

SCOTTISH CIVIL JUSTICE COUNCIL – FAMILY LAW COMMITTEE

PAPER BY THE SCOTTISH GOVERNMENT ON THE MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014

POTENTIAL IMPLICATIONS FOR COURT RULES, FORMS AND GUIDANCE

Introduction

1. This paper by the Scottish Government is an open paper.
2. The Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”) introduces same sex marriage; makes other changes to marriage law; introduces the religious and belief registration of civil partnership and allows transgender people to stay married and obtain a full Gender Recognition Certificate. Unless otherwise indicated, references in this paper to section numbers and schedule numbers are references to sections and schedules in the 2014 Act.
3. The Scottish Government is currently considering what secondary legislation is needed to implement the 2014 Act. The Government’s aim is to have all necessary Scottish secondary legislation in place by the end of 2014.
4. The UK Government will take through Westminster an Order under section 104 of the Scotland Act 1998, to make consequential provision for reserved matters.
5. The Marriage (Same Sex Couples) Act 2013 (“the 2013 Act”) has been passed at Westminster. The 2013 Act introduces same sex marriage in England and Wales and also has some impact on Scotland. A Legislative Consent Motion was agreed by the Scottish Parliament in respect of devolved matters covered by the 2013 Act¹. Some aspects of the 2013 Act extending to Scotland relate to reserved matters.

General

6. On a general point, this paper is proposing a number of suggested changes to court rules. It may be possible to combine changes to rules as a consequence of the 2014 Act with any changes in relation to simplified divorce, which the Committee is also considering.

Areas that may have implications for court rules, forms and guidance

7. Relevant provisions in the 2014 Act which the Scottish Government would like to draw attention to are:
 - Section 4: Meaning of marriage and related expressions in enactments and documents

¹ The Legislative Consent Memorandum is at <http://www.scottish.parliament.uk/LegislativeConsentMemoranda/SameSexMarriageBillLCM.pdf>

- Section 5: Further provision regarding same sex marriage
- Section 6, and schedule 1: Jurisdiction in proceedings relating to same sex marriages
- Section 23: Sheriff court jurisdiction in relation to declarator of marriage
- Section 24: Registration of civil partnerships
- Section 29 and schedule 2: Change of gender of married persons or civil partners
- Section 31: Grounds of divorce: interim gender recognition certificate followed by full certificate

Details on specific provisions

Section 4 – Meaning of marriage and related expressions in enactments and documents

Enactments

8. Section 4(1) to (4) provides that references in enactments passed or made before section 4 is commenced to marriage and to married people (however expressed) include references to both opposite sex marriage and same sex marriage and parties in both opposite sex and same sex marriage. In addition, subsections (2) and (3) make provision in respect of references in enactments to cohabitants so it is clear that they apply to same sex cohabitants also. The Scottish Government considers that “enactments” would include rules of court.

9. Section 4(1) to (4) apply subject to contrary provision. There are two key points in relation to contrary provision:

9.1 Section 4(1) to (4) do not apply in so far as the enactment, or any other enactment, provides otherwise. [Section 4(5)(b) refers].

9.2 The Scottish Ministers may make contrary provision by Order under section 4(8).

10. The Government’s view is that section 4(1) to (4) would not give any rise to any need for new court rules.

11. One issue arising is the need to consider if any existing rules need to be altered so that they just refer to either opposite sex or same sex marriage. The Government’s view is that this should not be necessary. The broad intention is that opposite sex and same sex married couples should be treated in the same way. There are some limited exceptions to that (eg pension rights may not be the same in all cases) but the Government considers that the rules should cover both opposite sex and same sex marriage. The same would be true in relation to future rules as well.

12. There may be a need to amend some forms and guidance. For example, the Government has noted that Ordinary Cause Form F31 includes a reference to

“husband and wife having lived apart for at least one year”². References of this nature may need to be changed to reflect that the marriage may in future consist of two parties of the same sex. Many references in forms are already to gender-neutral terms such as “spouse”, “pursuer” and “defender”.

Documents

13. Section 4(11) of the Act provides that references to marriage and married people in documents executed after the Act comes into force (see section 4(13)) cover both opposite sex marriage and same sex marriage and parties in both opposite sex and same sex marriages, unless the document provides otherwise. This could include court documents

14. Section 4(13) sets out that subsection (11) applies to documents ‘executed’ on or after the commencement of section 4. The extent to which court documents will be caught by this will depend on whether such documents would be considered to have been ‘executed’ or not. The Government considers that ‘executed’ indicates that certain formalities have been met (e.g. signing/sealing) in order to render the document valid and effective in law.

15. The Government is not of the view that new rules are required to implement the provisions on documents in section 4 of the 2014 Act.

Section 5 – Same sex marriage: further provision

16. The Government would also wish to draw attention to section 5.

17. Section 5(1) provides that the rule of law which provides for a marriage to be voidable by reason of impotence has effect only in relation to a marriage between persons of different sexes. Therefore, any court actions in this area would continue to relate to opposite sex marriage only. The Government’s understanding is that actions in this area are rare. The Government is not aware of any changes to rules, forms or guidance which would be required as a consequence of section 5(1).

18. Section 5(2) of the Act provides that adultery retains its current meaning in divorce law and so continues to refer to opposite sex intercourse outwith marriage (with marriage in future being either opposite sex or same sex)³. The Government considers that section 5(2) is unlikely to impact on Rules of Court but may, perhaps, impact on any guidance issued by the Scottish Court Service.

² Form F31 can be found at <http://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms/page/2/>

³ Adultery was discussed in the Policy Memorandum for the Bill: [http://www.scottish.parliament.uk/S4_Bills/Marriage%20and%20Civil%20Partnership%20\(Scotland\)%20Bill/b36s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Marriage%20and%20Civil%20Partnership%20(Scotland)%20Bill/b36s4-introd-pm.pdf) (see paragraphs 127 to 143).

Section 6 and schedule 1: Jurisdiction in proceedings relating to same sex marriages

19. Section 6 gives effect to schedule 1. Schedule 1 amends the Domicile and Matrimonial Proceedings Act 1973 (“the 1973 Act”) in respect of the jurisdiction in proceedings relating to same sex marriages. Schedule 1 also enables the Scottish Ministers to make provision corresponding to EC Regulation 2201/2003 (known as Brussels IIa). (The Government’s understanding is that Brussels IIa does not extend to same sex relationships).

20. Provision of a similar nature to schedule 1 was made in respect of civil partnerships under Chapter 3 of Part 5 to the Civil Partnership Act 2004 and regulations (SSI 2005/629) were made by the Scottish Ministers⁴.

21. The Government’s initial view is that, in general, no new rules are required as a consequence of schedule 1. Schedule 1 relates to jurisdiction in relation to actions which can already occur in relation to opposite sex marriage.

22. However, Regulation 6(2) of SSI 2005/629 provides that any interested party may apply to the Court of Session for a declarator of recognition or non-recognition of a judgment on civil partnerships from another Member State. The Government’s view in relation to same sex marriage is that it should be possible to obtain a declarator of recognition or non-recognition of a judgment from another Member State from the sheriff court, as well as from the Court of Session.

23. Therefore, the Government would intend that regulations made by Ministers under schedule 1 to the 2014 Act would provide that any interested party may apply to the Court of Session or the sheriff for a declarator of recognition or non-recognition of a judgment from another Member State. This is in line with section 8 of the Domicile and Matrimonial Proceedings Act 1973 and with paragraph 6(2) of Schedule 1B to the 1973 Act, inserted by Schedule 1 to the 2014 Act which make provision on the jurisdiction of the sheriff court in relation to declarators or recognition or non-recognition of relevant decrees granted ouwith the European Union⁵.

24. Proceeding in this way may require Rules in relation to the sheriff court, along similar lines to Part XI of Chapter 62 of the Court of Session Rules.

25. On a minor point, regulation 11 of SSI 2005/629 provides that where recognition is sought of a judgment given in another Member State and an appeal against the judgment has been lodged in that Member State, the court in Scotland may sist the proceedings. Ministers would intend to make similar provision under the regulations to be made under schedule 1 to the 2014 Act.

⁴ Please see the Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005 – SSI 2005/629: <http://www.legislation.gov.uk/ssi/2005/629/contents/made>

⁵ By virtue of paragraph 1 of Schedule 1 to the Marriage and Civil Partnership (Scotland) Act, section 8 of the 1973 Act will not apply to same sex marriages: provision instead is made in the inserted Schedule 1B.

Section 23 – sheriff court jurisdiction in relation to declarator of marriage.

26. Section 23 clarifies the jurisdiction of the sheriff court in relation to declarators of (opposite sex) marriage by amending section 8 of the 1973 Act. Provision was made previously (section 4 of the Family Law (Scotland) Act 2006) to extend the jurisdiction of the sheriff to declarators of marriage but no amendments were made to the 1973 Act⁶.

27. The Scottish Government's view is that no new rules are required as a consequence of section 23. Ordinary Cause Rule 33.1(1)(n) already provides that "In this Chapter, "family action means ... an action of declarator of marriage".

Section 24 – registration of civil partnership

28. Section 24 makes a number of changes to the Civil Partnership Act 2004 ("the 2004 Act") to introduce the religious and belief registration of civil partnerships (at the moment, the registration of civil partnership may only be carried out through civil ceremonies).

29. Section 24(13) inserts section 94B into the 2004 Act. This relates to religious and belief bodies nominating members to the Registrar General so that they can be empowered to register celebrants. If the Registrar General rejects a nomination, the body may appeal to the Scottish Ministers.

30. Under section 94B(10), if a reason given by Ministers is that the nominating body is not a religious or belief body, the body may appeal to the Court of Session and seek the court's determination as to whether the body is a religious or belief body⁷. This provision is along similar lines to existing provision in section 9(6) of the Marriage (Scotland) Act 1977.

31. The Scottish Government's view is that this does not require new rules. Chapter 41 of the Court of Session Rules already makes provision on appeals under statute.

Section 29 and schedule 2: change of gender of married persons or civil partners

32. Section 29 gives effect to schedule 2 which amends the Gender Recognition Act 2004 ("the GRA"). The most significant change is that married persons may now obtain a full Gender Recognition Certificate ("GRC") without being required to divorce. In addition, provisions are put in place so that persons in a civil partnership can obtain a full GRC.

⁶ Section 4 of the Family Law (Scotland) Act 2006 also made provision on sheriff court jurisdiction in relation to declarators of nullity of marriage. Section 15 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 subsequently amended section 8 of the 1973 Act to clarify sheriff court jurisdiction in relation to declarators of nullity.

⁷ There has recently been a case broadly of this type in the UK Supreme Court <http://www.bailii.org/uk/cases/UKSC/2013/77.html>. This related to authorisations in England and Wales, where the system is completely separate from and different to the system in Scotland.

Paragraph 5 of schedule 2

33. Paragraph 5 inserts new section 4E into the GRA. The purpose of section 4E is where the applicant has an interim GRC issued by the Gender Recognition Panel (because the applicant is married and the spouse has not consented to the marriage continuing), the applicant can then apply to the sheriff for a full GRC.

34. Section 4E provides:

- The application must be under the summary application procedure.
- The sheriff must grant the application if satisfied that the applicant was and still is in a marriage solemnised in Scotland and the application was made within 6 months of the issue of the interim GRC.
- If an application is made under this section, the sheriff must give the applicant's spouse notice of the application.
- If an application is granted, the sheriff must give the spouse notice of the issue of the full GRC.

35. The Government considers that rules may be needed in a variety of areas, such as:

- On the application procedure.
- On notifying the spouse of the application.
- On notifying the spouse of the issue of the full GRC.
- On divorce (see paragraphs 39 and 40 below).

36. On divorce, section 31 of the 2014 Act amends the Divorce (Scotland) Act 1976, in respect of divorce on the grounds of the issue of an interim GRC. In particular, the amendments provide that:

- a divorce cannot be obtained on the grounds of the issue of an interim GRC where the GRP has gone on to issue a full GRC. This can arise under the new section 4C of the GRA (as inserted by paragraph 5 of schedule 2) when the Gender Recognition Panel issues an interim GRC; within 6 months, both parties consent to the marriage continuing; and an application is then made to the GRP for a full GRC. (Similar provision is made under the new section 4A of the GRA, as inserted by paragraph 4 of Schedule 5 to the 2013 Act, in respect of people in a marriage registered in England and Wales or overseas. Schedule 5 to the 2013 Act extends to Scotland).
- a divorce can still be obtained on the grounds of the issue of an interim GRC even if a full GRC has been issued by the sheriff under section 4E of the GRA, as added by paragraph 5 of schedule 2. This reflects that in these cases both parties may not have consented to the marriage continuing.

37. In addition, paragraph 6 of schedule 2 amends section 5 of the GRA so that following a divorce on the grounds of an interim GRC, the court does not have to issue a full GRC when the full GRC has already been issued by the sheriff under section 4E of the GRA.

38. The Government's view is that amendments to the Rules are not likely to be needed as a consequence of these changes made by section 31 and paragraph 6 of schedule 2.

39. However, the Government's understanding is that up until now divorces (and dissolutions) on the grounds of the issue of an interim GRC have usually been sought by the transgender person, rather than by the spouse of the transgender person. At the moment, when dealing with a divorce application on the grounds of the issue of an interim GRC, the courts require the interim GRC itself or a copy certified by the GRP. This may not always be easy for the spouse of the transgender person to obtain. The Government would suggest that an option in future might be to accept the notification to the spouse by the sheriff under section 4E of the GRA as evidence that an interim GRC has been issued. This would save the non-transgender spouse from having to try and obtain a certified copy of the interim GRC from the GRP. Clearly, this proposed change would only apply in cases where an action under section 4E has been raised.

40. In this regard, the Government notes that Sheriff Court Ordinary Cause Rule 33.9A, on productions in action of divorce on ground of issue of interim GRC, provides that the interim GRC or a copy certified by the GRP must be provided "unless the sheriff otherwise directs". However, Court of Session Rule 49.10 does not appear to provide this discretion.

Paragraph 8 of schedule 2 (and provisions in the Marriage (Same Sex Couples) Act 2013)

41. Paragraph 8 of schedule 2 makes provision on appeals by amending section 8 of the GRA.

42. In particular, paragraph 8 of schedule 2 adds a new subsection (5B) to section 8 of the GRA to provide that an applicant's spouse or civil partner may apply to the Court of Session to quash a decision to grant a GRC on the grounds that its grant was secured by fraud.

43. Section 8 of the GRA is also amended by paragraph 8 of Schedule 5 to the 2013 Act. Schedule 5 to the 2013 Act generally covers people who married in England and Wales or overseas and people who entered into a civil partnership in England and Wales. However, as indicated above, Schedule 5 to the 2013 Act extends to Scotland as people in such marriages and civil partnerships may now live here.

44. The changes made to section 8 of the GRA by paragraph 8 of Schedule 5 to the 2013 Act are similar to the changes made by paragraph 8 of schedule 2 to the 2014 Act.

45. Paragraph 6 of Schedule 5 to the 2013 Act amends section 5 of the GRA. This makes additional provision, which extends to Scotland, about the person seeking gender recognition or the Secretary of State making applications where a GRC has been issued in error. If the GRC has been issued by the court, the application is to the court (see existing section 6(2) of the GRA).

46. Chapter 91 of the Court of Session Rules makes some provision on applications to the Court relating to the GRA. Amendments may be required as a consequence of paragraph 8 of schedule 2 to the 2014 Act and paragraphs 6 and 8 of Schedule 5 to the 2013 Act. In addition, sheriff court rules may be required in respect of any application claiming that a sheriff has issued a GRC which contains an error.

Marriage (Same Sex Couples) Act 2013: Schedule 2: Part 2

47. Under paragraph 2 of Schedule 2 to the 2013 Act, same sex marriages in England and Wales are treated as civil partnerships in Northern Ireland. Provision is also made so that same sex marriages from England and Wales can be treated as civil partnerships in Scotland by order⁸. (Once same sex marriage becomes lawful in Scotland, same sex marriages from England and Wales will (like same sex marriages from overseas) be treated as marriages⁹).

48. Part 2 of Schedule 2 to the 2013 Act makes provision so that if any such “deemed” civil partnership is dissolved or annulled or subject to a legal separation order, the dissolution or annulment or separation order has the same effect on the actual marriage and the validity of that order is recognised throughout the United Kingdom.

49. The Government’s view is that amendments to the Rules are not likely to be needed as a consequence of these provisions.

Religious divorces

50. Section 15 of the Family Law (Scotland) Act 2006 amended the Divorce (Scotland) Act 1976 to make provision on postponement of decree of divorce where a religious impediment to remarry exists. This provision applies in relation to marriages solemnised by a marriage celebrant of a religious body prescribed by regulations made by the Scottish religious bodies. The only body prescribed so far is “any Hebrew Congregation.”¹⁰

51. The Scottish Council of Jewish Communities have noted that the term “Hebrew Congregation” is no longer appropriate¹¹. The Government has accepted the need to amend the term in the SSI which prescribed “any Hebrew Congregation”. Changes in this area may have a knock-on effect on forms (eg simplified divorce forms SPA, SPB and SPC) which refer to “any Hebrew Congregation”.

⁸ Such an order has been made: http://www.legislation.gov.uk/ukdsi/2014/9780111108727/pdfs/ukdsi_9780111108727_en.pdf (see Article 5).

⁹ Section 38 of the Family Law (Scotland) Act 2006 already makes provision on the formal validity of overseas marriages and marriages from elsewhere in the UK. Section 4 of the 2014 Act makes provision so that references to “marriage” in enactments commenced before the 2014 Act means both opposite sex and same sex marriage.

¹⁰ See The Divorce (Religious Bodies) (Scotland) Regulations 2006 SSI 2006/253: http://www.legislation.gov.uk/ssi/2006/253/pdfs/ssi_20060253_en.pdf

¹¹ See pages 7 and 8 of this consultation response by the Scottish Council of Jewish Communities: http://www.scojec.org/consultations/2013/13iii_marriage_and_civil_partnership.pdf

Statistics

52. The Government will discuss separately with the Scottish Court Service any changes which may be required in respect of how statistics are collected and reported as a consequence of the 2014 Act (e.g. ensuring statistics are available on divorce actions relating to same sex marriage).

**Scottish Government
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