is being proposed and the potential complex and unsatisfactory implications flowing from that, we are of the view that a connecting factor should be required. We would suggest that Scottish domicile or one year’s habitual residence would be appropriate as a connecting factor. It must be borne in mind that what is being proposed not only permits marriage in Scotland, but so far as Scots law is concerned ends a legal status in another country. Without a requirement of a connecting factor, there are likely to be people getting involved in real conflict about their status without a good basis for doing so.

Notice of potential impact

We note from the consultation paper that the Scottish Government would encourage couples to take into consideration the potential impact that any change from civil partnership into marriage could have for them in different jurisdictions. We would respectfully suggest that if this proposal proceeds, registrars should be under a duty to provide a warning notice in writing setting out the practical real risks and continuing uncertainties which would be involved when individuals seek to change a civil partnership registered outwith Scotland to a marriage in Scotland.

Registrars

The proposals impose a considerable duty on registrars who have the responsibility of deciding whether a relationship is legally recognised in Scotland as a civil partnership. We note that it is proposed that Scotland would only change civil partnerships from outwith Scotland into marriage if the original civil partnership entered into outwith Scotland is recognised in Scotland, and if there were no other barriers outwith Scotland. We would suggest that registrars will require appropriate and fully comprehensive training. Consideration ought to be given to whether there is a point of reference if a registrar is not sure if a relationship is one which is recognised as a civil partnership in Scotland in terms of the Civil Partnership Act 2014. It would not be appropriate for a registrar who is in some doubt about the status of the civil partnership to go ahead with changing the civil partnership into a marriage.

Conclusion

In conclusion, we appreciate the reasons why the Scottish Government wish to take the step of allowing the changing of civil partnerships registered outwith Scotland to marriage in Scotland. We are, however, firmly of the view that it would be wise to take more time to research the issues which we have highlighted, and, in particular, the implication of the proposals. There are a number of serious drawbacks, capable of giving rise to far-reaching difficulties over matters of status for the parties and their families. There are also financial implications that have not been considered. The law would be

uncertain, which is hardly desirable. We would suggest that a wider consultation would be helpful with more time being provided to respondents, given the importance and complexity of the matter.

In particular, we consider that it would be of assistance to further consider the position within the UK and other EU jurisdictions as well as other countries from which it is likely that people may come to Scotland to change their civil partnership into marriage. The implementation of the proposals should, in our view, be delayed until further research and consultation has been carried out, as indicated above, and until there has been further discussion and possible consensus between the constituent parts of the UK.

23 March 2015