

Civil Partnership in Scotland 2004 – 2014, and Beyond

Kenneth McK. Norrie, Professor of Law, University of Strathclyde

Introduction

Exactly ten years separates the passing by the UK Parliament of the Civil Partnership Act 2004, which brought civil partnership to Scotland, and the passing by the Scottish Parliament of the Marriage and Civil Partnership (Scotland) Act 2014, which opened marriage to same-sex couples in Scotland; exactly fifteen years separates the (re)establishment of the Scottish Parliament in 1999 and the Independence Referendum in 2014. The political judgment made in 1999 that devolution would kill the aspiration to independence stone dead has proved as misconceived as the political judgment in 2004 that civil partnership would satisfy any demand for same-sex marriage. The new political structures within the United Kingdom established by devolution rendered it inevitable that the development of civil partnership would play out very differently in Scotland and in England, but the existence of two distinct legal systems, on separate developmental paths, long pre-dates devolution.

Scottish family law has always been based on very different perceptions of family life from English family law and these differences reflect profound historical, social and (particularly) religious dissimilarities between the two nations. We in Scotland have no concept, for example, of parental consent to marriage, revealing a different view of both the nature of the parent-child relationship and of marriage (and avoiding the difficulties English law will face when parents refuse consent due to non-acceptance of their child's sexual orientation). That marriage is a more secular contractual relationship in Scotland than it is in England is shown by the facts (i) that marriage contracts have always been enforceable in Scotland but are (generally speaking) unenforceable in England (Scherpe, 2012), and (ii) that divorce has been available in Scotland for three hundred years longer than in England. The grounds laid down in the (English) Matrimonial Causes Act 1973 by which a marriage is voidable leaves

the Scots lawyer utterly bemused. The differences in both the rules of annulment and of divorce are traced to the very different religious histories of the two countries.

The Reformation was caused by separate pressures in Scotland and England, and led to very different forms of church (and, before the Union and after Devolution, state) governance. Scotland adopted a Presbyterian model for its national church (the Church of Scotland, or “the Kirk”), which is membership led and without a hierarchy of vicars, rectors, bishops and the like. Its more puritan doctrines are illustrated well by the fact that divorce – following the biblical precedents – was accepted in Scotland immediately after the Reformation while the reformed English church continued to adhere to Catholic doctrine concerning the sanctity (and therefore irreversibility) of marriage. The flattened, non-hierarchical, structure of the Kirk, which is to be compared with the retained Catholic hierarchy within the established Church of England, had political as well as legal consequences: the King became the Supreme Governor of the Church of England but, like everyone else, a mere member of the Church of Scotland. (Indeed it was the efforts of King Charles I to turn himself from member to master of the Church of Scotland that triggered what is usually, rather oddly, referred to as the “English” Civil War). And it affected social attitudes: the social democracy that is ascendant in present-day Scotland, which has resisted the individualism of most of the rest of the UK, has long historical roots.

Devolution offered the opportunity for Scottish family law to take a very different route from that in England, though same-sex relationship recognition has followed a similar path, responding to similar social pressures, in the two jurisdictions. The *28th British Social Attitudes Report* (National Centre for Social Research, 2010, table 2.6) shows a continuous fall in the number of people in the United Kingdom who consider same-sex relationships to be always or mostly wrong (48% in Scotland and 46% in England in 2000; 40% in both Scotland and England in 2005; and 27% in Scotland and 29% in England in 2010), together with a concomitant rise in the number of those who consider same-sex relationships to be not wrong at all (29% in Scotland and 34% in England in 2000; 35% in Scotland and 37% in England in 2005; and 50% in Scotland and 44% in England in 2010). The Scottish Parliament has been quick to respond to this change in social attitudes. The Scotland Act 1998 itself included prevention of discrimination on the ground of sexual orientation in its definition of

“equal opportunities”, and one of the Scottish Parliament’s earliest pieces of legislation was the Adults with Incapacity (Scotland) Act 2000 which contains the first explicit statutory inclusion in the United Kingdom of same-sex couples in a provision dealing with families. Since then no legislative provision passed by the Scottish Parliament concerning couples has failed to include same-sex couples on the same terms. The civil partnership proposals in 2003-04 were never going to be resisted by the Scottish Parliament.

Why Westminster?

The Civil Partnership Act 2004 is, of course, an Act of the UK Parliament at Westminster, and it provides three separate civil partnership regimes: one for England and Wales, one for Northern Ireland and one for Scotland. Differences between the three parts reflect the existing differences in the marriage laws in these three jurisdictions. Yet civil partnership is a matter that falls clearly within the authority of the Scottish Parliament: family law is not one of the areas that the Scotland Act 1998 reserved to Westminster. As such, the first question to ask in relation to Scotland is this: Why does the 2004 Act contain a “Part 3: Civil Partnership in Scotland” at all?

Shortly after the UK Government proposed a system of civil partnership registration for same-sex couples in England and Wales (Department of Trade and Industry, 2003), the Scottish Executive (as the Scottish Government was then known) announced that they would seek the agreement of the Scottish Parliament to include Scottish provisions in the UK Bill. A consultation paper was then published (Scottish Executive, 2003), in which a number of difficulties were identified that would follow if England and Wales introduced civil partnership but Scotland did not: Scottish couples who registered their partnership in England would be treated as civil partners for reserved matters (including tax, benefits and pensions) but not for devolved matters (such as succession, property sharing and dissolution); if Scottish civil partnership were substantially different from English civil partnership (for example in eligibility to enter such a relationship), some Scottish couples might be recognised for devolved but not for reserved matters. The simplest solution, the

consultation paper suggested, was to provide a civil partnership registration scheme in Scotland, equivalent to the English system.

The Scottish Parliament was therefore invited to pass a motion giving its permission for the UK Parliament to legislate on a devolved matter. The official line was that this was desirable in order to ensure that the reserved consequences of marriage, such as tax and social security, could be extended to civil partnership at the same time as the non-reserved consequences, but would also ensure consistency between the two jurisdictions (Scottish Executive, 2003, [4.2]-[4.6]). The same argument might, of course, be made in relation to same-sex marriage, which similarly involves a mix of both devolved and reserved consequences, but by the time same-sex marriage was on the agenda Scotland had elected a Scottish Nationalist Government, and there was never any question of that Government using the legislative consent motion process for an issue so central to domestic social policy. One of the inherent tensions in the devolutionary settlement is illustrated here: the UK Parliament, legislating for England and Wales, does not distinguish between devolved and reserved matters and so domestic English debate at Westminster continues to have consequences for Scots (and Northern Irish) law.

One of the explanations for the Scottish Parliament's willingness to allow Westminster to act on its behalf is that, though in its second four year session by 2004, the Scottish Parliament was still finding its feet, and the Scottish Executive was at that time a coalition government – comprising the Scottish Labour Party as the dominant, and the Scottish Liberal Democrats as the junior, partners. This meant that the Scottish Government at that time had very strong political connections to the (Labour) UK Government. (These connections of course came to an end in 2007 when the coalition was replaced by the Scottish Nationalists, and even more profoundly in 2010 when the Labour Government was replaced by a UK coalition dominated by the Conservative Party, whose support in Scotland shows no sign of recovering from its Thatcherite crash).

But there is a deeper reason beyond these close governmental links which explains the Scottish Parliament's willingness to contemplate Westminster legislating for Scotland, a reason that traces its roots (like the Scottish Tory collapse) back to the

Thatcher era. In 1988 the UK Parliament passed the Local Government Act 1988, section 28 of which prohibited local authorities throughout the United Kingdom from “promoting homosexuality as a pretended family relationship”. Both the Labour Government in the UK, elected in 1997, and the Labour/Lib-Dem Coalition in Scotland, elected in 1999, very early indicated that “section 28” was to go, and this was effected in Scotland in 2000,¹ three years before the British Parliament managed to do so for the rest of the United Kingdom.² However, notwithstanding that the overwhelming number of MSPs from both the coalition Government and the SNP opposition favoured repeal, opposition took a surprising and disturbingly extra-parliamentary form. A wealthy businessman and Evangelical Christian, Brian Soutar, who owns and operates the Stagecoach group of companies, joined forces with the Roman Catholic Church and mounted a vicious scare-campaign against the repeal of section 28. Souter funded the so-called “Keep the Clause Campaign” to the tune of £1m,³ which was used to conduct a private “referendum” on the matter (though in fact the ballot paper couldn’t even get the name of the statute right that they wanted to retain). Catholic priests instructed their flocks how to vote, and posters appeared across Scotland explicitly associating homosexuality with child abuse: the narrative presented by the Keep the Clause campaign was that section 28 was all about protecting children.⁴ Many opponents to section 28 simply ignored this “referendum” but it is a sobering thought that, from an electorate of around 3 million, just over 1 million people in Scotland “voted” to keep section 28 on the statute book. To their credit, the Scottish Executive went ahead with its repeal, with only the Conservatives (very much a minority party in Scotland) and a handful of nationalists voting to retain it.

The repeal of section 28 did little to voting patterns, and the same (Lib-Lab) coalition was re-elected to the Scottish Parliament for its second session in 2003, but there is little doubt that the Keep the Clause campaign had made Scottish politicians exceptionally nervous about directly challenging what appeared to be powerful religious forces, which had shown an ability to disrupt normal political debate. It was against that background that the decision had to be taken when the UK Government announced its Civil Partnership Bill for England and Wales (and Northern Ireland) whether the Scottish Parliament would take the responsibility that the Scotland Act

1998 had given it in this central family law matter or would allow Westminster to legislate on its behalf. The convenience argument (which is not without merit) won, though the suspicion has long remained that the infant Scottish Parliament simply did not have the courage to take on the issue, so soon after the bruising section 28 fight. In any case the Parliament passed the necessary motion and the UK Parliament extended its Civil Partnership Act to Scotland.

The Civil Partnership Act 2004 in Scotland

The policy objective for Scottish civil partnership was the same as for English civil partnership: to replicate so far as possible the marriage (and divorce) rules for this new legal institution, and the differences between the Scottish and the English parts of the Act reflect the fact that the matrimonial laws of the two jurisdictions, as we have already seen, have always been substantially different. This policy objective was achieved in the Scottish part by three distinct drafting strategies: (i) replicating in the 2004 Act itself those family law statutes concerning the creation and termination of the marital relationship; (ii) amending existing legislation that gave legal consequences to marriage; and (iii) creating entirely new statutory rules applicable to civil partners for those consequences of marriage that continue to be governed by the common law. The most important of the last mentioned is section 131, which puts into statutory form for civil partners the ancient common law rule that the surviving spouse of a person who dies domiciled in Scotland has an indefeasible claim to part of the deceased's estate.

Since the Civil Partnership Act 2004 came into force, Scotland has not seen the litigation experienced in England involving individuals unwilling to accept the moral, social and legal equivalence of marriage and civil partnership and the development of the law has been driven by subsequent legislation, politically designed to further the original objective of making civil partnership as like marriage as possible.

Differences Between Marriage and Civil Partnership

Though the UK Act went noticeably further than most other European jurisdictions that introduced civil partnership in equating the institution with marriage, in neither Scotland nor England is civil partnership completely identical to marriage. In Scotland there are two major structural respects (other than the obvious difference in gender-mix) in which the two institutions were, until 2014, treated differently: civil partnership, unlike marriage, was designed to be an entirely secular institution, and an entirely sex-free institution. Civil partnership for its first ten years could be created only by a district registrar and registration was prohibited in religious premises (a matter explored more fully below). The sexual aspects of marriage were deliberately excluded too (and indeed remain so, even after the 2014 amendments). Adultery, though still a ground for divorce, was not made a ground to dissolve a civil partnership – though all the other grounds for divorce are replicated. And the only ground upon which a marriage in Scotland is voidable and open to retrospective annulment – incurable impotency at the date of the marriage – was not extended to civil partnership. So while marriage remains even today a relationship with both religious overtones and sexual undertones, civil partnership was designed as a relationship with legal consequences created by a state official without any religious involvement at all, and without any implication of sexual fulfilment. To many people this is an attractive blue-print for the legal regulation of personal relationships in the modern age but, as we will see, it is a model followed only to a limited extent as marriage has developed.

There were also a couple of important areas where the decision was made to treat civil partnership differently from marriage. There is some difference in the calculation of pensionable service in relation to occupational pension schemes, which is an area where the laws of Scotland and England are identical – and is reserved to Westminster (and Scots law on the matter will therefore be reviewed under the terms of section 16 of the (English) Marriage (Same-Sex Couples) Act 2013 rather than the Marriage and Civil Partnership (Scotland) Act 2014). Other than that, the most important difference between marriage and civil partnership in the Scottish part of the 2004 Act concerned adoption of children. The Adoption (Scotland) Act 1978 restricted couple-adoption to married couples, as did the equivalent English legislation until the Adoption and Children Act 2002 allowed in

that jurisdiction joint adoption by any couple, of whatever gender mix, so long as the applicants are “living as partners in an enduring family relationship”.⁵ This was amended in the English part of the Civil Partnership Act 2004 so that spouses or civil partners could jointly adopt, as well as couples in an enduring family relationship. No equivalent amendments were made to the Scottish adoption legislation, on the only partly persuasive ground that Scottish adoption law was at that time under review and that the matter of extending capacity to adopt was better dealt with within the context of a comprehensive restructuring of adoption law (Scottish Executive, 2003, [6.40]). So while civil partners in England and Wales were able to adopt from the commencement date of the Civil Partnership Act 2004, civil partners in Scotland had to wait until the Adoption and Children (Scotland) Act 2007 came into effect in September 2009.

Errors in the 2004 Act

The drafting strategy adopted, for all three UK jurisdictions, was to amend each individual statute that provides consequences for married couples rather than to enact a general amending provision such as “wherever ‘spouse’, ‘husband’, ‘wife’ or cognate terms appear they shall be read to include civil partners”. It was all but inevitable from that drafting strategy that errors and omissions would be made, requiring subsequent amendment.

By far the most serious error in relation to Scots law was discovered in 2012, by which time the 2004 Act had been in force for almost seven years. For it was not noticed until that point that the secondary legislation that allows courts to dispense with third party evidence in non-contested divorces⁶ had not been extended to the dissolution of civil partnerships. This was a problem because courts since civil partnership came in had been happily granting dissolutions without such evidence in non-contested cases, just as they do in non-contested divorces. By the time the error was discovered, some 145 dissolutions had been granted without third party evidence, giving rise to an exceptionally nice legal problem: is a decree granted by a court acting beyond its powers completely void, in which case the couples are still empartnered (and any subsequent registration or marriage is invalid), or merely

voidable, in which case the couple are free until such time as their decree of dissolution is reduced? Emergency legislation was passed,⁷ but it was not made retrospective since the Scottish Government took the view that the decrees were merely voidable, and that anyone who had acted on the basis that they were now single would be personally barred (or “estopped”, in the English term) from challenging their dissolution; in any case the Government felt that it could not use secondary legislation to render valid any existing decree that might be invalid, but that primary legislation would be necessary.⁸ Section 27 of the Marriage and Civil Partnership (Scotland) Act 2014 backdates the secondary legislation to the date the Civil Partnership Act 2004 came into effect, thereby retrospectively validating all such potentially invalid decrees. This is an inelegant solution to a problem that inevitably arises when the law has two institutions doing the job of one. There is an important lesson here that will need to be remembered when the decision comes to be taken whether to retain civil partnership or to abolish that institution as unnecessary now that same-sex couples have the right to marry.

Place of Registration

The location where marriage ceremonies may take place has never been a big deal in Scotland, where the control mechanism has traditionally lain more in who is authorised to celebrate the marriage rather than where it can be done. This can be seen by comparing the lengthy provisions in the (English) Marriage (Same Sex Couples) Act 2013 on the registration of premises with the equally lengthy provisions in the Marriage and Civil Partnership (Scotland) Act 2014 on the authorisation of celebrants. Questions like the one that troubled the Supreme Court in 2013, whether Scientology was sufficiently a “religion” that its premises could be used for marriage ceremonies,⁹ would not arise in Scotland, where religious marriages have always been able to be solemnised anywhere agreed to by the parties and the celebrant. Civil marriages could originally be solemnised only in the registration office of the relevant local authority, but since 2002 local authorities have been able to approve any place as suitable for marriage solemnisation, other than a place associated with a religion the doctrines of which would be inconsistent with civil marriage.¹⁰

The Civil Partnership Act 2004 gave rather greater protection to religious organisations, by prohibiting the use of any “religious premises”, whether or not the religion in question adhered to doctrines inconsistent with civil partnership.¹¹ But this created an inconsistency between civil marriage in Scotland and civil partnership. The response of the Scottish Government was to amend the 2002 Regulations for civil marriage and bring in the more restrictive rule applicable to civil partnership.¹² It is a paradox that legislation designed to liberalise the law of personal relationships thus led directly to a reduction rather than an increase in the choices available to couples getting married. And there was a bigger paradox to come, for the English provision limiting place of registration of civil partnership was repealed in the Equality Act 2010, but the identical Scottish provision was not – mainly it would seem because it was a late amendment from an English peer and then the whole of that Act was rushed through just before the dissolution of the Westminster Parliament for the 2010 General Election. The end result was to leave Scotland with a restrictive rule, designed to be consistent with English law, but which English law has since dropped. The Marriage and Civil Partnership (Scotland) Act 2014¹³ attempts to resolve the conundrum by repealing all the rules about local authority authorisation of places, for both civil marriage and civil partnership, but maintaining the prohibition on either being in a religious place: the effect is to shift the burden from the local authority to the district registrar to determine whether a place is religious.

Unregistered Same-Sex Couples

An ever-increasing gap between Scottish and English family law is found in the way that informally cohabiting couples – cohabitants – are treated in the two jurisdictions. The primary aim of the Civil Partnership Act 2004 was, of course, to deal with formalised relationships but the Act’s failure to amend the law of cohabitation meant that same-sex couples continued after the 2004 Act came into force to be treated less well than opposite-sex couples who did not formalise their relationship with the state. The interpretative obligation imposed by the House of Lords in *Ghaidan v Mendoza*¹⁴ to include same-sex couples within the concept of “living together as husband and wife” only partly assuaged the problem because some legislation

remained very gender-specific. But two years after the Civil Partnership Act 2004, the Scottish Parliament passed the Family Law (Scotland) Act 2006, the major effect of which was to create new financial remedies at the termination of cohabitation, either by death or by separation. This goes far beyond what English law has yet been able to achieve for cohabitants and, perhaps, reflects a discomfort in Scotland with hierarchies of relationships that has not fully evolved in England. The provisions in the 2006 Act were, of course, applied to same-sex as well as opposite-sex cohabitants,¹⁵ and the 2006 Act also took the opportunity to extend to same-sex couples existing cohabitation provisions that had not been so extended by the Civil Partnership Act 2004. Interestingly, and perhaps presaging the ending of civil partnership, the Marriage and Civil Partnership (Scotland) Act 2014 repeals all statutory references to same-sex couples “living together as if civil partners”, and replaces them with references to “two people ... living together as if they were married to each other”.¹⁶

The Marriage and Civil Partnership (Scotland) Act 2014

Showing a confidence and maturity that was, perhaps, less evident in 2004, the Scottish Parliamentary debates on the Bill that became the Marriage and Civil Partnership (Scotland) Act 2014 contain very few references to the equivalent English legislation. No longer was the aim to do as the English were doing, but instead was to provide a marriage and civil partnership regime consistent with existing Scottish principles. As in England the main opposition came from religious organisations, but that opposition was far less strident than it had been during the “section 28” debates – not least because the most prominent Roman Catholic cleric in Scotland, Cardinal Keith O’Brien, was forced to resign in early 2013 due to allegations of sexual impropriety with other priests. The final vote in favour of same-sex marriage (105 to 18¹⁷) was substantially greater in Scotland than in England and Wales (where at the Third Reading in the House of Commons the Marriage (Same-Sex Couples) Bill passed with 366 MPs in favour to 161 against).¹⁸

The headline effect of the Marriage and Civil Partnership (Scotland) Act 2014 is, of course, to open marriage to same-sex couples but it also amends marriage law in a

number of interesting and useful ways. First, the existing common law rule that a wife cannot be convicted of “reset” (receiving stolen goods) if the husband is the thief is simply abolished,¹⁹ removing from Scots law the last vestige of a wife’s duty to obey her husband. Secondly, the rules relating to impotency are limited to marriages involving opposite-sex couples,²⁰ with the consequence that there is no ground upon which a same-sex marriage will be voidable and open to retrospective annulment.²¹ Thirdly, the Registrar General for Scotland is given new powers to ensure that religious or belief bodies that seek to provide marriage celebrants meet certain prescribed requirements.²² Fourthly, the concept of “religious marriage” is extended to include “religious or belief” marriages. The inclusion of belief marriages (and belief civil partnerships) was designed to accommodate humanist ceremonies, though it removes what had been a rather pleasing paradox in Scotland that the Humanist Society Scotland was prescribed by the Registrar General for Scotland as a religious body in order to allow humanist celebrants to solemnise marriages. (This could not happen in England, for humanists have no “places of worship” – a matter irrelevant in Scotland). In truth of course, we have always had belief marriages – we call them religious marriages – and the most logical thing to do (other than require all marriages to be civil) would have been to subsume religious marriage into the more general category of belief marriages. Politically, however, this was simply not practicable within an Act that was already irritating most mainstream religious bodies almost beyond endurance.

In addition to these changes to marriage law the Scottish legislation – as its title suggests and in sharp distinction from the English legislation – contains comprehensive amendments to civil partnership too.

The religification of civil partnership

The primary change to civil partnership effected by the 2014 Act was to remove its one great saving grace: its immunity from religious involvement. Originally designed as a strictly secular institution, civil partnership could not be registered by anyone other than a district registrar, nor at any religious venue. Now, however, religious officials are to be allowed to effect their registration. In the name of equality with

marriage, civil partnership is made equally vulnerable to religious interference. This is madness. Once we allow religious bodies to effect the creation of our relationships, we invite them to tell us how to live our lives, and such bodies are unlikely to decline the invitation. The history of religion is the history of powerful bodies of men (and the gender-specificity here is deliberate) taking it upon themselves to lay down rules of sexual and familial behaviour – not only for their own followers but for the whole of society.

The result is that same-sex couples in Scotland will be able to choose one of four mechanisms for formalising their relationship in law: (i) religious or belief marriage, solemnised by a religious or belief celebrant, (ii) civil marriage, solemnised by a district registrar, (iii) religious or belief civil partnership, registered by a religious or belief celebrant, or (iv) civil registration of civil partnership, effected by a district registrar. (The limitation of choice for opposite-sex couples to civil or religious/belief marriage only is no substantive deprivation and requires no expenditure of sympathy).

Conversion of civil partnership to marriage

It is likely that many of the same-sex couples who have since 2005 registered their civil partnership in order to formalise in law their relationship would have preferred to marry, had that option been available to them. The Marriage and Civil Partnership (Scotland) Act 2014 allows for same-sex couples who are in a civil partnership (registered either before or after marriage became available to them) to convert that partnership into a marriage. The Act provides two methods of conversion, neither of which involves divorce. First, there is to be an administrative process the details of which will be contained in regulations made by the Scottish Ministers.²³ Secondly, the civil partners may, quite simply, marry each other: in other words, an exception has been created to the otherwise universal rule that a person in a civil partnership is ineligible to marry.²⁴ (It may be noted that the equivalent English legislation provides only an administrative process for conversion²⁵ – civil, but not religious, conversion). There is, however, no mechanism for converting (“downgrading”?) a marriage into a civil partnership.

Accommodating religious opposition

The debates in the Scottish Parliament were far less strident than the debates in the media (or the UK Parliament), perhaps because parliamentary opponents realised from an early stage that they would lose the primary argument – and were more realistic in that assessment than their English counterparts. Opponents in both jurisdictions sought instead a number of amendments, such as to confer a right of conscientious objection to district registrars, a right of school teachers to teach that same-sex marriage is wrong, a right of service providers to discriminate between opposite-sex and same-sex marriage, and a specific statutory provision exempting expressions of opposition to same-sex marriage from the hate crime legislation. In Scotland, unlike in England, all of these amendments failed and the only concession made to religious sensitivities was that any religious or belief body that wishes to provide civil partnership celebrants or marriage celebrants for same-sex couples must seek authorisation to do so; and there is an explicit statutory statement that no religious or belief body is obliged to seek any such authorisation.²⁶ The Equality Act 2010 already provides religious bodies with a right to refuse to offer public services in a non-discriminatory fashion, but the protections for individuals are necessarily different and an additional protection is provided by an amendment by the UK Parliament to the 2010 Act (which is reserved to Westminster), allowing any individual member of a religious or belief organisation that has sought prescription as a body empowered to register civil partnerships (or solemnise same-sex marriages) to refuse as an individual to do that which his or her body permits. “The challenge for human rights law ...[is] to allow the religious individual to participate to the greatest extent possible in public life, while ensuring that particular manifestations of their religious beliefs do not have the effect of imposing their beliefs on others” (Wintemute, 2014, 224). It is unlikely that the amendments to the 2010 Act fully meet that challenge. Though described as a conscience clause, it is to be noted that this protection of conscience works only in one direction and any person who belongs to a body that disapproves of same-sex relationships cannot be authorised as a celebrant even when he or she, as an individual, welcomes as a matter of conscience same-sex relationship recognition.

It is not just the church minister who can claim a conscientious objection, but anyone who might otherwise be expected to be involved in the solemnities of the occasion, such as the organist or choirmaster – though the right does not extend to those involved in the celebratory elements, such as the chauffeur or the hotel waiter whose employers have contracted to provide such services to a same-sex couple. Exactly where to draw the line between solemnisation and celebration will not always be clear, and it is not out of the question that the courts will interpret the exemption expansively.²⁷ The conscientious objection need not be shown to be based on any official religious doctrine: it is the individual's self-defined belief that is protected, irrespective of its basis. This is a major widening of existing exemptions from the requirements in the Equality Act 2010, as illustrated in the Supreme Court's decision in *Bull v Hall*,²⁸ where Lady Hale pointed out that the 2010 Act exemptions (then applicable) were deliberately restricted to institutions protecting their own doctrinal positions, and that this represented a carefully calibrated balance between the equality imperative and the need to give some recognition to religiously-traced requirements to discriminate.²⁹ The amendments to the 2010 Act necessitated by the Marriage and Civil Partnership (Scotland) Act 2014 to allow opposing members of supporting churches to continue to discriminate for their own self-defined reasons threatens to disrupt that carefully-struck balance.

The position of the Kirk in Scotland, Scotland's "national church", is very different from the position of the Established Church of England in England and there was no need to make any special provision for the Kirk which is, therefore, as open as any other religious organisation to decide that it will, in future, offer marriage services to same-sex couples. It is interesting to note that, in its response to the Scottish Government's consultation on the Bill, the Church of Scotland, while opposing the opening of marriage to same-sex couples on doctrinal grounds, nevertheless explained the process by which its doctrines on the matter could be changed (Church of Scotland, 2011, [6]-[8]). This was very different from the doctrinal objections of the Church of England, which founded on the definitional argument that it is not open to a legislature to change the nature of church doctrine (Church of England, 2012, [8]), and reflects the membership-led governance of the Kirk: as Kirk membership changes its views, so too does church doctrine. (This approach is

found with other non-hierarchical denominations, such as the Scottish Methodists, who similarly contemplated that its membership might change its current opposition to same-sex marriage). Nor was there any need to exempt members of the clergy of the national church from the obligation to solemnise marriages³⁰ because in Scotland there is no such obligation. The Kirk's opposition to same-sex marriage reflected its earlier opposition to civil partnership, though it is noticeable that its response to the marriage consultation expressed opposition only to religious civil partnership. In 2009 the Kirk established a Special Commission to determine whether being in a civil partnership was compatible with the ministry; this Commission reported in 2011,³¹ recommending a further two year period of reflection, and the General Assembly in 2013 voted in favour of allowing the training and ordination of civil partners (that is to say, of gay and lesbian people).³² A gradual accommodation of same-sex relationships seems to be the route that the Kirk is on.

The Future of Civil Partnership

From 2014, therefore, there are two institutions in Scotland, marriage and civil partnership, both available to same-sex couples, though only marriage is available to opposite-sex couples. This position is surely unsustainable, giving as it does more options to the former than to the latter. Both the UK Government and the Scottish Government have recognised this unsustainability. The Scottish legislation does not contain, as the equivalent English legislation does,³³ a statutory obligation to review the continued operation of civil partnership, but the Scottish Government announced before the 2014 Act was passed that such a review would nevertheless take place. It is likely that there are two primary models for the future, which might be called the Dutch model and the Scandinavian model. The former, which seems to be the preferred option of the main LGBT campaigning group in Scotland (the Equality Network), would involve maintaining both marriage and civil partnership, but opening civil partnership to opposite-sex couples.³⁴ The latter option would involve closing civil partnership registrations for the future while retaining existing civil partnerships until such time as they naturally die out.

Each option has some attractions, but the Dutch model has far more serious disadvantages than the Scandinavian model. Choice is of course a good thing, but four different means for registering one's relationship with the state smacks of overindulgence. In any case, and more substantively, choice is valid and real only if there is a practical difference in the options available. Given that marriage for same-sex couples is now to be virtually identical in its consequences to civil partnership, any choice between these two separate institutions (even when open to all) is illusory. A choice only of a name – “marriage” or “civil partnership” – is a choice without substance.

A more practical objection to the Dutch model is that it is not efficient law reform to have two institutions doing the job of one. At the moment we require two sets of legislation, two sets of forms to be designed, two sets of approvals of celebrants, two sets of opt-ins, two registers of (non-registrar) celebrants: mistakes will inevitably be made, as we in Scotland have already seen with the expedited divorce provisions, mentioned above. Any amendment of the law will require twice the effort in legislative drafting than if we had only one institution doing one job: there are costs involved in this even without the risk of error.

The reviews of civil partnership that are taking place as this chapter is being written might well come to different conclusions, leading to intriguing possibilities of registered relationships having a different range of consequences depending upon whether they were registered in Scotland or in England. The fear of the inevitable complexities that would give rise to was decisive in the original decision to allow Westminster to extend its Civil Partnership Act 2004 to Scotland. The present, independence-seeking Nationalist, Scottish Government is more sanguine about such complexities, seeing them as the unavoidable consequence of the devolutionary settlement. That settlement is unlikely to survive in its present form much beyond 2014 – irrespective of the outcome of the Independence Referendum due in September 2014 – and so there is no guarantee that the Scots, faced with the question of keeping or abolishing civil partnership, will do as they did in 2004 and simply follow the English lead.

If it is accepted that only one institution is necessary, then (for reasons of international recognition if no other) that institution must be marriage. The best approach would be to build upon the attractive aspects of civil partnership and use that institution – as originally designed – as a model from which to effect improvements in the law of marriage (letting civil partnership itself gradually wither). This process has already started: the removal of the sexist reset rule came about when it was realised that not only could it not be applied to same-sex couples but that, in truth, there was no good reason to keep it for opposite-sex couples either. The limitation of impotency to annulments of opposite-sex marriages might well prove so anomalous that it is finally scrapped for all marriages – and the exclusion of all sexual considerations from civil partnership continues to provide a role model that marriage must, surely, adopt eventually. Cohabitation is now defined in terms of its similarity to marriage and no longer to either marriage or civil partnership. The influence was in the other direction with the unfortunate imposition on civil partnership of the marriage rules relating to religious involvement, but that may simply be the price that needs to be paid to ensure parity between the two institutions. The anomaly would, in any case, be very short lived if the Dutch approach were rejected and the Scandinavian embraced. Civil partnership would be an institution that, having acted as a bridge to the ultimate goal of gender-neutral marriage, had served its function and could now be dispatched to an honourable place in history.

BIBLIOGRAPHY

Church of England, *Response to the Government Equalities Office Consultation "Equal Civil Marriage"* (London, 2012).

Church of Scotland, *Response to the Scottish Government's Consultation "Registration of Civil Partnerships; Same Sex Marriage"* (Edinburgh, 2011).

Department for Trade and Industry, Women and Equality Unit, *Shared Lives: A Framework for the Legal Recognition of Same-Sex Couples* (2003).

Jens Scherpe, *Marital Agreements in Comparative Perspective* (Oxford, Hart, 2012)

Scottish Executive, *Civil Partnership Registration: A Legal Status for Committed Same-Sex Couples in Scotland* (Edinburgh, 2003)

Robert Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others" (2014) 77 *Modern Law Review* 223.

¹ Ethical Standards in Public Life etc (Scotland) Act 2000, s 34.

² Local Government Act 2003, sched 8 para 1(1).

³ See 'Soutar to Bankroll Clause Referendum' *BBC News website* (28 March 2000).

⁴ See 'A Mother's Anger at "Keep the Clause" Campaign' *Herald* (Glasgow, 26 February 2000).

⁵ Adoption and Children Act 2002, s 144(4).

⁶ Civil Evidence (Scotland) Act 1988, s 8(3A), disapplied in relation to non-contested divorces by the Sheriff Court Rules 1993 (rule 33A.66-75) and the Rules of the Court of Session (rule 49.80A-I).

⁷ Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012, SSI 2012/111.

⁸ Executive Note, attached to the Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012.

⁹ *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

¹⁰ Marriage (Approval of Places) (Scotland) Regulations 2002, SSI 2002/260.

¹¹ Civil Partnership Act 2004, s 6 (for England and Wales), s 93 (for Scotland).

¹² Marriage (Approval of Places) (Scotland) Amendment Regulations 2005, SSI 2005/657.

¹³ Marriage and Civil Partnership (Scotland) Act 2014, ss 21 and 24(10) and (11).

¹⁴ [2004] 2 AC 557.

¹⁵ See for example *Savage v Purches* 2009 SLT (Sh Ct) 36.

¹⁶ 2014 Act, s 4(3) and (4). The English legislation does the same.

¹⁷ Voting breakdown was as follows: SNP voted 56 to 7; Labour voted 33 to 3; LibDems voted 5 to 0; Conservatives voted 7 to 8; Greens voted 2 to 0; Independents voted 2 to 0.

¹⁸ Voting breakdown: Labour 194 to 4; Conservatives 124 to 134, LibDems 43 to 4; others 5 to 9. SNP MPs do not vote in purely English/Welsh votes.

¹⁹ 2014 Act, s 7.

²⁰ 2014 Act, s 5(1).

²¹ Adultery is explicitly stated in s 5(2) to be unaffected by the Act, so a marriage, whether same-sex or opposite-sex, can be terminated by divorce if one of the parties had (heterosexual) sexual intercourse outwith marriage, but not if the sexual activity were homosexual. It is the same under the English legislation.

²² 2014 Act, s 12(2)(b).

²³ 2014 Act, s 10.

²⁴ 2014 Act, s 11.

²⁵ Marriage (Same-Sex Couples) Act 2013, s 9.

²⁶ 2014 Act, ss 12-15 (for marriage) and s 25 (for civil partnership). An amendment to strengthen this provision so that religious bodies cannot be forced “by any means, including by enforcement of contract or a statutory or other legal requirement” to do so was defeated. The English Act, in section 2, was amended (in the House of Lords) in precisely this way.

²⁷ In *Doogan v Greater Glasgow and Clyde Health Board* [2013] CSIH 36 the Court of Session held that the conscientious objection clause in the Abortion Act 1967 had to be interpreted widely enough to include all those who felt their own beliefs compromised by the activity in question, though far removed from the actual medical procedure of terminating a pregnancy. This dangerous decision risks allowing any individual to define for him or herself when a rule of law compromises their own beliefs.

²⁸ [2013] UKSC 73.

²⁹ [2013] UKSC 73, [8], [38].

³⁰ As found in the English Marriage (Same Sex Couples) Act 2013, s 1(4).

³¹ *Special Commission on Same Sex Relationships and the Ministry* (Church of Scotland, May 2011).

³² Not all parishes were happy with this result, and it is reported that a congregation in Stornoway has as a result left the Kirk for the more traditionalist Free Church of Scotland: see “Church of Scotland Responds to Congregation’s Vote to Leave”, *Stornoway Gazette*, 20th May 2014.

³³ Marriage (Same Sex Couples) Act 2013, s 15.

³⁴ As well as the Netherlands, Belgium, France and New Zealand adopted this model. But the analogy is not exact, for all of these countries started with a civil partnership regime that was available to all couples, and opening marriage extended the same range of options to same-sex couples. In the UK it is opposite-sex couples who (now) have limited options.