MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND ON BEHALF OF THE FAMILY LAW SUB-COMMITTEE AND THE EQUALITY LAW SUB-COMMITTEE

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes. The Family Law sub-committee and the Equality Law sub-committee (“the committees”) have examined the Marriage and Civil Partnership (Scotland) Bill and have the following comments to make.

General Comments

The committees would reiterate the point we made in response to the preceding consultation that while we do not seek to comment on the underlying policy of the bill, we would suggest that as it will expand the ways in which a couple can choose to define their relationship, whether different or same-sex marriage, cohabitation or civil partnership; in order to help people to understand the differences between them and/or choose between them, further definition or explanation of the status of each would be useful.

From the perspective of article 9 of the ECHR (freedom of thought, conscience and religion) we understand that the bill’s objectives seek to balance these rights with other rights although we do think that there is scope for conflict as a result of the public sector equality duties contained in section 149 of the Equality Act 2010. It is, of course, a matter for the Scottish Government whether such conflict is an acceptable consequence of the bill but we expressed concern that this issue was not considered in the previous equality impact assessment.

Part 1 – Marriage

Sections 4(2) to (5) would amend the definition of ‘cohabitant’ as contained in section 25 of the Family Law (Scotland) Act 2006 by providing that the reference to two persons of the same sex who are (or were) living together as if they were civil partners (however expressed) will cease to have effect.

This would appear to take away the prospect of establishing cohabitation between two people living together as if they were civil partners. We are of the view that these provisions as currently worded are difficult to interpret. It could also be argued that the intended effect of the provisions does not seem logical in the context of this bill, which seeks to allow a choice between marriage and civil partnerships as co-existing legally recognised relationships for same-sex couples. Further to the point we made in our introduction about the requirement to help society understand the different types of legally recognised relationship available, this could give rise to some confusion.
The proposed insertion into section 1 of the Divorce (Scotland) Act 1976 contained in section 5 of the bill is not clearly worded. To say that adultery has the same meaning in relation to a same-sex marriage as it does in relation to a marriage between people of different sexes could be construed to mean as equal grounds for divorce. As adultery is not statutorily defined but is instead a common law concept, it would be much clearer to use the wording contained in the policy memorandum, ie “…the existing [common law] definition of adultery (sexual intercourse with a person of the opposite sex outwith marriage) will continue to apply”.

Sections 10 and 11 of the bill amend sections 8 and 9 of the 1977 Act to allow for the prescription of religious or belief bodies to solemnise same-sex marriage; and to permit the authorisation of ‘nominated persons’ from non-prescribed bodies to solemnise same-sex marriage. We think that the proposed amendment to the Equality Act 2010, which has been extended since the previous consultation to protect the beliefs of individuals ancillary to the marriage ceremony, such as organists and those controlling the use of religious or belief premises, will help to achieve compatibility on an intra-UK level. However, we think there is still the possibility that the provisions designed to implement this policy could be challenged in future as being discriminatory and contravening article 14 of the European Convention of Human Rights1.

In subsection (2)(a)(ii)(C) of section 10 “marriages” should be plural rather than singular.

Chapter 4

The rights acknowledged in section 14 are already enshrined in law by virtue of the Human Rights Act 1998. The Scottish Parliament cannot pass a measure that conflicts with the rights set out in articles 9 and 10 of the European Convention on Human Rights (Scotland Act 1998, section 29). It is not clear why this section is necessary. It remains unclear in any event how the rights mentioned in section 14 will interact with the public sector equality duties contained in section 149 of the Equality Act 2010. Given the profile of recent cases citing a breach of an individual’s article 9 rights in the course of their employment2, individuals working in the public sector need to be clear that the equality duties of their employers can in some cases take precedence over respect for the employee’s article 9 and 10 rights to express and act on their own views.

Part 2 – Civil Partnership

Section 22 provides a similar opt-in system for the prescription of religious or belief bodies to register civil partnerships and for the authorisation of religious or belief celebrants to register civil partnerships, as sections 10 and 11 does in relation the solemnisation of same-sex marriage.

We think that this raises the same questions in relation to the possibility of future challenge on grounds of discrimination according to the European Convention on Human Rights.

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1 Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
2 Eweida and others v United Kingdom (App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10) [2013] All ER (D) 69 (Jan)
Section 25 corrects an anomaly where civil partnerships were dissolved using the simplified procedure but without obtaining third party evidence before the Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012\(^3\) came into effect\(^4\). Section 25 grants retrospective effect to the Order to validate the dissolutions that took place between 2005 and 2012 under the simplified procedure.

We are aware that the Faculty of Advocates has drawn the Scottish Government’s attention to the potential difficulties inherent in this approach and has instead suggested that the problem was corrected by imposing a prospective measure, precluding future challenge to the dissolution. However, the Scottish Government appears to be satisfied that by granting retrospective effect to the Order, this will have the same effect. We would suggest that further consideration is given to this issue to ensure that it does not result in unintended consequences for succession rights, pension entitlements, tax liabilities and benefit rights, as well as the future status of any civil partnership (or same-sex marriage) subsequently entered into.

The committee welcomes the decision not to proceed with the repeal of sections 3(3) and (4) of the Family Law (Scotland) Act 2006, while the provisions at section 29 of the Act conferring rights on cohabitants as drafted are restrictive in their terms.

**Part 3 – Marriage and Civil Partnership: other provision**

Section 26 removes the common law offence of bigamy and replaces it with a new statutory offence with a maximum of 2 years’ imprisonment on indictment (12 months on summary conviction) and a maximum fine of £10,000. We are pleased to note that these penalties are higher than those that were put forward at consultation stage (imprisonment not exceeding three months or to a fine not exceeding level 3 on the standard scale or both), as it is our view that bigamy is a serious offence, which can have potentially a very damaging effect on the parties involved.

**Part 4 – Change of Gender of Married Persons or Civil Partners**

Schedule 2, as introduced by section 27, introduces the concept of a “statutory declaration of consent” in relation to the issuing of a gender recognition certificate (GRC) to a person, namely a statutory declaration by the person’s spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate. While we appreciate that the bill aims to balance the interests of the transgender person and his/her spouse, we would ask the Scottish Government to satisfy itself that this provision could not have the unintended consequence of prolonging a transgender individual’s transitioning process by effectively placing the power to obtain a GRC in the hands of his or her spouse, and potentially contravening his or her right to gender recognition under Article 8 of the ECHR.

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\(^3\) SSI 2012/111

\(^4\) The external evidence requirement was dropped for divorces under the simplified procedure by the Evidence in Divorce Actions (Scotland) Order 1989 but no equivalent dispensation was given for simplified dissolutions.
The Scottish Government recognises that having to divorce or dissolve a civil partnership where one party to the relationship is seeking a GRC can lead to the loss of some accrued rights. The provisions in sections 27 and 28 seek to ensure that this is not the case if both parties wish to stay in a “legally recognised relationship”. Following the Family Law (Scotland) Act 2006, cohabiting couples now also have a legally recognised relationship however, the bill doesn’t make provision for spouses/civil partners where one party seeks a GRC who may wish to stay together but would prefer to cohabit rather than marry or enter into a civil partnership. For the sake of parity, such couples should be able to make financial claims as cohabitees and should have the full extent of their relationship recognised for the purpose of determining what their entitlements are upon separation or death.

Part 5 – Registration Services

We have no comment to make on this part.

Part 6 – General Provisions

We have no comment to make on this part.

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5 The Marriage and Civil Partnership (Scotland) Bill: A Consultation, Annex D, page 53