

EXECUTIVE NOTE

THE EVIDENCE IN CIVIL PARTNERSHIP AND DIVORCE ACTIONS (SCOTLAND) ORDER 2012

SSI 2012 No. [XX]

This instrument is being made under section 8(4) of the Civil Evidence (Scotland) Act 1988. It removes the requirement for a sheriff or the Court of Session to see evidence from a third party before granting a dissolution of a civil partnership under the simplified procedure. It is subject to the affirmative parliamentary procedure.

Policy objectives

The Civil Partnership Act 2004 introduced civil partnership as a legal status for same sex couples. The responsibilities and rights that flow from civil partnership largely mirror those that flow from marriage. A civil partnership can be brought to an end by the death of one of the parties or by an order of a court called a decree of dissolution. In legal terms, dissolution of civil partnership is broadly similar to divorce.

Some couples can apply for a divorce or dissolution under a simplified procedure. The criteria for the simplified procedure include that the couple have no children under 16 years old and are not seeking a court order relating to financial provision. Information on the simplified procedure is on the Scottish Court Service website: www.scotcourts.gov.uk/library/docs/Divorce_Dissolution_Guidance_leaflet_2.pdf.

Under section 8 of the Civil Evidence (Scotland) Act 1988, a court is required to receive evidence from a third party before it grants a divorce or dissolution, except in types of cases covered by an Order made under section 8(4). The power to make Orders under section 8(4) was originally exercisable by the Lord Advocate, but transferred to the Scottish Ministers at devolution in 1999. In 1989 the Lord Advocate made an Order (S.I. 1989/582) under section 8(4). That Order removed the requirement for a sheriff or the Court of Session to see evidence from a third party before granting a divorce under the simplified procedure.

Following the introduction of civil partnership in 2005, Scottish Ministers should have made an Order, similar to SI 1989/582, removing the requirement for third party evidence when civil partners seek dissolution under the simplified procedure. However, they did not identify the need for an Order at the time.

Once this Order comes into force, the courts will no longer be required to see third party evidence before granting decree of dissolution of civil partnership under the simplified procedure.

Since 2005, some courts in Scotland have granted decrees of dissolution of civil partnership under the simplified procedure without seeing evidence from a third party. We have identified around 145 cases. The Scottish Government's view is that these decrees of dissolution are still effective. However, it would be possible for a party to challenge one of these decrees. We believe that there is a small risk of it being in the interests of a person to challenge such a decree, and we judge the likelihood of a successful challenge as being low.

When we consulted on the draft Order, those organisations which responded expressed concern about the position of former civil partners where the court granted a decree of dissolution without having seen evidence from a third party. They pointed out the serious implications should the court's decree be declared void. If it was declared void, it would mean the decree had no effect and the civil partnership that the parties thought had been dissolved would still exist. Such a declarator could have significant implications for the parties, their finances, any subsequent relationships, and any children.

We cannot in this Order make a change to the law that would remove the risk of a challenge to the existing decrees of dissolution on the grounds that there was no third party evidence. We would need to do that in primary legislation. We are committed to primary legislation when there is a suitable legislative opportunity.

This Order also amends the periods of non-cohabitation shown in the 1989 Order from five years to two years and from two years to one year respectively. These periods are the length of time parties to a marriage must live apart before seeking divorce or dissolution on the basis of non-cohabitation. The time periods are set out in the Divorce (Scotland) Act 1976. The Scottish Parliament changed those periods in the Family Law (Scotland) Act 2006. This part of the Order is a technical change to reflect the law as it has been since the 2006 Act came into force on 4 May 2006.

Consultation

The Scottish Government consulted the Equality Network; the Faculty of Advocates; the Law Society of Scotland; the LGBT Network and Stonewall Scotland. The consultation is at:
www.scotland.gov.uk/Topics/Justice/law/17867/familyevidence.

All the respondents expressed their concern about the existing dissolutions. As indicated above, the Scottish Government have committed to primary legislation when a suitable opportunity arises.

Business and Regulatory Impact Assessment

The Cabinet Secretary for Health, Wellbeing and Cities Strategy confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Equality Impact Assessment

We have updated the EqIA following comments we received when consulting and have laid the revised EqIA alongside the Order.

Strategic Environmental Assessment

None required as there is no impact on the environment.

Scottish Government
February 2012