EQUALITIES AND HUMAN RIGHTS COMMITTEE
CIVIL PARTNERSHIP (SCOTLAND) BILL
SUBMISSION FROM LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Child and Family and Equality Law committees welcome the opportunity to consider and respond to the call for evidence from the Scottish Parliament Equalities and Human Rights Committee on the Civil Partnership (Scotland) Bill. We have the following comments to put forward for consideration.

1. What is your view of the Bill’s approach to achieving equality by making civil partnerships available to different sex couples, rather than closing future civil partnerships to all couples?

We responded to the Scottish Government consultation, The Future of Civil Partnership in Scotland, in December 20181. The Supreme Court decision in R (on the application of Steinfeld and another) v Secretary of State for International Development2 made clear that restricting civil partnerships to same sex couples was discriminatory, leaving one of two possible outcomes: extending the right to enter a civil partnership to different sex couples; or removing this right from same sex couples. Our consultation response noted that many of the issues surrounding which of these options should be chosen were social and historical matters that may be deeply emotive for many, though our view was that civil partnership should be made available to all. We note that this policy has now been implemented in England and Wales (and similar provisions in Northern Ireland).

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1 [https://www.lawscot.org.uk/media/361544/18-12-03-equ-consultation-future-of-civil-partnership.pdf](https://www.lawscot.org.uk/media/361544/18-12-03-equ-consultation-future-of-civil-partnership.pdf)
2 [2018] UKSC 32
2. What will the impact of the Bill and its provisions be on you, your community or your organisation? Give consideration as to whether there is any impact on human rights or equality issues for any particular groups of people.

The Bill aims to remove the difference in formal relationship recognition based on gender, following the Steinfield judgment. There may be a need for consistency between this current Bill and the proposed Gender Recognition (Scotland) Bill, to be laid before the Scottish Parliament later in 2020.

3. The Bill will make consequential changes to existing legislation to carry through the effect of the main change. Do you have any comment to make on these changes?

For same sex couples, recognition of civil partnerships was introduced in 2004; and for marriages in 2014. Section 10 of the Marriage and Civil Partnership (Scotland) Act 2014 allows – through regulations – for a civil partnership to change into a marriage. One of the effects of this, as section 11(2) of the 2014 Act provides is "the civil partners are to be treated as having been married to each other since the date on which the qualifying civil partnership was registered". With civil partnerships to be opened to opposite sex couples as a result of this Bill, there is no inverse provision, namely to change a marriage into a civil partnership. If the purpose of the Bill is to remove any differential treatment between same sex and opposite sex couples, we would recommend that this is considered to avoid any potential discrimination issues.

In England and Wales, section 2(5) of the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 allows for the Secretary of State to lay regulations making provision "for and in connection with a right to convert a marriage into a civil partnership... [or] restricting or bringing to an end... the right to convert a civil partnership into a marriage."

In addition to the potential discrimination implications, the absence of provisions from marriage to civil partnership in the Bill raises several practical issues, including whether a marriage may need to be ended through divorce, whether there would be any continuity between property accrued during marriage and the subsequent civil partnership, and also the potential cross-border implications from a neighbouring jurisdiction potentially having provisions in place to convert a formal relationship from marriage into civil partnership.

Including an offence of forced civil partnership in the current Bill is an important step. Though we are unaware of any reports of such situations (for instance, evidenced by a ground of referral in the Childrens’ Hearings System), because of the broad legal equivalence of civil partnership and marriage, we believe that this offence helps to meet our obligations under Article 37 of the Council of Europe Convention on preventing and combating violence against women and domestic violence.
4. Is there anything else about civil partnerships that should be included in (or excluded from) the Bill? If so, what changes would you like to see and why? Please explain your reasons.

Removing the differential approach taken to civil partnerships will provide options to same sex couples in the same way as for different sex couples and may encourage more couples to formalise their relationship. However, many will remain in cohabitation outside these formal relationship structures and we recommend taking forward cohabitation reform as a policy priority following this legislation. We are anticipating a discussion paper from the Scottish Law Commission later this year around cohabitation reform. We have previously highlighted some of the challenges of the current legislation, particularly the effect of section 28 of the Family Law (Scotland) Act 2006, which extinguishes the legal rights of a cohabitant after an unduly short period.

We also highlight the differences that will remain around the dissolution of either a marriage or civil partnership. For the former, there are several grounds that establish that a marriage has irretrievably broken down, including that “since the date of the marriage the defender has committed adultery”\(^3\). For the latter, adultery is not a ground for dissolution though this may constitute behaviour demonstrating the irretrievable breakdown of the partnership, namely that “since the date of registration of the civil partnership the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender”\(^4\). In addition, for the purposes of divorce in Scotland, adultery is considered as taking place between individuals of different sex and not same sex. Considering whether to harmonise the grounds for the dissolution of both marriage and civil partnership may be beneficial. We note the current Divorce, Dissolution and Separation Bill before the UK Parliament, which would remove the requirement to establish facts, instead requiring an application to be accompanied by a statement by the applicant or applicants that the civil partnership has broken down irretrievably\(^5\).

5. Will the Bill result in any resource implications for your organisation or you as an individual? If so, please explain and provide any supporting information.

We note the costs highlighted in the Financial Memorandum to the Bill, particularly those involving legal aid. As legal aid in family separation may involve preservation or recovery of financial assets, from which the legally aided individual (or individuals) would need to reimburse the Scottish Legal Aid Board, the costs may be less than anticipated.

\(^3\) Section 1(2)(a), Divorce (Scotland) Act 1971
\(^4\) Section 117(3)(a), Civil Partnership Act 2004
\(^5\) Sections 1-3, Divorce, Dissolution and Separation Bill