



FACULTY OF ADVOCATES

Response from the Faculty of Advocates to the Consultation on The Civil Partnership (Scotland) Bill

The Faculty of Advocates, as the independent referral bar in Scotland is pleased to offer its comments on the Civil Partnership (Scotland) Bill.

General points

We appreciate that this is a necessary response to the Supreme Court decision in *R (Steinfeld) v SSE* [2018] UKSC 32. The policy intention of the Bill is clear. The point is to open up to different sex couples the possibility of entering into a civil partnership, as an alternative to marriage. As matters stand, only same sex couples have this choice.

The Bill itself is complex. Whether it achieves the policy objective in every respect may have to wait until it is in force to be tested. There is significant scope for the Scottish Ministers to make additional provision by regulations. This has possible drawbacks of uncertainty, but in this case, may allow any unforeseen consequences of a complex set of provisions to be addressed.

The impact of the Bill in relation to human rights and equality issues

The Bill does not, as far as we can detect, address what may be a point of discrimination between opposite and same sex couples. A same sex couple in a civil partnership may transform this into marriage in terms of section 10 of the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”). The couple may have wished to marry but marriage may not have been available to them at the material time. There are married couples who would have wanted a civil partnership,

but opted for marriage because civil partnership was not available. Is it intended to allow such couples to transform their marriage into civil partnership?

Consideration might also be given to whether it is intentional that adultery is not a ground of dissolution of a civil partnership between opposite sex couples?¹ The omission of this ground for same sex couples may have arisen out of the definition of adultery which is restricted to heterosexual intercourse. Accordingly the 2014 Act amended the Divorce (Scotland) Act 1976 to reinforce this distinction in relation to same sex marriages.² If, however, civil partnership for opposite sex couples is intended to be an alternative to marriage then the omission of adultery as a ground of dissolution may at least require some explanation.

Changes to the Civil Partnership Act 2004

The reference to the Civil Partnership Act 2004, section 94A may require some clarification as there are currently two sections numbered 94A, the second being inserted as a result of a drafting error in the Referral and Investigation of Proposed Marriages and Civil Partnerships (Scotland) Order 2015/396.

We appreciate that the provisions in section 8 for second registration of a civil partnership are designed to replicate the provision of the Marriage (Scotland) Act 1977, section 20, when registration of the first ceremony cannot be proved, but this does give rise to a problem in relation to financial provision on divorce. The principle in section 9(1)(a) of the Family Law (Scotland) Act 1985 requires fair sharing of the net value of assets acquired during the marriage, ie between the date of the marriage and the relevant date (usually the date of separation). There is no provision for whether, for this purpose, the date of marriage is to be taken as the second ceremony, or the date of the earlier unprovable ceremony. We have encountered no case where this gives rise to a practical difficulty, but it is a potential source of problems, which could easily be addressed, possibly by further amendment to the Family Law (Scotland) Act 1985, section 10.

Section 9 of the Bill deals with religious impediment to marry. There may be limited scope for securing religious recognition of dissolution of a status of civil partnership that is deliberately non-religious. However it may be considered at least theoretically appropriate to recognise

¹ Albeit it could in appropriate circumstances amount to behaviour justifying dissolution.

² Divorce (Scotland) Act 1976, section 1 (3A), added by Marriage and Civil Partnership (Scotland) Act 2014 s.5(2)

symmetry with marriage and divorce and cover potential religious impediments to marriage after dissolution of civil partnership.

Change to the Anti-social Behaviour, Crime and Policing Act 2014

The proposed change to the 2014 Act will have no practical effect. The Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 does not currently apply to ‘forced’ civil partnerships. Section 10 of the 2011 Act gives Ministers the power to apply that part of the Act to civil partnerships, but this power does not appear to have been invoked. This could be an appropriate time to do so to achieve equality of treatment between parties to marriage and civil partnerships.

Consequential changes to other existing legislation

We confine our comments to the following issues.

Registration of Births, Deaths and Marriages (Scotland) Act 1965

The title of section 18 of the 1965 Act could be changed from “Births of children born out of wedlock” to “Births of children born out of wedlock or civil partnership”.

Family Law (Scotland) Act 1985

The amendments of the Family Law (Scotland) Act 1985 are designed to ensure that children of a civil partnership are taken into account when awarding financial provision pursuant to the principle in section 9(1)(c). The redefinition of “family” as simply including a one-parent family is difficult to understand in the context of legislation governing provision to be made by one parent for another. The drafting of Schedule 2, paragraph 2(3)(b) may require to be revisited.

We also refer to the potential difficulty in the application of section 9(1)(a) of the 1985 Act in the case of a second registration of civil partnership, explained above.

Children (Scotland) Act 1995

Schedule 2, paragraph 4 makes changes to the Children (Scotland) Act 1995. Where section 3(1)(a) of that Act is amended, there should, for consistency, also be added the words “or entered into civil partnership with” before “his father”. Alternatively, the words “whether or not she is or has been married to his father” could simply be deleted.

Section 12 places certain restrictions on decrees of divorce, separation or annulment affecting children. Section 12(1)(b) already extends the section to the dissolution or declarator of nullity of a civil partnership or separation of civil partners. Section 12(4) defines “*child of the family*” and already includes a child treated by both partners to a civil partnership as a child of the family. The amendment simplifies and equalises the definition for the purposes of both marriage and civil partnership to “*in relation to the parties to a marriage or civil partnership means a child – (a) of both of them; or (b) who has been treated by both of them as a child of their family, not being a child who is placed with them as foster parents by a local authority or voluntary organisation.*” This is uncontroversial.

However the new section 12(4) deletes from the existing definition of a “child of the family” in a civil partnership, a child born as a result of artificial insemination, where the mother and her female partner are treated as parents by virtue of sections 33 and 42 of the Human Fertilisation and Embryology Act 2008. This could result in such children falling outwith the ambit of section 12. Rather than delete the reference to children born to female partners as a result of artificial insemination, the provision should be extended to cover children born to opposite sex civil partners and treated as their children by virtue of sections 33 and 35 of the 2008 Act.

This is also an opportunity to change the title of section 12 to be more inclusive with reference to dissolution, from “Restrictions on decrees for divorce, separation or annulment” to “Restrictions on decrees for divorce, dissolution, separation or annulment”.

Gender Recognition Act 2004

The intended purpose of the amendments proposed to the Gender Recognition Act 2004 is to address the fact that once civil partnership is available to opposite sex couples, a change in gender by one party to a same sex partnership would no longer conflict with the requirements of the Civil Partnership Act 2004.

Presently a full gender recognition certificate cannot be issued to a person who is in a civil partnership. The issue of an interim gender recognition certificate is a ground for the dissolution of a civil partnership. A full gender recognition certificate may not be applied for until decree of dissolution has been granted. The Bill proposes that a full gender recognition certificate may be issued if the applicant provides a statutory declaration that their civil partner consents to the issue of such a certificate. It is only where such consent is proved that a full gender recognition certificate may be issued.

Whilst the proposals may be seen to restrict the autonomy of the partner seeking to complete the process of gender recognition, they are consistent with the relevant terms of the Marriage and Civil Partnership (Scotland) Act 2014 and acceptable for that reason.

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