CONSULTATION QUESTIONS

The registration of civil partnerships

Question 1  (Paragraphs 2.12 and 2.13)

Do you agree that legislation should be changed so that civil partnerships could be registered through religious ceremonies?

Yes ☒
No ☐
Don’t know ☐

Please give reasons for your answer.

Comments

The underlying rationale behind our response to this consultation is that there should be equality of treatment for Scots irrespective of their sexual orientation. It is our view that couples who wish to register a civil partnership and they wish to do so through a religious ceremony that they should be able to do so under Scots law.

Question 2  (Paragraphs 2.14 to 2.19)

Do you think that the proposals in England and Wales on registration of civil partnerships in religious premises would be appropriate for Scotland?

Yes ☐
No ☒
Don’t know ☐

If you have answered no, please explain what elements of the proposals in England and Wales you consider inappropriate for Scotland.

Comments

Leaving aside the underlying differences between the law that has developed in Scotland and England and Wales our primary reason for
rejecting the suggestion that the proposals being made in England and Wales as being appropriate for Scotland is that the proposals do not, as we understand them, allow couples entering into civil partnership to have a religious ceremony.

Question 3  (Paragraphs 2.20 to 2.24)

Do you agree with allowing religious celebrants to register civil partnerships in religious premises?

Yes   ☒
No     
Don’t know  

Please give reasons for your answer

Comments

Given the framework that exists to ensure that celebrants appropriately have authority from the state to confer legal status on parties we see no difficulty with religious celebrants having the ability to register civil partnerships in religious premises. Indeed, we have a concern that the existing position (which prevents religious celebrants registering civil partnerships) discriminates against individuals within those faith organisations who wish to confer the status of civil partnership by virtue of proceedings conducted in religious premises.

Question 4  (Paragraphs 2.20 to 2.24)

Do you agree with allowing religious celebrants to register civil partnerships in other places agreed between the celebrant and the couple?

Yes   ☒
Question 5  (Paragraph 2.25)

Do you agree that religious bodies should not be required to register civil partnerships?

Yes  
No  ☒
Don’t know  

Please give reasons for your answer

Comments

Where a celebrant has been given power by the state to confer status we do not believe that it would be appropriate to restrict that power by allowing discrimination on the basis of sexual orientation. It is our view that if the Scottish Government decide, as we hope they will, that the underlying principle that should apply is that of equality of treatment that it is necessary, and would be appropriate, that those wishing to act as a celebrant be required to do so in a manner that is non-discriminatory.
### Question 6 (Paragraphs 2.26 and 2.27)

Do you consider that religious celebrants should not be allowed to register civil partnerships if their religious body has decided against registering civil partnerships?

- Yes  
- No  
- Don't know  

Please give reasons for your answer

**Comments**

It is our view that when a celebrant agrees to take on a role conferred by the state in terms of which they have the authority to confer status that that celebrant should be required to act in a way that is consistent with the basic principle of treating all individuals equally irrespective of their sexual orientation. That being the case, it is our view that the celebrant should be required to act in accordance with Scots law (which we trust will be changed to provide equality of treatment irrespective of sexual orientation) whatever the views of the religious hierarchy to which they belong.

### Question 7 (Paragraphs 2.28 to 2.30)

Do you agree that individual religious celebrants should not be required to register civil partnerships?

- Yes  
- No  
- Don't know  

Please give reasons for your answer

**Comments**

See commentary to question 6.
Question 8  (Paragraphs 2.31 to 2.35)

Which of the options do you favour to ensure that religious bodies and celebrants do not have to register civil partnerships against their will?

Do you favour:

Option 1  ☒
Option 2  ☐
Neither  ☐

If you have another option, please describe it.

Comments

We have made clear that it is our view that religious bodies and celebrants should be required to carry out civil partnerships if they wish also to carry out their function in relation to marriage. In the event however that the government considers that religious bodies and celebrants should not have to register civil partnerships against their will we would prefer to see option 1 being implemented.

Question 9  (Paragraphs 2.36 to 2.40)

Religious bodies may not wish their premises to be used to register civil partnerships. Do you agree that no legislative provision is required to ensure religious premises cannot be used against the wishes of the relevant religious body?

Yes  ☐
No  ☒
Don’t know  ☐

Please give reasons for your answer

Comments

We would wish to see legislative provision requiring relevant religious bodies to make their premises available. Ultimately, again, it is a matter for the religious body and individual celebrant whether they wish to apply for
and being recognised as having the power to confer status by way of marriage or civil partnership. It is our respectful view that if religious bodies or individual celebrants wish to be in a position to confer that status on behalf of the state that they should be required to do so in a non-discriminatory way.
Same sex marriage

Question 10  (Paragraphs 3.11 and 3.12)

Do you agree that the law in Scotland should be changed to allow same sex marriage?

Yes ☒
No   
Don’t know

Please give reasons for your answer

Comments

It is our position that there should be equality of treatment for all Scots irrespective of their sexual orientation. In our respectful view it is appropriate that all systems of partnership rights available to Scots should be available to all individuals irrespective of their sexual orientation ie. marriage should be available to both heterosexual individuals and same sex couples, as should civil partnership.

Question 11  (Paragraph 3.13)

Do you agree that religious bodies and celebrants should not be required to solemnise same sex marriage?

Yes   
No ☒
Don’t know

Please give reasons for your answer

Comments

Our previous comments refer.
Question 12  (Paragraphs 3.14 to 3.18)

Do you agree with the introduction of same-sex **civil** marriage only?

Yes ☐  
No ☒
Don’t know ☐

Please give reasons for your answer

Comments

We see no legal justification for inequality of treatment on the grounds of sexual orientation and would respectfully suggest that the same provision should be made available to all Scots irrespective of their sexual orientation. Our response to question 10 refers.

Question 13  (Paragraph 3.19)

Do you agree with the introduction of same-sex marriage, **both** religious and civil?

Yes ☒
No ☐
Don’t know ☐

Please give reasons for your answer

Comments

Our previous comments refer.
Question 14 (Paragraphs 3.23 and 3.24)

Do you agree that religious bodies should not be required to solemnise same sex marriage?

Yes [ ]
No [x]
Don't know [ ]

Please give reasons for your answer

Comments

Our previous comments refer.

Question 15 (Paragraphs 3.25 and 3.26)

Do you consider that religious celebrants should not be allowed to solemnise same sex marriages if their religious body has decided against solemnising same sex marriage?

Yes [ ]
No [x]
Don't know [ ]

Please give reasons for your answer

Comments

Our previous comments refer.
Question 16 (Paragraphs 3.27 and 3.28)
Do you agree that individual religious celebrants should not be required to solemnise same sex marriage?
- Yes
- No [$\checkmark$]
- Don’t know

Please give reasons for your answer

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Question 17 (Paragraphs 3.29 to 3.33)
Which of the options do you favour to ensure that religious bodies and celebrants do not have to solemnise same sex marriage against their will?
- Do you favour:
  - Option 1 [$\checkmark$]
  - Option 2
  - Neither
  - Don’t know

Please give reasons for your answer and if you have another option, please describe it.

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Question 18 (Paragraphs 3.34 to 3.39)
Religious bodies may not wish their premises to be used to solemnise same sex marriage. Do you agree that no legislative provision is required to ensure religious premises cannot be used against the wishes of the relevant religious body?
Question 19 (Paragraph 3.41)
If Scotland should introduce same-sex marriage, do you consider that civil partnerships should remain available?

Yes ☒
No ☐
Don’t know ☐

Please give reasons for your answer

Comments
Our previous comments refer.

Question 20 (Paragraph 4.19)
Do you have any other comments?

Yes ☒
No ☐

We are particularly interested in your views on:

- potential implications of the proposals for transgender people (paragraph 3.42)
- possible transitional arrangements (paragraphs 3.43 and 3.44);
• recognition of Scottish same sex marriages elsewhere (paragraphs 3.45 to 3.49);
• any comments on forced marriage (paragraphs 3.51 and 3.52)
• any comments on sham marriage (paragraph 3.53)
• potential financial implications (paragraphs 4.01 to 4.08);
• potential equality implications (paragraphs 4.09 to 4.14).

Comments

1. We are of the view that one of the most significant justifications for changing the law in this area is to ensure that there is equality of treatment for transgender individuals. As Scots law does not currently recognise marriage between same sex individuals nor civil partnership between opposite gender individuals if an individual wishes to have his or her acquired gender recognised legally they are only able to do so, and obtain the benefits of a full gender recognition certificate, after divorce or dissolution of their civil partnership. It is our view that this is an entirely inappropriate position to exist in modern day Scotland. There are very significant legal implications arising from the status of marriage and civil partnership – and then divorce/dissolution. In our view it is entirely unacceptable that individuals who wish to have their acquired gender recognised require to divorce/dissolve their civil partnership. This has very significant financial and emotional implications not only for the individuals concerned but for their children and wider families. Married couples who wish to remain married following one of the individuals having obtained recognition of their acquired gender should be free to take that choice and continue to enjoy the legal benefits of the marriage which they entered into. Their children should also be able to continue to enjoy the benefits that accrue to them as children of married parents.

The government has, rightly in our view, recognised that it is appropriate that individuals are able to obtain recognition of their acquired gender. That principle decision having been taken it is our view that, as a result, that, of itself, justifies amendment to the existing legal provision that requires that individuals who are parties to a marriage are of opposite gender and individuals who are parties to a civil partnership are of the same gender.

2. As lawyers we are concerned that there is scope for confusion and inequality where the attempt is made to provide "separate but equal" provision. This is evidenced by the difficulties that have arisen recently in relation to the dissolution of civil partnerships under the simplified procedure. The failure to extend the exemption for third party corroborating evidence (available for divorce under the simplified procedure) to civil partnership dissolution under the simplified procedure amply demonstrates the potential difficulties arising. There are many areas of Scots law which are impacted
upon as a result of an individual’s status as a married person or as an individual who is a party to a civil partnership. It is our respectful view that the most cost effective, straightforward and intellectually coherent approach is to provide that there is absolute equality of treatment under the law irrespective of sexual orientation by way of making both marriage and civil partnership available to all individuals irrespective of their sexual orientation.

3. As far as transitional arrangements are concerned we would envisage that if there is introduction of provisions providing for equality of treatment that some individuals who are currently within a civil partnership will wish to have that union recognised as a marriage. As is the case in the Civil Partnership Act 2004, this provision would, in our respectful view, be a straightforward matter.

4. As lawyers we are required, and have, advised on international recognition issues that have arisen in this area. We consider that it would be good for Scotland, as a country with a separate and distinct legal system, to be in a position to make clear to the rest of the world that equality of provision applies. We would regard that as conferring benefit on relevant individuals concerned in that it would lead to greater certainty and simplicity for them if they required to seek to have their union recognised outwith Scotland. We also see a benefit to Scotland as a whole in being able to present to the world that we are a state that has taken the view that equality of treatment should be available to all individuals irrespective of their sexual orientation.

We have had experience of requiring to advise same sex individuals who have married outwith the UK and have subsequently become subject to Scots law. These individuals have been put to additional expense (as a result of the existing provision that exists). In particular this issue has arisen in relation to same sex individuals who were parties to an overseas marriage seeking to adopt in Scotland and seeking to dissolve their union here.