

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY

Part 1 – Marriage

Chapter 1 – Same sex marriage

Overview

5. This Chapter makes a number of changes to marriage law. In particular, it amends the 1977 Act, in relation to the “forbidden degrees” (about people who are too closely related to each other to get married) to reflect the introduction of same sex marriage; it deals with existing references to marriage and related expressions in legislation and private documents, such as wills; and it clarifies how certain common law rules will operate in the context of a same sex marriage.

Section 1: Marriage of related persons

6. This section makes a number of amendments to the 1977 Act, in relation to the “forbidden degrees”. Provision is made about the forbidden degrees in section 2 of, and Schedule 1 to, the 1977 Act. Section 2 of the 1977 Act makes various provisions about how the forbidden degrees are to operate and be interpreted. Some of these provisions refer at present to a husband and wife or make other indirect references to opposite sex marriage. Due to the introduction of same sex marriage, these provisions are amended by section 1 of the Act so that they can apply to opposite sex and same sex marriage. Section 1(2)(c) makes provision so that “spouse” means either a wife of a husband or a husband of a wife or a same sex spouse.
7. [Section 1](#) introduces a new Schedule 1 to the 1977 Act, replacing the previous Schedule 1. Section 1(2)(d) deletes the word “former” from section 2(7) of the 1977 Act. The word “former” is not needed as the new Schedule 1 to the 1977 Act refers to “former spouse” and “spouse” is defined as outlined in paragraph 6 above. The new Schedule 1 is a simplified version of the previous table of forbidden degrees in the 1977 Act. No changes are made in respect of the types of relationships which mean that a couple cannot marry. Instead, the change relates to how the relationships are described. The table below demonstrates this:

<i>Previous table (Column 1)</i>	<i>Previous table (Column 2)</i>	<i>New table</i>
<i>Relationships by consanguinity</i>		
Mother	Father	Parent
Daughter	Son	Child
Father’s mother	Father’s father	Grandparent

*These notes relate to the Marriage and Civil Partnership (Scotland)
Act 2014 (asp 5) which received Royal Assent on 12 March 2014*

<i>Previous table (Column 1)</i>	<i>Previous table (Column 2)</i>	<i>New table</i>
Mother's mother	Mother's father	Grandparent
Son's daughter	Son's son	Grandchild
Daughter's daughter	Daughter's son	Grandchild
Sister	Brother	Sibling
Father's sister	Father's brother	Aunt or uncle
Mother's sister	Mother's brother	Aunt or uncle
Brother's daughter	Brother's son	Niece or nephew
Sister's daughter	Sister's son	Niece or nephew
Father's father's mother	Father's father's father	Great-grandparent
Father's mother's mother	Father's mother's father	Great-grandparent
Mother's father's mother	Mother's mother's father	Great-grandparent
Mother's mother's mother	Mother's mother's father	Great-grandparent
Son's son's daughter	Son's son's son	Great-grandchild
Son's daughter's daughter	Son's daughter's son	Great-grandchild
Daughter's son daughter	Daughter's son's son	Great-grandchild
Daughter's daughter's daughter	Daughter's son son	Great-grandchild
<i>Relationships by affinity referred to in section 2(1A)</i>		
Daughter of former wife	Son of former husband	Child of former spouse
Daughter of former civil partner	Son of former civil partner	Child of former civil partner
Former wife of father	Former husband of mother	Former spouse of parent
Former civil partner of mother	Former civil partner of father	Former civil partner of parent
Former wife of father's father	Former husband of father's mother	Former spouse of grandparent
Former civil partner of mother's mother	Former civil partner of mother's father	Former civil partner of grandparent
Former wife of mother's father	Former husband of mother's mother	Former spouse of grandparent
Former civil partner of father's mother	Former civil partner of father's father	Former civil partner of grandparent
Daughter of son of former wife	Son of son of former husband	Grandchild of former spouse
Daughter of son of former civil partner	Son of son of former civil partner	Grandchild of former civil partner
Daughter of daughter of former wife	Son of daughter of former husband	Grandchild of former spouse

Previous table (Column 1)	Previous table (Column 2)	New table
Daughter of daughter of former civil partner	Son of daughter of former civil partner	Grandchild of former civil partner
Relationships by adoption		
Adoptive mother or former adoptive mother	Adoptive father or former adoptive father	Adoptive parent or former adoptive parent
Adopted daughter or former adopted daughter	Adopted son or former adopted son	Adopted child or former adopted child

Section 2: Objections to marriage

8. Section 5 of the 1977 Act provides for situations where there is an objection to a marriage proceeding. Section 5(4) lists the legal impediments to a marriage. These include where one or both parties are already married; where both parties are of the same sex or where one or both parties are not domiciled in Scotland and marriage would be void according to the law of the party's domicile.
9. [Section 2](#) of the Act repeals the legal impediment of both parties being of the same sex, so that marriages between two people of the same sex can take place in Scotland, once the Act is commenced.
10. [Section 2](#) of the Act also amends section 5(4) of the 1977 Act in relation to cases where one or both of the parties are not domiciled in Scotland.
11. The amendment makes it clear that even if a same sex marriage would be void according to the law of the domicile of one (or both) of the parties, that is not a barrier to the parties entering into a same sex marriage in Scotland.

Section 3: Preliminaries to marriage

12. This section makes some amendments to sections 3 and 7 of the 1977 Act. Section 3 of the 1977 Act makes provision about the procedures a couple must go through when they want to marry. They must submit to a district registrar a notice of intention to marry, with the prescribed fee, their birth certificates and certain other documents, which are specified in section 3 of the 1977 Act.
13. Subsection (2)(a) substitutes a new paragraph (b) in section 3(1) of the 1977 Act, to remove terms like "widow", "widower" and "spouse". The new paragraph instead refers to "the other party" to the marriage. Despite the change in terminology, the effect of the provision remains the same. When a marriage has ended because one of the parties has died, a person who is marrying again has to provide the death certificate of the deceased party.
14. Section 3(1) of the 1977 Act is also amended so that any person who wants to get married who has a civil partner who has died is required to submit the relevant death certificate. Section 8 of the Act amends section 3 of the 1977 Act so that if a person who wants to get married is changing from a civil partnership to a marriage, that person must submit a relevant extract from the civil partnership register.
15. Section 3(2) of the 1977 Act makes provision in cases where someone intending to get married cannot supply the birth certificate or some of the other documents required by section 3(1). In essence, a person in this position has to supply the district registrar with a declaration on why the documents cannot be submitted.
16. The obligation in section 3(2) of the 1977 Act is extended by subsection (2)(b) so that it also applies to the additional documents required as set out in paragraph 15 above.

For more information on the process of changing from a civil partnership to a marriage, see the explanatory notes on sections 8 to 10.

17. Section 3(5) of the 1977 Act makes provision where one or both of the parties to the marriage is not domiciled in Scotland. Under section 3(5), such a party is required, if practicable, to submit a certificate issued by the party's home jurisdiction which confirms that there is no legal bar to the party marrying in terms of the law of the home jurisdiction.
18. There are some exceptions in section 3(5) to the need to supply such a certificate. Subsection (2)(c) amends section 3(5) to provide that a certificate is not required if it would not be issued just because the parties to the marriage are of the same sex.
19. Section 7 of the 1977 Act allows a person who wants to marry outwith Scotland to apply to a district registrar in Scotland for a certificate in respect of a person's capacity to marry. When applying, the person must submit certain documents to the registrar.
20. Subsection (3) amends section 7(1) so it refers also to the death certificate when a civil partnership has ended by death and an extract from the entry in the civil partnership register where civil partners are changing their civil partnership to a marriage.

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

21. **Section 4** makes provision on how the term "marriage" and other expressions should be interpreted in enactments (legislation) generally, the 1977 Act specifically, the common law and private documents (such as wills). The provisions of section 4 apply only to devolved legislation – legislation that is within the legislative competence of the Scottish Parliament.
22. Subsection (1) provides that references in enactments to "marriage" and people who are or were married should be read as referring to both opposite and same sex marriage and married couples. This would, for example, apply to terms in those enactments such as "husband", "wife", "man and wife" and "spouse".

Examples

*Section 1 of the Divorce (Scotland) Act 1976 makes provision on the irretrievable breakdown of marriage being a ground for divorce. By virtue of **section 4** of this Act, this will apply to both opposite sex and same sex marriages.*

*Section 1 of the Family Law (Scotland) Act 1985 makes provision on who owes an obligation of aliment. Under **section 1**, an obligation of aliment is owed by a husband to his wife and by a wife to her husband. By virtue of **section 4** of this Act, the obligation is also owed by a spouse to his or her same sex spouse.*

23. Subsections (2) and (3) make provision in respect of references in legislation to cohabitants, so it is clear they apply to same sex cohabitants too.
24. Subsection (4) provides that references in legislation to two persons of the same sex who are (or were) living together as if they are or were in a civil partnership (i.e. cohabitants) cease to have effect. Once the Act comes into force, such references will be unnecessary as same sex cohabitants will be covered by the provision made in subsections (2) and (3).

Example

*Section 25 of the Family Law (Scotland) Act 2006 defines "cohabitant" for the purposes of sections 26 to 29 of the 2006 Act. The provisions at **section 4(2) to (4)** of this Act mean that the reference to living together as if husband and wife extends to persons of the same sex living together as if married and the reference to living together as if civil partners ceases to have effect.*

25. Subsection (5) makes it clear that subsections (1) to (4) only apply to enactments, other than private Acts, passed or made before section 4 is commenced. (As outlined below, subsection (15) makes changes to the Interpretation and Legislative Reform (Scotland) Act 2010 in respect of future legislation). Subsection (5) also makes it clear that subsections (1) to (4) do not apply if the enactment or any other enactment provides otherwise.
26. Subsection (6) ensures that where being (or having been) married or in a purported marriage is relevant in the common law, the law applies equally to opposite sex and same sex marriage.
27. Subsection (8) empowers the Scottish Ministers to make an order, which due to subsection (9) will generally be subject to the negative procedure, to disapply or modify the effect of subsections (1) to (6).
28. Subsection (9) ensures that any order under subsection (8) may amend primary and secondary legislation. Subsection (10) ensures that, despite an order under subsection (8) generally being subject to negative procedure, any such order which amends primary legislation is subject to affirmative procedure.
29. For private documents which are executed after section 4 comes into force, subsection (11) provides that references in them to “marriage” or people being (or having been) married should be read as referring to both opposite and same sex marriage and married couples. This would, for example, apply to terms in private documents such as “husband”, “wife”, “man and wife” and “spouse”. Subsection (12) makes provision about the interpretation of “widow” and “widower” in documents executed after section 4 comes into force.
30. By virtue of subsection (13), subsections (11) and (12) do not apply to documents where the document provides otherwise. Therefore, if a document executed after section 4 comes into force refers to a person being in an opposite sex marriage, subsection (11) would not enable that reference to be read as meaning a same sex marriage as well.
31. Subsection (14) adds a definition of “marriage” to the 1977 Act, referring to both opposite sex and same sex marriage. Section 26 of the 1977 Act, which contains a number of definitions, makes it clear that the definitions are to apply in the 1977 Act “except where the context otherwise requires”. An example would be the separate provisions of the 1977 Act, as amended or inserted by this Act, on solemnising opposite sex and same sex marriage.
32. Subsection (15) adds definitions of “marriage”, “widow” and “widower” to the Interpretation and Legislative Reform (Scotland) Act 2010. The 2010 Act makes provision on how Acts of the Scottish Parliament and Scottish Statutory Instruments are to be interpreted. Adding a definition of “marriage” to the 2010 Act means that any references to marriage and married couples in any future Acts of the Scottish Parliament and legislation made under Acts of the Scottish Parliament will cover both opposite sex and same sex marriage and spouses, unless specific provision is made so that this is not the case. The new definitions of “widow” and “widower” make it clear that in future Acts of the Scottish Parliament and legislation made under Acts of the Scottish Parliament “widow” will include the female spouse of a deceased woman and “widower” the male spouse of a deceased man, unless contrary provision is made.

Section 5: Same sex marriage: further provision

33. This section makes provision relating to the introduction of same sex marriage and its effect on certain aspects of Scots law.
34. Subsection (1) makes provision in respect of permanent and incurable impotency. In Scotland, a marriage is voidable (i.e. a court action may be raised to challenge and end the marriage) if one of the parties is at the time of the marriage permanently and

incurably impotent in relation to the other spouse. Subsection (1) provides that this rule of law only applies to opposite sex marriages.

35. Subsection (2) amends section 1 of the Divorce (Scotland) Act 1976 (“the 1976 Act”). Under the 1976 Act, there are two grounds of divorce in Scotland:
- (a) irretrievable breakdown of the marriage;
 - (b) the issue, after the date of marriage, to either party of an interim gender recognition certificate under the Gender Recognition Act 2004.
36. Section 1(2) of the 1976 Act provides a number of ways in which the irretrievable breakdown of a marriage can be established. One of those ways is adultery. Adultery means in the common law sexual intercourse between a man and a woman.
37. Subsection (2) provides that “adultery” has the same meaning for the purposes of the 1976 Act for same sex marriage as it does for opposite sex marriage in that it relates to heterosexual intercourse only. This means that a spouse in a same sex marriage could, like a spouse in an opposite sex marriage, raise an action for divorce saying that the marriage has broken down irretrievably because the other spouse in the marriage has committed adultery (i.e. had sexual intercourse with a person of the opposite sex).
38. However, subsection (2) does not extend adultery to cover sexual activity between people of the same sex. Therefore, the ways of establishing irretrievable breakdown of a marriage remain unchanged. Neither an opposite sex spouse nor a same sex spouse can raise an action for divorce saying that the marriage has broken down irretrievably because the other party in the marriage has had sexual intercourse with a person of the same sex. Instead, the divorce action would have to put forward other reasons for irretrievable breakdown, such as unreasonable behaviour.

Section 6: Jurisdiction in proceedings relating to same sex marriages

39. This section introduces schedule 1 on the jurisdiction of the Scottish courts in proceedings relating to same sex marriages. This schedule is explained at paragraphs 219 to 243 of these Explanatory Notes.

Section 7: Reset: abolition of defence

40. This section repeals the defence for wives against the crime of reset. It is a crime to receive goods stolen by another. Subsection (1) abolishes the common law defence to the crime where the person accused of reset is the wife, and the goods were stolen by her husband.
41. Subsection (2) provides that the repeal of the defence to the crime of reset is abolished the day after the provision is brought into force. This means that the repeal will not affect anyone who is relying on the defence prior to this section being commenced.