

Civil Partnership (Scotland) Bill

Stage 1 evidence submission from the Equality Network
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Q1: Our view on the general approach to removing the discrimination in civil partnership law

We strongly support the approach taken in the bill to removing the ECHR non-compliance and discrimination in current civil partnership law. In our view, opening civil partnership to couples regardless of their gender mix is clearly preferable to the alternative of closing down civil partnership to new registrations. Our reasons for this view are set out below.

Generally, the solution to an inequality, where more rights or choices are available to one group than to another, should be to level up, providing the more extensive rights / choices to all, rather than to level down, removing rights / choices from those who already have them.

In 2012, we commissioned a Scotland-wide, representative sample opinion poll, from Ipsos MORI, asking whether “Civil partnerships, which are currently only available to same-sex couples, should also be available to heterosexual couples.” 71% agreed, 16% disagreed, and the remaining 13% neither agreed nor disagreed.

Following the introduction of equal marriage, we conducted a survey in 2015 to explore people’s views on the future of civil partnership. 80% of 705 LGBTI respondents, and 80% of 566 non-LGBTI respondents, said that civil partnership should be opened up to mixed-sex couples. Only 17% of LGBTI respondents, and 15% of non-LGBTI respondents, said that civil partnership should be closed down.

Demand for civil partnership

There is clearly a demand for civil partnership from both same-sex and mixed-sex couples. Following the introduction of same-sex marriage in 2014, the numbers of same-sex couples registering a civil partnership unsurprisingly fell, as most (but certainly not all) same-sex couples prefer marriage. However, the numbers of same-sex civil partnerships registered has remained stable at 60 to 70 per year since then – that is around 7% of the annual number of same-sex marriages.

It is not possible to accurately predict the rate of mixed-sex civil partnership. In our 2015 survey on the future of civil partnership, 17% of LGBTI respondents, and 41% of non-LGBTI respondents, said that they would consider a mixed-sex civil partnership in the future. These figures are similar to those found in research conducted by the UK Government (“Exploring the potential uptake of opposite-sex civil partnership”, Government Equalities Office, July 2019). However, we agree with the UK Government that such surveys are likely to over-estimate the actual demand.

In our response to the Scottish Government's 2015 consultation on the future of civil partnership, we estimated that demand for mixed-sex civil partnership in Scotland might be at least 500 partnerships per year. That was based in part on the relative popularity of same-sex and mixed-sex registered partnership in the Netherlands. The Scottish Government estimates there may be 100 to 150 mixed-sex civil partnerships per year, based mainly on experience in New Zealand. In contrast, the UK Government's estimates are (adjusted proportionately for population) around 2000 (low estimate), 4000 (best estimate), or 8000 (high estimate) mixed-sex civil partnerships per year on average in Scotland.

Registration of mixed-sex civil partnerships in England and Wales began on 31st December 2019. There are no official figures available yet, but anecdotal evidence from colleagues south of the border is that "hundreds" of couples have registered or given notice of registration. All of this suggests that the Scottish Government's estimate of 100 to 150 mixed-sex civil partnership registrations per year could be considered a lower bound. Any estimate is, at this point, a finger in the air exercise, but we would not be surprised if the rate turns out to be several times higher than the Scottish Government figure.

Reasons for the demand

We know from feedback to ourselves and to other organisations that there are significant numbers of couples who have chosen not to marry, but who would consider registering a civil partnership. While the legal effects of marriage and civil partnership are almost identical, the personal, social and cultural meanings are, for many people, very different. That is why the introduction of same-sex marriage was so important. Same-sex couples could already access the same legal rights as marriage, by registering a civil partnership, but they were excluded from marriage itself, and all the personal, social and cultural meanings it has.

While some people consider marriage to be the "gold standard", others and their families and friends have a different view, and prefer civil partnership. Some mixed-sex couples feel that marriage is too patriarchal or has too many religious connotations, for example. We have also had feedback from people who were previously married and the marriage ended by bereavement, who have a new partner and want to access the legal protection of civil partnership, but feel that their first marriage should be their one and only marriage. Others may have ended a very unsatisfactory marriage previously, and would prefer for that reason to choose civil partnership for a new relationship.

There is an additional specific reason why some same-sex couples need access to civil partnership – same-sex couples with a religious belief that marriage is only for mixed-sex couples (a belief held by significant numbers of churches and other religious bodies) have an option, in civil partnership, to formally register their relationship and access legal protections.

Legal protection

Although there is some legal protection for cohabiting couples and their families, the protections are weaker than for marriage and civil partnership if the couple split up or

if one of them dies. Providing civil partnership as an option for couples who do not wish to marry therefore provides a way for them to access better legal protections. We note that, after conducting research on the demand for mixed-sex civil partnership, the UK Government concluded that more than half of the likely demand would be from couples who would not otherwise marry (Financial Memorandum to the bill, paragraphs 41 & 42).

Other reasons

It is sometimes suggested that closing down civil partnership would result in simpler law, because marriage would then be the only option for registering a relationship. However, the Scottish Government accepted, during debate on the Marriage and Civil Partnership (Scotland) Act 2014, that to force those several thousand same-sex couples already in Scottish civil partnerships to change their partnerships to marriages would breach their human rights. Closing down civil partnership to new registrations would therefore not result in any simplification of the law while any of those civil partnerships still exists, which could be for 70 years or more. It could however result in significant negative effect on couples already in civil partnerships, because the closing down to new registrations would be likely over time to undermine respect for and understanding of their continuing civil partnership.

Furthermore, since mixed-sex civil partnerships can now be registered in the rest of the UK, Scotland must find a way to give effect to those for couples who move here. Treating them as marriages would not in our view be acceptable, since the couples deliberately chose civil partnership rather than marriage. Those civil partnerships would therefore need to be given legal effect in Scotland, indefinitely, as civil partnerships, even if civil partnership registration were closed down here. In addition, if Scotland were to close down Scottish civil partnership to new registrations, it is likely that Scottish couples who want a civil partnership would simply make visits across the border to register their civil partnership in the rest of the UK.

Q2: Impact on LGBTI people

Opening up civil partnership to mixed-sex couples removes discrimination against those couples in the current law. This will benefit LGBTI people who are in relationships that are legally mixed-sex. For example, it makes no sense that for a bisexual person the legal forms of relationship open to them depend on the gender of their chosen partner.

The bill will also benefit trans people in civil partnerships. At present, a trans person in a civil partnership who applies for gender recognition is required to dissolve their civil partnership (or change it to a marriage), because otherwise a (currently disallowed) mixed-sex civil partnership is created. Because it allows mixed-sex civil partnership, the bill removes this requirement to end their civil partnership.

Q3: Changes made by the bill to existing legislation

The basic principle of the bill is to extend the existing legal rules for same-sex civil partnerships, to apply equally to mixed-sex civil partnerships. Additionally, rules relating to parenthood and parental rights and responsibilities, which currently apply

to mixed-sex marriages, will be applied also to mixed-sex civil partnerships. We agree with this approach, and we think the bill implements it well.

Rules for pensions, and in particular survivor's pension entitlement for mixed-sex civil partners, will follow the rules for mixed-sex marriage, rather than those for same-sex civil partnership. This reflects the fact that survivor's pension entitlements are lower for bereaved men in mixed-sex marriages than for bereaved women in mixed-sex marriages. While that difference persists, it seems fair to reflect it in mixed-sex civil partnership.

The bill introduces "second registration of civil partnership" for same-sex and mixed-sex civil partnership, based on second marriage ceremonies (section 20, Marriage (Scotland) Act 1977), and we agree that this could be useful for a small number of couples. Similarly, we welcome the introduction of provisions on forced civil partnership, mirroring those on forced marriage, and the extension of the power of the court to postpone a decree of divorce where there is a religious impediment to marriage, to cover civil partnership dissolution decrees also.

We welcome the amendments made by the bill to the Gender Recognition Act 2004. These simply recognise that, with civil partnership available to couples regardless of their genders, it will no longer be a legal requirement for a trans person in a civil partnership to end that civil partnership before obtaining gender recognition. The approach taken in the bill is to exactly mirror the provisions for a married person who applies for gender recognition, which were introduced with equal marriage in 2014, and we fully agree with this. The provisions in the bill only cover trans people in civil partnerships registered in Scotland; those in civil partnerships registered elsewhere are covered by the recent Westminster legislation for mixed-sex civil partnership. Because that legislation was laid at Westminster after the introduction of the bill here, it will be important for the Scottish Government to verify that the provisions in the bill dovetail with those in the Westminster legislation.

We agree with the proposal to amend to the Equality Act 2010 (by way of the UK Government's section 104 order associated with the bill) to ensure that religious and belief bodies and celebrants are under no obligation to register mixed-sex civil partnerships. We agree with the provision in section 10 of the bill, which confirms that religious or belief celebrants are under no duty to solemnise a marriage between a couple who are already in a mixed-sex civil partnership.

We agree with the proposal in section 3 of the bill, that mixed-sex civil partnerships registered in the rest of the UK and the rest of the world will temporarily be treated in Scotland as if they are marriages. Generally, as noted above, we think it is unsatisfactory to treat non-Scottish civil partnerships as marriages, because the partners specifically chose not to marry. However, we agree with the Scottish Government that the sooner such civil partnerships can be given some legal recognition in Scotland the better. They cannot be recognised as civil partnerships until the bill is fully commenced, so commencing section 3 first, to give temporary recognition as marriages, is better than no recognition at all. We would hope that the delay between commencement of this interim recognition in section 3, and commencement of the rest of the bill, giving proper recognition as civil partnerships, would be as short as possible.

Q4: Are any changes needed to the bill?

We agree with the proposal to extend to mixed-sex civil partnerships the existing provision that a same-sex civil partnership can be changed to a marriage, either via a marriage ceremony, or (for civil partnerships registered in Scotland only) via an administrative process. We agree with the Scottish Government that this provision should not be time-limited, because a couple who have registered a civil partnership may at any time in the future need to change it to a marriage if they move to a country that does not recognise civil partnerships, or perhaps if they join a religion that does not approve of civil partnership.

However, we think that further consideration should be given to allowing a time-limited way of changing a mixed-sex marriage registered in Scotland to a civil partnership. We do not agree with the Scottish Government's statement (Policy Memorandum paragraphs 142 to 144) that change in this direction is not justified because there is more societal validation for marriage than for civil partnership. Societal validation is relative, and for some mixed-sex couples, as noted above, a civil partnership carries more acceptable social and cultural meanings than a marriage. We think that consideration should be given to allowing mixed-sex couples who married in Scotland before the bill commences, but who would have preferred a civil partnership, an opportunity, for a time, to change their marriage to a civil partnership. We note that the UK Government have proposed this for mixed-sex marriages / civil partnerships in England and Wales, and are expected soon to publish the analysis of their public consultation on this proposal ("Implementing opposite-sex civil partnerships: next steps", Government Equalities Office, July 2019).

Q5: Resource implications

The passing of the bill will have no significant resource implications for the Equality Network.

We note that some of the resource implications set out in the Financial Memorandum and the Business and Regulatory Impact Assessment depend on the number of mixed-sex civil partnerships that will be registered, and in particular, on the number of "additional" mixed-sex civil partnerships (that is, civil partnerships between couples who would not otherwise have married). We noted above that we think that the numbers of mixed-sex civil partnership registrations may be higher than the Scottish Government have estimated. That would increase the cost estimates for devolved public sector pension schemes and for legal aid. However, those costs are low, and in the case of pension schemes will mostly not be incurred for a long time, and may in any case simply displace existing costs (Financial Memorandum paragraphs 60 to 62).