The Faculty of Advocates is the independent bar in Scotland. The Faculty is committed to human rights and to equal opportunities for all. Its members include advocates with expertise in all fields of law, including family law. The Faculty welcomes the opportunity to offer evidence in relation to the Marriage and Civil Partnership (Scotland) Bill. The comments which follow are concerned with the legal effects of the Bill. The Faculty does not generally take a position on matters of social policy.

- The Faculty has identified a small number of technical matters – in relation to clauses 4 and 25 and Schedule 1 - upon which it offers comment.

- The Faculty has identified one respect in which the policy intention as regards the protection for freedom of conscience appears not to be reflected in the provisions of the Bill.

Clause 4

In responding to the Consultation on the draft Bill the Faculty drew attention, in particular, to the definition of “cohabitant” in section 25 of the Family Law (Scotland) Act 2006, where a cohabitant is defined to include “either member of a couple consisting of …two persons of the same sex who are (or were) living together as if they were civil partners”. It is assumed that clause 4(2) to (5) is intended to change this to refer to persons living together as if they were married. The drafting is awkward and does not clearly achieve this purpose. Clause 4(4) provides for cessation in effect of a provision such as that in section 25 of the 2006 Act, but sub-clauses 4(2) and (3) only apply to statutory provisions that refer to persons living together as if they were married. Added to that, clause 4(5) disappplies the new provision if there is a conflict with existing law. The result is at best confusing, and at worst ineffective to change the law. It would be useful to amend section 25 of the 2006 Act specifically and this could easily be done by substituting “two persons” for “a man and a woman” in section 25(1)(a), or by adding after the reference to civil partners the words “or married”.

Clauses 10, 11 and 14

These provisions seek to safeguard Article 9 rights (the rights to freedom of thought, conscience and religion). Annex A to the Scottish Government’s Consultation on the draft Bill contained the following statement: “The Scottish Government has made it clear throughout that no religious body and no religious celebrant should be required to solemnize same sex marriage or to register a civil partnership”.
The Faculty is not convinced that this policy intention has been fully implemented in the Bill so far as individual religious celebrants are concerned. The Bill does not contain provisions equivalent to those which appear in section 2 of the Marriage (Same-Sex Couples) Act 2013 (which applies in England and Wales). Section 2 of the 2013 Act provides that a person may not be compelled by any means to undertake certain specified activities, including conducting a relevant same-sex marriage.

Religious celebrants who belong to a religious or belief body which is in favour of same-sex marriage, but who have a conscientious objection to same-sex marriage, might be open to pressure from their religious or belief body to solemnise such marriages. In effect, the pressures that have existed for civil registrars might come to be applied to such celebrants: in *Ladele v United Kingdom* (2013) 57 E.H.R.R. 8, the European Court of Human Rights held that the dismissal of a civil registrar who declined to solemnise civil partnerships was not incompatible with her Convention rights. Having regard to section 149 of the Equality Act 2010, there may be particular implications for persons employed in the public sphere, such as hospital, prison and army chaplains.

The Faculty notes the joint statement by the Scottish Government and UK Government on amendments to the UK Equality Act 2010. Paragraph 18 of the joint statement suggests that the proposed amendment to that Act will follow section 2(6) of the Marriage (Same-Sex Couples) Act 2013, to provide that a celebrant does not contravene section 29 of the 2010 Act by refusing to solemnise a same-sex marriage or register a civil partnership. It does not, however, appear to be envisaged that the legislation will replicate the other provisions of section 2 of the 2013 Act.

The Bill seeks to offer reassurance by re-iterating, in clause 14, the rights to freedom of thought, conscience and religion and to freedom of expression found in articles 9 and 10 of the European Convention on Human Rights. While the express acknowledgement of these rights may be useful, it is doubtful whether express reference to them adds anything of substance since these freedoms are already built into the law by the Human Rights Act 1998 and the Parliament does not have the power to pass a measure that conflicts with them (Scotland Act 1998, section 29).

**Clause 25**

The Faculty drew to the attention of the Scottish Government the problem which this Clause is intended to alleviate – namely the failure to appreciate that civil partnerships could not be dissolved on the basis of evidence solely from one of the partners. There are, however, objections in principle, to which the Faculty has drawn attention, to retrospective measures, such as the provision in the Bill. The Faculty suggested an alternative, and prospective measure, which would reduce the risks of future challenge.
Clause 26

The Faculty is pleased to note that its concerns about the serious and potentially damaging effect of bigamy have been recognised by an increase in the possible financial penalty from £1,000 to £10,000.

Schedule 1

The Faculty has concerns about the possible interaction of the exclusion of jurisdiction to entertain an application for financial orders (in paragraph 1) with the terms of regulations that are not yet available. There is potential for serious injustice if financial provision cannot be claimed. Further, if the sheriff at Edinburgh is to have extended jurisdiction to entertain proceedings for divorce pursuant to paragraph 3(3), there should be clarity that the sheriff can also deal with ancillary orders, including financial provision.

While it is a matter for the regulations, there is a difference in treatment between persons domiciled in the UK or Republic of Ireland where domicile is the test of jurisdiction and the rest of the EU where nationality is the test. This is recognised in paragraph 2(1)(a)(iii), but should perhaps be reflected in 2(1)(a)(ii).

Faculty of Advocates
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