

Response from
Professor Elaine E. Sutherland¹
to the
Equalities and Human Rights Committee of the Scottish Parliament
invitation to comment on the
Civil Partnership (Scotland) Bill

1. *What is your view of the Bill's approach to achieving equality by making civil partnerships available to different sex couples, rather than closing future civil partnerships to all couples?*

The Bill is welcomed and, indeed, might be described as “overdue”. It is one of the great ironies of modern Scots family law that, when the Scottish parliament eliminated one form of discrimination, by making marriage available to sex couples, it created another form of discrimination by its failure to make civil partnership available to different sex couples.² It is familiar territory that, in *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*,³ the UK Supreme Court found similar discrimination in England and Wales to be incompatible with the Human Rights Act 1998.

The Supreme Court simply made clear that the law could not remain as it was. It did not determine how the problem of incompatibility should be resolved, leaving it to the legislature to decide whether to abolish civil partnership for the future or to make it available to different sex couples. As we know, in England, Wales and Northern Ireland, the latter option was adopted.⁴ This Bill will ensure that different sex couples in Scotland will have the same opportunity to register a civil partnership as their counterparts in the rest of the United Kingdom.

The various arguments surrounding what to do about civil partnership have been explored fully in the consultation documents published by the Scottish Government and it is unnecessary to repeat them all here.⁵ At the heart of the debate lies the argument that, since different sex and same sex couples may now formalise their relationships by marrying, or elect to live together without doing so, there is no need to provide the third option of civil partnership. That argument would be persuasive were it not that some couples find marriage to be an unattractive – sometimes an unpalatable – option, often due to its patriarchal and religious associations.⁶ While a marriage may be solemnised in a wholly civil ceremony, that is not enough to remove what are, for some, the serious, negative associations of marriage. As a result, some couples choose not to formalise their relationships and lose valuable

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² “Different sex couple” is used here, following the Committee’s choice of terminology in its questions.

³ [2018] UKSC 32.

⁴ Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, s.2 (England and Wales) and the Northern Ireland (Executive Formation etc) Act 2019, s.8 (Northern Ireland).

⁵ *Review of Civil Partnership - A consultation by the Scottish Government* (Edinburgh: Scottish Government, 2015) and Scottish Government, *The future of civil partnership in Scotland* (Edinburgh: Scottish Government, 2018).

⁶ Others may be influenced by unhappy previous experience of the institution.

legal protection during the relationship and on breakdown. It is no answer to the vulnerable position in which these people are placed to point to the legal consequences attaching to non-marital cohabitation since the protection they offer is considerably less than that given to spouses and civil partners.

The solution is to extend civil partnership to different sex couples, as this Bill does, giving them the opportunity to formalise their relationship in this way, respecting their autonomy and ensuring that they receive the maximum protection available.

2. What will the impact of the Bill and its provisions be on you, your community or your organisation? Give consideration as to whether there is any impact on human rights or equality issues for any particular groups of people.

As someone who has been married for many years, it might be thought that the Bill will have no direct impact on me. However, living in a country that respects the human rights of all has an impact on each and every one of us. If some individuals face discrimination because of their personal characteristics, then we are all vulnerable. If, in contrast, equality is respected, then a climate that values diversity is created and tolerance is promoted.

It is sometimes suggested that civil partnership poses a threat to marriage and, thereby, risks offending those whose religious convictions prioritise marriage. That is simply not the case. First, those who wish to marry, whether for religious or other reasons, will still be free to do so. Secondly, as the European Court of Human Rights has pointed out, the rights guaranteed by Article 9 of the European Convention on Human Rights protect both freedom of religion and freedom from it:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.⁷

3. The Bill will make consequential changes to existing legislation to carry through the effect of the main change. Do you have any comment to make on these changes?

Sections 1-8 and 10 of the Bill simply amend existing legislation in order to accommodate civil partnerships between different sex couples and follow the model used in the Marriage (Scotland) Act to accommodate same sex marriage. Consistency in legislation is desirable since it avoids the possibility of creating unnecessary distinctions, sometimes with unintended consequences.

Section 9 of the Bill creates a civil partnership equivalent of the Divorce (Scotland) Act 1976, s.3A. Section 3A was added to the 1976 Act to address a specific religious issue (the *get* divorce), an issue that is unlikely to arise in the context of civil partnership. Thus, it could be argued that s.9 of the Bill is unnecessary. However, that simply means that the provision will not be used. Its presence future-proofs the

⁷ *Kokkinakis v Greece* (1994) 17 EHRR 397, para. 31.

legislation against changing circumstances and the, albeit remote, possibility that it will become relevant in the future.

Section 11 of the Bill amends the Anti-social Behaviour, Crime and Policing Act 2014, s.122, to extend the offence of forced marriage to civil partnerships by creating an offence of forced civil partnership. There is no evidence, at present, of individuals being forced into civil partnerships. However, it is possible that the problem could arise in the future and it makes sense to provide for it.

The consequential modifications in Schedule 2 of the Bill appear to cover most of the other necessary legislative amendments.

4. Is there anything else about civil partnerships that should be included in (or excluded from) the Bill? If so, what changes would you like to see and why? Please explain your reasons.

The Marriage and Civil Partnership (Scotland) Act 2014, s 10, empowers the Scottish Ministers to make regulations to enable civil partners to convert a 'qualifying civil partnership' into a marriage. The requisite regulations have been made and the process is reasonable straightforward and inexpensive.⁸ Crucially, where a couple converts their civil partnership into a marriage, there is continuity in their relationship because their marriage is backdated to the date when their civil partnership was registered.⁹

The Civil Partnership (Scotland) Bill contains no parallel provision for regulations to be made so that spouses can convert their marriage into a civil partnership. Provision is made for this in the relevant legislation in England and Wales.¹⁰

It would make sense to provide for conversion of marriages into civil partnerships in Scotland. Take, for example, a different sex couple who had serious reservations about the concept of marriage, but married because that was the only way they could formalise their relationship at the time. Once civil partnership becomes available to them, they would like to avail themselves of a relationship that fits better with their beliefs. If there is no simple procedure for doing so, their only option would be to divorce, then register a civil partnership. Not only would they be put to needless expense, but they would lose continuity in their relationship, something that could be important were their relationship to break down later.

This Bill is probably not the appropriate place to amend the law on divorce since there has been no opportunity for the broad consultation that should precede such a step. However, the extension of civil partnership to different sex couples highlights the inconsistency in the current law on divorce and dissolution in so far as adultery is concerned.

⁸ Marriage Between Civil Partners (Procedure for Change and Fees) (Scotland) Regulations 2014 (2014/361).

⁹ The Marriage and Civil Partnership (Scotland) Act 2014, s 11(2), provides, 'the civil partners are to be treated as having been married to each other since the date on which the qualifying civil partnership was registered.' This has the curious result that the legal system regards some same sex couples as being married at a time when same sex marriage was not available in Scotland.

¹⁰ Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, s 2(5).

At present, a different sex spouse may found on the other spouse's adultery as the gateway to divorce since adultery is one of the factual situations demonstrating irretrievable breakdown of marriage, always assuming the infidelity occurred with a person who was of a different sex to the adulterer.¹¹ When same sex marriage became available, the relevant statute was amended to make it clear that the definition of adultery remained unaltered.¹² As a result, a same sex spouse may only found on adultery in respect of infidelity by the other spouse that occurred with a different sex person. While individuals are not always consistent in their sexual preference, it would seem more likely that a same sex spouse would stray with a person of the same sex. The path to divorce is not closed off where there is infidelity with a person of the same sex as the adulterer, since it would usually constitute behaviour that makes it unreasonable to expect the pursuer to continue to cohabit with the defender, another of the factual situations that demonstrates irretrievable breakdown.¹³

Since civil partnership was created as the marriage-equivalent for same sex couples, adultery simply does not feature in the context of civil partnership dissolution¹⁴ and that will continue to be the case if the Bill, as drafted, passes. Again, such conduct would usually constitute behaviour that makes it unreasonable to expect the pursuer to continue to cohabit with the defender, one of the factual situations that demonstrates irretrievable breakdown of civil partnership.¹⁵ Thus, a different sex spouse who engages in extra-marital sex with a different sex person could face divorce based on adultery, while there is no prospect of dissolution based on adultery for a similarly situated civil partner (dissolution based on behaviour being the only option).

It will be apparent from the above that the law governing how infidelity can be used to justify terminating a marriage or a civil partnership is inconsistent and untidy. One solution would be to remove adultery as one of the factual situation demonstrating irretrievable breakdown for the purpose of divorce and address all sexual infidelity as a form of behaviour. Another approach would be to undertake a comprehensive evaluation of the law on divorce and dissolution in Scotland to assess whether more radical reform is required. It is anticipated that such an evaluation would involve looking at the law in a range of comparable jurisdiction, including the reform proposals currently being considered at Westminster.¹⁶

5. Will the Bill result in any resource implications for your organisation or you as an individual? If so, please explain and provide any supporting information.

Not applicable.

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¹¹ Divorce (Scotland) Act 1976, s.1(2)(a).

¹² Divorce (Scotland) Act 1976, s.1(3A).

¹³ Divorce (Scotland) Act 1976, s.1(2)(b).

¹⁴ Civil Partnership Act 2004, s.117.

¹⁵ Civil Partnership Act 2004, s.117(3)(a).

¹⁶ Divorce, Dissolution and Separation Bill [HL] 2019-20.