

Consultation on the future of civil partnership in Scotland

Scottish Government response

Introduction

1. This document outlines the way forward following the consultation carried out by the Scottish Government on the future of civil partnership.¹
2. This document uses the term “mixed sex” to describe a relationship between a man and a woman.

Consultation

3. The consultation was published following the UK Supreme Court’s declaration that the Civil Partnership Act 2004 (the 2004 Act) as it applies in England and Wales is incompatible with the European Convention on Human Rights (ECHR) in that it prevents a mixed sex couple from entering into a civil partnership.² The decision to consult was taken because the law in Scotland is very similar, and if the law in a devolved area (such as civil status) is found to be incompatible with the ECHR, the Human Rights Act 1998 may require the Scottish Ministers to take steps to address the incompatibility.
4. The consultation ran from 28 September 2018 to 21 December 2018. It set out two options for changing the 2004 Act, either of which would remove the ECHR incompatibility from the law:
 - civil partnership to be closed to new relationships from a future date. The consultation noted that, in the event of closure, civil partners would be able to stay in their relationship if they wished and that these civil partnerships would continue to be recognised in Scotland. There would be no obligation on existing civil partners to change their relationship into marriage.
 - the introduction of mixed sex civil partnership in Scotland, making civil partnership available to both same sex couples and mixed sex couples.
5. The purpose of the consultation was to draw out fresh insights into the known arguments for and against these two options. The consultation also asked for respondents’ views on the way in which civil partnerships from other jurisdictions could be recognised in Scotland should civil partnership be closed to new relationships.
6. The Scottish Government received 481 responses to the consultation. The Scottish Government is very grateful to all respondents for taking the time and trouble to respond to this consultation.

¹ The consultation is at <https://www.gov.scot/publications/future-civil-partnership-scotland/>.

² The decision by the UK Supreme Court is at <https://www.supremecourt.uk/cases/uksc-2017-0060.html>.

The Scottish Government decision

7. Following careful consideration of the comments made by consultees, the Scottish Government has decided to bring forward a Civil Partnership (Scotland) Bill in the Scottish Parliament to extend the availability of civil partnership to mixed sex couples.

8. In reaching the decision to extend the availability of civil partnership to mixed sex couples, the Scottish Government has taken account of a number of factors, including that extending the availability of civil partnership to mixed sex couples will:

- bring an end to people in civil partnerships being effectively “outed”. This occurs at present because civil partnership is only available to same sex couples
- enable couples who feel that they cannot marry due to religious or other beliefs (for example, if they were previously married and believe that one can only marry once) to enter into a legally recognised relationship that provides rights, and responsibilities
- provide more rights to couples who do not wish to marry. Economic gender inequality might mean that women are more at risk of being affected by the absence of legal rights than men. Mixed sex civil partnership will provide women with expanded access to the rights and protections that stem from a legally recognised relationship
- reflect that consultation responses and other correspondence suggest that there is clearly some demand for mixed sex civil partnership. In addition, while more same sex marriages than same sex civil partnerships take place each year, there is still ongoing demand for same sex civil partnership
- will bring benefits to trans people in civil partnerships (who will no longer have to end their relationship before receiving a full Gender Recognition Certificate)

9. The closure of civil partnership might have had implications for couples in existing same sex civil partnerships. Although couples in a same sex civil partnership could continue in their own relationship, the “legacy” status of civil partnership might pressurise them to change their relationship to marriage. In addition, over time there might be a lack of understanding of the status of “legacy” civil partnership.

Timings of the planned Scottish Bill

10. The Scottish Government recognises the need to legislate in this area as soon as possible, given the declaration of incompatibility made by the UK Supreme Court.

Section 104 Order

11. As well as legislation in the Scottish Parliament, the Scottish Government will discuss with the UK Government the need for an Order under section 104 of the Scotland Act 1998.³ Such an Order might cover:

- cross-UK border recognition of civil partnerships
- any changes to the Equality Act 2010
- any changes to reserved pensions and benefits, particularly in relation to survivor benefits for mixed sex civil partners in pensions⁴
- any provisions to allow mixed sex civil partnerships to be carried out overseas by UK consuls and UK armed forces.

12. Given the need for a Bill and a section 104 Order, it will be some time before the registration of mixed sex civil partnerships becomes possible in Scotland. However, in light of the ECHR background to the new legislation on civil partnership, the Scottish Government will seek to work with the UK Government to progress the section 104 Order as soon as is practical.

³ UK Ministers can make Orders under section 104 of the Scotland Act 1998 to make provision which is necessary or expedient following an Act of the Scottish Parliament. Section 104 Orders are regularly made on reserved and cross-UK border matters following legislation in the Scottish Parliament.

⁴ Pensions are generally a reserved matter but the Scottish Public Pensions Agency <http://www.sppa.gov.uk/> manages the executive devolved some public service pension schemes including fire, police, local government, NHS and teachers.

The contents of the Bill

13. The Scottish Government expects that the Bill will cover a range of areas. The broad intention is that, where possible, mixed sex civil partnerships, including how they are entered into and dissolved and the rights and responsibilities, will be along very similar lines to same sex civil partnerships.

14. Therefore, provisions which may be in the Bill include:

- removing the current bar on mixed sex couples entering into a civil partnership
- provisions to recognise mixed civil partnerships registered elsewhere in the UK and overseas
- provisions so that civil partners applying for gender recognition can stay in their civil partnership
- aspects of family law.

15. Some details on how the registration of mixed sex civil partnerships would work are outlined in Annex A.

Inquiries

16. Any inquiries should be addressed to:

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Annex A: The Scottish Government's intentions on registering mixed sex civil partnerships

Introduction

1. Up until 2014, the registration of (same sex) civil partnerships was through civil procedures only. The Marriage and Civil Partnership (Scotland) Act 2014 changed the law so that it became possible to register civil partnerships through religious or belief ceremonies.

2. The Scottish Government's intention is that arrangements for registering mixed sex civil partnerships through religious or belief ceremonies will be along the same lines as the procedures for registering same sex civil partnerships through religious or belief ceremonies.

Procedures for the religious or belief registration belief of same sex civil partnerships

3. Procedures for the religious or belief registration of civil partnerships were aligned with the procedures for the religious or belief solemnisation of marriage. As a result, Section F of the civil partnership notice form⁵ submitted to the registrar asks for details of the intended celebrant if the couple intend to have ceremony registered by someone other than a registrar.

4. Under section 94A of the Civil Partnership Act 2004, celebrants of religious or belief bodies are only authorised to register civil partnerships if:

- their religious or belief body is prescribed by Scottish Statutory Instrument (SSI) made by the Scottish Ministers so that all the body's celebrants may register civil partnerships
- they have been nominated to the Registrar General of Births, Deaths and Marriages for Scotland to be registered as celebrants for civil partnerships and the Registrar General has accepted the nomination
- the Registrar General has granted them temporary authorisation to register civil partnerships. Such temporary authorisation could be for a specific ceremony or ceremonies or could be for a period of time. (Under section 94E of the 2004 Act, the Registrar General can only grant temporary authorisation for a period of time if the religious or belief body of which the person is a member is prescribed to register civil partnerships or has nominated members to the Registrar General to register civil partnerships)

⁵ The civil partnership notice form is at <https://www.nrscotland.gov.uk/files//registration/form-cp10a.pdf>.

5. The legislation also provides that the Scottish Ministers may prescribe a religious or belief body by SSI only if the body requests them to do so. The 2014 Act contains provision on qualifying requirements for religious or belief bodies which solemnise marriage or register civil partnership to meet. These provisions are not yet in force. The criteria applied by the Scottish Ministers when deciding to prescribe a religious or belief body are outlined in Policy Notes accompanying SSIs which have prescribed bodies.⁶

6. Section 94A of the 2004 Act also provides that it does not impose a duty:

- on any religious or belief body to make a request to be prescribed to register civil partnerships
- on any religious or belief body to nominate any of its members to be registered as empowered to register civil partnerships
- on any person to apply for temporary authorisation to register civil partnerships
- on any person who is an approved celebrant in relation to civil partnerships to register civil partnerships

Proposed procedures for the religious or belief registration belief of mixed sex civil partnerships

7. The Scottish Government's intention is that the procedures for registering mixed sex civil partnerships through religious or belief ceremonies will be along the same lines as the procedures for registering same sex civil partnerships through religious or belief ceremonies.

8. For registration purposes, mixed sex civil partnerships would be treated as a different category to same sex civil partnerships and so religious or belief bodies wishing to register mixed sex civil partnerships would have to obtain separate authorisation.

9. Therefore, celebrants would be authorised to register mixed sex civil partnerships if:

- their religious or belief body is prescribed by Scottish Statutory Instrument (SSI) made by the Scottish Ministers so that all the body's celebrants may register mixed sex civil partnerships
- they have been nominated to the Registrar General of Births, Deaths and Marriages for Scotland to be registered as celebrants for mixed sex civil partnerships and the Registrar General has accepted the nomination
- they have been granted a temporary authorisation to register mixed sex civil partnerships

⁶ Please see, for example:
https://www.legislation.gov.uk/ssi/2016/427/pdfs/ssipn_20160427_en.pdf.

The Equality Act 2010

10. In paragraph 4.31 to 4.33⁷ of last year's consultation, the Scottish Government said:

“4.31 When same sex marriage and the religious or belief registration of civil partnership was introduced, the UK Equality Act 2010 was amended, by way of an Order under section 104 of the Scotland Act 1998, to reflect that some celebrants do not wish to take part in the solemnisation of same sex marriage and the registration of civil partnerships.

4.32 These exemptions from the Equality Act provisions refer, both in relation to marriage and in relation to civil partnership, to the couple being of the same sex. If civil partnership is extended to opposite sex couples, the Scottish Government has considered whether an Equality Act exemption would be needed to cover religious and belief bodies who do not wish to register opposite sex civil partnership.”

4.33 The Scottish Government's view is that no provision would be needed as:

- The rationale for the existing exemptions is that some religious or belief bodies would not wish, for doctrinal reasons, to take part in ceremonies relating to same sex relationships. That remains the rationale.
- If a religious or belief body decides not to register civil partnership generally, there is no discrimination on the grounds of sexual orientation or sex as the service is not provided generally rather than not provided to a particular group in society who share a protected characteristic.”

11. However, a point made in one consultation response was that an exemption could be needed where a religious body did not support same sex marriage but does register civil partnerships. That body might not think it was appropriate to register mixed sex civil partnerships. An exemption could be required to ensure that such a body did not breach the Equality Act.

12. The Equality Act 2010 is largely reserved. The Scottish Government will consider further, with the UK Government, what amendments may be needed in this area. Any necessary amendments could potentially be made by way of an Order at Westminster under section 104 of the Scotland Act 1998.⁸

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⁷ <https://www.gov.scot/publications/future-civil-partnership-scotland/pages/6/>

⁸ Section 104 of the Scotland Act 1998 empowers UK Ministers to make provision at Westminster which is necessary or expedient following an Act of the Scottish Parliament.