

Equal marriage law in Scotland – is it devolved?

Equality Network, 30 Bernard St, Edinburgh, EH6 6PR

en@equality-network.org

www.equality-network.org

August 2010

The Equality Network is a national Scottish network of lesbian, gay, bisexual and transgender (LGBT) people and groups, working for LGBT equality in Scotland.

Equal marriage law is now one of the top priorities for LGBT people in Scotland. Our paper, 'The case for equal marriage law in Scotland', explains why this is.

The Equality Network's policy is for the opening up marriage and civil partnership in Scotland to couples regardless of their gender. Within this, religious bodies should be free to choose whether or not to offer same-sex marriages. The requirement to divorce before obtaining gender recognition should be abolished at the same time.

Is same-sex marriage a devolved issue?

Marriage law is certainly devolved to the Scottish Parliament. The rules about who can marry, how marriages are conducted, the responsibilities of married couples to one another, and the rules for divorce and inheritance, for example, are all devolved.

The same is true for civil partnership law. Although the Civil Partnership Act 2004 was passed at Westminster, that was for reasons of convenience. The Scottish Parliament passed a Sewel motion (now called a legislative consent motion) to allow Westminster to include around 50 sections and a schedule of devolved legislation in the Act. The Scottish Parliament is responsible for any changes to that legislation, including the rules on who can register a civil partnership.

However there are some aspects of law reserved to Westminster which apply in a particular way to married couples and to civil partners. These include inheritance tax, immigration, the law on fertility treatment, and the law on pension regulation. The law in these areas treats married couples and civil partners the same, to all intents and purposes.

How could the Scottish Parliament legislate for same-sex marriage?

Of course if Westminster legislated for same-sex marriage for England and Wales at the same time, legislation could be coordinated between the UK and Scottish Parliaments. But that is not necessary – the Scottish Parliament does not have to wait for Westminster.

The Scottish Parliament could certainly pass a bill opening marriage to same-sex couples, and this would apply for all devolved purposes. But what would happen about the reserved matters like inheritance tax, mentioned above? And what would happen if a same-sex couple married in Scotland moved to England?

The answer is that civil partnership law across the UK already deals with this kind of situation. Same-sex marriages registered anywhere overseas (eg Spain, South Africa, US states, etc) are already recognised across the UK as if they were civil partnerships. All that is needed is for the same to apply to Scottish same-sex marriages.

Scottish same-sex marriages would then be recognised for reserved purposes in Scotland as if they were civil partnerships. And because reserved law treats marriages and civil partnerships to all intents and purposes the same, this is a workable solution.

Scottish same-sex marriages would also be recognised in the rest of the UK as if they were civil partnerships, just like overseas same-sex marriage are now.

Because Scotland is not 'overseas', this would require small amendments to the Civil Partnership Act 2004, which would need to be done at Westminster. But this would not require a bill; it could be done with a statutory instrument under section 104 of the Scotland Act 1998. That section gives UK ministers the power to make amendments to any UK legislation, by statutory instrument, in consequence of an Act of the Scottish Parliament. The power is used a couple of times, on average, each year.

We hope that the UK Government would be willing to introduce this statutory instrument. It requires no change of policy, since overseas same-sex marriages are already recognised in this way. We would expect the Scottish and UK Governments to cooperate to make this work.

How could the Scottish Parliament legislate for mixed-sex civil partnership?

Just as with same-sex marriage, the Scottish Parliament could legislate to open civil partnership in Scotland to mixed-sex couples, and this would be effective for all devolved purposes.

But for reserved purposes such as inheritance tax, a change of reserved law is needed. Also, the question arises of how a Scottish mixed-sex civil partnership would be recognised in the rest of the UK.

At the moment, UK law does not recognise overseas mixed-sex civil partnerships, for example New Zealand mixed-sex civil unions, or Netherlands mixed-sex registered partnerships. These relationships are simply not recognised at all in the UK.

For Scottish mixed-sex civil partnerships to be recognised for reserved purposes, and in other parts of the UK, therefore requires a policy change at UK level. This would require significant policy agreement between the UK and Scottish Governments.

Summary

The Scottish Parliament can legislate to open marriage to same-sex couples. In our view, a consequential statutory instrument at Westminster would enable such marriages to be recognised, for reserved purposes and in other parts of the UK, as if they were civil partnerships. This requires no policy change at UK level, because overseas same-sex marriages are already treated in this way.

The Scottish Parliament could (at the same time or at a later time) legislate to open civil partnership to mixed-sex couples. But for this to be effective for reserved purposes, and to be recognised for any purposes in other parts of the UK, would require a policy change at UK level.