

POLICY NOTE

THE FORCED MARRIAGE ETC. (PROTECTION AND JURISDICTION) (SCOTLAND) ACT 2011 (APPLICATION TO CIVIL PARTNERSHIPS AND CONSEQUENTIAL PROVISION) ORDER 2023

SSI 2023/XXX

The above instrument was made in exercise of the powers conferred by sections 10(1) and (2) and 16(1) and (2) of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 and section 35(1) and (3) of the Marriage and Civil Partnership (Scotland) Act 2014. The instrument is subject to affirmative procedure.

Summary Box

This Order amends part 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 so that forced marriage protection orders can cover forced civil partnerships as well. It also amends the definition of “marriage” in the 2011 Act so it covers belief marriages as well as religious and civil marriages. The Order also amends section 28A(7) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 in relation to the register of divorces operated by National Records of Scotland. The effect is that the references in section 28A to declarators of nullity of marriage include declarators granted by a sheriff.

Policy Objectives

The Civil Partnership (Scotland) Act 2020¹ (“the 2020 Act”) extended the availability of civil partnership to mixed sex couples and made some other changes to the law on civil partnership.

As paragraph 121 of the Policy Memorandum² for the Bill which led to the 2020 Act noted, there are currently no provisions in place in Scotland which relate to forced civil partnership. The Scottish Government’s view is that the extension of civil partnership to mixed sex couples may create a loophole.

Paragraph 127 of the Policy Memorandum went on to note that Part 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011³ (“the 2011 Act”) contains civil measures on forced marriage, including forced marriage protection orders. These orders can contain prohibitions, restrictions, requirements or other measures intended to protect someone from forced marriage.

¹ The Civil Partnership (Scotland) Act 2020 - <https://www.legislation.gov.uk/asp/2020/15/contents/enacted>

² Civil Partnership (Scotland) Bill Policy Memorandum (parliament.scot) - <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/civil-partnership-scotland-bill/introduced/policy-memorandum-civil-partnership-scotland-bill.pdf>

³ Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 - <https://www.legislation.gov.uk/asp/2011/15/part/1/enacted>

Section 10 of the 2011 Act provides the Scottish Ministers with the power to make an Order applying Part 1 (or part of Part 1) to civil partnership. This draft Order extends Part 1 of the 2011 Act so that forced marriage protection orders can cover forced civil partnerships too. The intention to make an Order in this area was outlined in paragraph 129 of the Policy Memorandum.

This draft Order also makes two further amendments. It amends:

- the definition of “marriage” in the 2011 Act so that it refers to “any religious, belief or civil ceremony of marriage”. This reflects that the Marriage and Civil Partnership (Scotland) Act 2014 put belief marriages (e.g. humanist marriages) on the same footing as religious marriages; and
- section 28A(7) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965⁴ (“the 1965 Act”). Section 28A of the 1965 Act establishes the register of divorces operated by National Records of Scotland. The effect of the amendment is that the references in section 28A to declarators of nullity of marriage should be read as including such declarators when granted by a sheriff. This is consequential on section 15 of the 2011 Act which extends jurisdiction in nullity of marriage proceedings to the sheriff court.

Along with this draft Order, the Scottish Government have laid before Parliament a set of commencement regulations for the 2020 Act. These commencement regulations will commence section 13 of the 2020 Act. Section 13 amends section 122 of the Anti-social Behaviour, Crime and Policing Act 2014⁵ to apply the forced marriage offence under the law of Scotland to civil partnerships.

If this draft Order is approved by Parliament, the intention is the Order and the commencement regulations will come into force around the same time, to provide a comprehensive package of measures against forced civil partnership.

Consultation

There has been no specific consultation on this draft Order.

The UK Supreme Court made a declaration in 2018 that the Civil Partnership Act 2004 was incompatible with the European Convention on Human Rights in so far as it made civil partnership available only to same sex couples⁶. Following this, the Scottish Government consulted on two options for the future of civil partnership in Scotland⁷. The first involved closure of civil partnership to new relationships from a specific date in the future. The second involved making civil partnership available to mixed sex couples. After this consultation, the Scottish Government introduced into Parliament the Bill which led to the 2020 Act.

⁴ Registration of Births, Deaths and Marriages (Scotland) Act 1965 - <https://www.legislation.gov.uk/ukpga/1965/49/section/28A>

⁵ Anti-social Behaviour, Crime and Policing Act 2014 (legislation.gov.uk) - <https://www.legislation.gov.uk/ukpga/2014/12/section/122/enacted>

⁶ The Supreme Court judgment is at <https://www.supremecourt.uk/cases/uksc-2017-0060.html>

⁷ The future of civil partnership in Scotland - Scottish Government - Citizen Space (consult.gov.scot) - <https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/>

More recently, the Scottish Government has written to the Foreign, Commonwealth and Development Office (which runs a Forced Marriage Unit); the Crown Office and Procurator Fiscal Service and Police Scotland to advise of the intention to commence the extension of the forced marriage offence to civil partnership and to extend the provisions on forced marriage protection orders to cover forced civil partnerships.

Impact Assessments

The Scottish Government prepared and published a range of Impact Assessments for the Bill which led to the 2020 Act:

- A Business and Regulatory Impact Assessment⁸
- A Child Rights and Wellbeing Impact Assessment⁹
- An Equality Impact Assessment¹⁰

Financial Effects

No significant costs are expected as a consequence of this Order.

As indicated above, extending forced marriage protection orders so they cover forced civil partnership as well is closing a potential loophole. The Scottish Government is not expecting a significant volume of orders in relation to forced civil partnership.

The statistics on forced civil marriage orders show that in 2017/18, there were two applications to the courts for these orders; in 2018/19, there were six applications; in 2019/20, 2020/21 and 2021/22 there was one application in each of these years.

Section 9 of the 2011 Act makes it a criminal offence to breach a forced marriage protection order. Up to and including 2020/21, there have been no prosecutions for breaching a forced marriage protection order.

Scottish Government
Justice Directorate

May 2023

⁸ Civil Partnership (Scotland) Bill: business and regulatory impact assessment - gov.scot (www.gov.scot) - <https://www.gov.scot/publications/civil-partnership-scotland-bill-business-regulatory-impact-assessment/>

⁹ Civil Partnership (Scotland) Bill: child rights and wellbeing impact assessment - gov.scot (www.gov.scot) - <https://www.gov.scot/publications/civil-partnership-scotland-bill-child-rights-wellbeing-impact-assessment/>

¹⁰ Civil Partnership (Scotland) Bill: Equality Impact Assessment - <https://www.gov.scot/publications/civil-partnership-scotland-bill-equality-impact-assessment/>