



Equality at last?



Marriage is more than mere attorneyship, but to properly advise clients lawyers need to pay close attention to the Marriage (Same Sex Couples) Bill, say **Ann Northover** and **Spencer Clarke**

Despite the near-parity offered by the introduction of civil partnerships in late 2005, for many gay people same-sex marriage is about affording them equal status. It is a hot topic of debate in the UK; the bill progressed through its second reading in the House of Commons and was passed by a substantial majority of 400 to 175, despite much Tory opposition. It goes to the committee stage on 12 February and seems likely to become law. Internationally, same-sex marriage is a reality in Belgium, Denmark, the Netherlands, Portugal, Spain and Sweden inside the EU and also in Argentina, Canada, Iceland, Norway and South Africa (and certain US and Brazilian states).

Clause 1(1) of the bill amends the Marriage Act 1949 to make lawful the marriage of same-sex couples.

The bill only extends to England and Wales but there is provision (in clause 10 and schedule 2) for a same-sex marriage to be treated as a civil partnership in Scotland and Northern Ireland and for recognition of an order in those jurisdictions ending such a deemed civil partnership to be recognised as ending the marriage.

Opt-in

A total of 32 per cent of heterosexual couples in 2010 in England and Wales were married in the Christian, Jewish or Quaker traditions and the bill deals with the much-debated question of the religious aspect of same-sex marriages and to answer the objections of religious organisations, particularly the Church of England.

Under clause 1(3) and (4) there is no obligation on the clergy of the churches of England and Wales to marry same-sex couples and protection is given from falling foul of the anti-discrimination

provisions in the Equality Act 2010. Clause 2 protects those other individuals and other religious organisations who do not wish to conduct or participate in a religious marriage ceremony of a same-sex couple by providing that a person cannot be compelled to undertake an activity necessary for forming a marriage.

Clause 4 permits same-sex marriages in places of worship where the religious organisation has opted in and schedule 1 deals with the registering of buildings, as places of worship for the solemnisation of marriages for same-sex couples.

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A new replacement section is inserted into the Marriage Act to set out those marriages for which no such opt-in is necessary including, importantly, civil marriages for same-sex couples either in a register office or other approved premises.

The Quakers, Unitarians, Liberal and Reform Judaism have backed same-sex marriage and will presumably opt-in to the provisions permitting religious marriage for such couples. The Church of England and the Church of Wales, should they change their position on same-sex marriage, would be able to seek a change in the law to allow them to do so.

Extending the definition

The bill contains, at clause 9, a provision for the conversion of civil partnerships to

marriage. The conversion will be under a procedure to be established by regulations to be made by the Registrar General, dealing, for example, with the information to be supplied for such an application and the payment of fees.

The conversion would end the civil partnership and the couple would be treated as having been married since the date the civil partnership was formed (under clause 9(7)).

Clause 11 is the central one on the effect of the extension of marriage to same-sex couples providing that: “In the law of England and Wales, marriage has the same effect in relation to same-sex couples as it has in relation to opposite sex couples.”

Schedule 3, parts 1 and 2, provides that existing and new legislation respectively should be read so as to give effect to the expanded definition of marriage to include same-sex couples. However, there is a “carve-out” with regard to the effect on any private legal instrument (e.g. a will or trust deed) under schedule 4, part 1, which provides that references to marriage or someone being married will only include opposite sex marriage where the legal instrument was made before the section came into force. This means that instruments will require amendment to include same-sex couples, to avoid inadvertent discrimination.

Schedule 4 provides for further specific, principally family and pension-related provisions. Noteworthy provisions include:

Divorce/Family

- Part 4 of schedule 4 deals with the jurisdiction of the Courts of England and Wales to deal with, broadly, the divorce of same-sex married couples. The jurisdiction provisions follow those

already used for heterosexual divorces under the Brussels II(a) Regulation for determining the divorce jurisdiction of EU member states, i.e. based on habitual residence, nationality and domicile. But it is important to note that there is not yet any Europe-wide scheme for dealing with same-sex marriage and divorce. A “saving” provision provides that the English Court will have jurisdiction where the same-sex couple married under English law, no other court has jurisdiction, and it appears to the court to be in the interests of justice to assume jurisdiction.

- The common law presumption that a child born to a woman during her marriage is also the child of her husband will not extend to the situation where two women are married to each other.
- In line with the dissolution of civil partnerships, the Matrimonial Causes Act 1973 is amended to maintain the existing definition of adultery so that can only be a fact for proving irretrievable breakdown of a marriage in the case of opposite sex couples (because of the heterosexual definition of adultery).

Pensions

- Part 5, schedule 4 deals with a person’s entitlement to a state pension based on a current or deceased spouse’s or civil partner’s national insurance record. Part 6 deals with occupational pensions, in particular guaranteed minimum pensions, and to provide an extension to the exception contained in the Equality Act 2010 (to cover same-sex married couples as well as those in civil partnerships) so it will not be discrimination on the ground of sexual orientation to restrict access to a benefit, facility or service for rights accrued before 5 December 2005 (when the Civil Partnership Act came into force).

Universal application

Schedule 5 of the bill amends the Gender Recognition Act 2004 (which enables transsexual people to change their legal gender) so that it is no longer necessary for a marriage to be ended where one party changes gender, as marriage can now include a same-sex couple.

Both parties to a civil partnership can also remain in the partnership, in the same

situation, if both legally change their genders simultaneously.

Schedule 6 of the bill deals with marriages, including same-sex marriages in British Consulates overseas, and of armed forces personnel under UK law overseas, allowing such same-sex marriages to be entered into.

Schedule 7 deals with many minor transitional and consequential provisions, e.g. amending the Equality Act 2010 regarding employment for the purposes of an organised religion. An occupational requirement may allow a restriction that a person should not be married to someone of the same sex.

While marriage may be worth more than mere ‘attorneyship’, as Shakespeare suggested, it is likely that lawyers will wish to follow closely the progress of the bill, to be ready to advise their clients on its likely effect when (as seems likely) or if it becomes law.



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