

## **Converting Civil Partnerships into Marriages**

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The Marriage and Civil Partnership (Scotland) Act 2014, which came into force on 16<sup>th</sup> December 2014, allows same-sex couples to formalise their relationship as a marriage instead of (as before) a civil partnership. It is likely that many couples who previously registered their relationship under the Civil Partnership Act 2004 would have chosen marriage had that option been available to them, as it now is. The 2014 Act, therefore, permits couples who are in a civil partnership to convert their relationship into a marriage. Indeed couples in the future who deliberately choose civil partnership over the now-available marriage will be entitled to change their minds and have their civil partnership converted on the same basis. Conversion, however, can only go one way, for two policy reasons: existing marriages are not to be “downgraded” in case this demeans the value of marriage, and conversion to civil partnership, if made available, would be possible only for same-sex couples since civil partnership remains closed to opposite-sex couples, which some might perceive as giving an unfair advantage to same-sex couples. (Neither reason makes much sense, but there it is). The effect of conversion is, by s.11 of the 2014 Act, to bring the civil partnership to an end from the date of the conversion, and to require that the couple be treated for all purposes (unless the contrary is expressed in any statute) as having been married from the date of the registration of the civil partnership. The 2014 Act allows conversion to take place by one of two quite separate processes.

### *Conversion by Marriage*

First, the civil partners may, quite simply, get married. Section 5(4)(b) of the Marriage (Scotland) Act 1977, which provides that one of the impediments to marriage is that a party is already married or in a civil partnership, is now qualified by the words “other than in a qualifying civil partnership” (inserted by s.8(3)(a) of the 2014 Act). There is no special process for getting married, other than that the couple must satisfy the district registrar that their civil partnership is indeed a “qualifying civil partnership” (a matter considered below). Normal fees for getting married apply, as

do the normal rules for submitting a marriage notice a clear 14 days before the ceremony (to be increased to 28 days at some point in 2015), the normal requirements for witnesses, and the normal rules relating to place of marriage and authorisation of celebrants.

### *Conversion by Administrative Process*

The second method of conversion is by the administrative process set out in regulations made under s.10 of the 2014 Act: the Marriage Between Civil Partners (Procedure for Change and Fees) (Scotland) Regulations 2014 (SSI 2014/361). This requires no witnesses, no notice and no ceremony, though the early indications are that couples undergoing this process do dress up and celebrate. There is nothing to prevent the couple from making an event of it, but the legal requirements are far less than with a marriage ceremony. An application form, set out in the Schedule to the 2014 Regulations, needs to be submitted, and a prescribed fee (£30) paid – subject to the qualification that no fees will be charged in the first year for conversions of civil partnerships registered before the date of commencement (reg.6). Reg.3 provides that the application form must be submitted by the parties in person together with the fee payable, an extract from the entry in the civil partnership register relating to their civil partnership and any evidence of their identity requested by the district registrar. Importantly, both parties to the civil partnership must together attend the district registrar in order to allow the latter to witness the signing of the application form by the parties in each other's presence. The parties' signing of the form confirms their joint wish to change their civil partnership into a marriage. The district registrar, where satisfied with the information and evidence provided, must then sign the application form (in the presence of the parties) and then enter the information contained in the form in the marriage register. The change from a civil partnership into a marriage takes effect on the signing by the district registrar of the application form (reg.4).

### *Void Marriages*

Where the parties to a civil partnership have purported to change their civil partnership into a marriage by the administrative route, that marriage will be void on grounds specified in a modified s.20A of the Marriage (Scotland) Act 1977 (reg.7(3) of the 2014 Regulations). The drafting of the modified s.20A seems, however, to have gone somewhat awry. It opens with a new s.20A(1) which states “Where subsection (2), (3) or (4) applies in relation to a civil partnership changed into a marriage under [the 2014 Regulations], the marriage will be void”. This suggests that there are three circumstances, each specified in one of the following subsections, that will render the marriage void. The new s.20A(2) provides that that subsection applies (and therefore a marriage is void) “if at the time an application form was signed by the parties, a party who was capable of consenting to the marriage purported to give consent but did so by reason only of duress or error”; we are told further that “error” in this context means “error as to the nature of the procedure to change the civil partnership into a marriage” (new s.20A(5)). This is unproblematical. The new s.20A(3) provides that it applies (and therefore a marriage is void) “if at the time an application form was signed by the parties, a party to the application was incapable of: (a) understanding the nature of marriage; and (b) consenting to the marriage”. This too is unproblematical, though the language might have been better to reflect the new s.20A(5) and focus on incapacity to understand the nature of the procedure to change the civil partnership into a marriage rather than the nature of marriage itself. But the meaning is clear, and obvious.

It is the new s.20A(4) which, taken with s.20A(1) makes no sense. Overall, the provision read as follows:

“(1) Where subsection ... (4) applies in relation to a civil partnership changed into a marriage ... the marriage will be void. ....

(4) If a party to a marriage purports to give consent to the marriage other than by reason only of duress or error, the marriage will not be void by reason only of that party’s having tacitly withheld consent to the marriage at the time when the application form was signed by the parties”.

In other words, if subsection (4) applies, the marriage is *not* void according to its own rule, but according to subsection (1) the marriage *is* void if subsection (4) applies. The only way to make sense of this is to ignore the reference to subsection (4) in

subsection (1) and to read subsection (4) as a stand-alone rule: the rule, as with the normal s.20A(4) (as introduced into the 1977 Act by the Family Law (Scotland) Act 2006), is that tacit withholding of consent is insufficient on its own to render the act ostensibly consented to void.

The existing grounds in the original s.20A upon which a marriage is void apply without modification when the conversion of civil partnership is effected by marriage.

Another oddity with the drafting of reg.7 is that it is not made clear whether the civil partnership (which is terminated by s.11(2) on conversion) revives on the marriage being found to be void, but the inescapable conclusion must be that it does, for otherwise a flaw in the conversion process would lead to dissolution of the whole relationship. It is not so much the marriage that is void (as the statutory language suggests) but the conversion. Section 11(2) of the 2014 Act only brings the civil partnership to an end if “the change took effect”, and if the marriage is void then the change from civil partnership to marriage never took effect and the civil partnership was never terminated. This is clearly the result intended but it is achieved only by reading s.11(2) of the 2014 Act together with s.20A of the 1977 Act, as modified for conversions by reg.7 of the 2014 Regulations: this is hardly accessible law reform.

### *Qualifying Civil Partnerships*

The 2014 Act restricts the power of conversion to those civil partnerships designated as “qualifying civil partnerships” which, by s.8(3), are defined to mean those which were registered in Scotland and those registered through prescribed British Consulates or UK armed forces overseas where the couple have elected Scotland as the place to which details of the registration are to be sent, in both cases the civil partnership not having been dissolved, annulled or ended by death. But s.9 allows Scottish ministers to modify this definition by order, and they intend to do so. It is to be hoped that they act quickly, and expansively, though the current intention is to consult generally on the matter after having consulted with numerous overseas governments in order to ensure that undue problems are not caused by allowing the conversion of foreign civil partnerships into Scottish marriages.

The current position means that a couple whose civil partnership was registered in any other part of the UK than Scotland, or in another country, will not be able to convert their relationship to marriage (unless they terminate the civil partnership by dissolution and then marry by the normal process – a dangerous tactic that does not guarantee the protection of accrued rights, as the statutory conversion process does). Not only will this prevent “marriage tourism” (couples coming to Scotland to marry here because they cannot marry in their home country) – which is presumably the primary fear, though it is not one we protect against otherwise – but it will also prevent Scottish couples who have never lived anywhere else and intend to continue to live in Scotland from converting to marriage. A Scottish couple may, for example, have registered their civil partnership in England for family reasons or other reasons of convenience; a Scottish couple may have registered their civil partnership while on holiday in some romantic location (as commonly happens with opposite-sex couples who wish to marry on a Caribbean island under a palm tree before the setting sun). Such couples cannot convert to marriage in Scotland, for no good reason that I can see. (A Scottish couple who registered their civil partnership in England and Wales will be able to utilise the administrative process of conversion established under the Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 (SI 2014/3181), which came into force on 10<sup>th</sup> December 2014, or a ceremonial process also established under these regulations).

The matter was discussed by the Cabinet Secretary when he appeared before the Equal Opportunities Committee (*Official Report* EO Committee, 20<sup>th</sup> November 2014, cols. 4-7). He made it quite plain that the Government’s objective is to allow as many couples who registered a civil partnership overseas as possible to convert to marriage in Scotland, but that the legislation needs to be drafted in a way that accommodates all the different approaches of different countries (col. 5). The caution may well be misplaced. One fear seems to be that if foreign couples convert from civil partnership to marriage in Scotland the conversion might not be recognised in their home country. That fear is more apparent than real, for the worst thing that could happen is that the couple who registered a civil partnership in their home country will be treated by their home jurisdiction as civil partners, which is not a hurt worth protecting against. The risk of a country that permits civil partnership but not marriage accepting that the Scottish conversion terminates the civil partnership but

refusing to accept that the conversion creates a marriage is vanishingly small. A marginally more realistic worry is that if a converted marriage is then ended by divorce the country where the civil partnership was originally created may not accept that a termination of the marriage is also the termination of the pre-existing civil partnership. But to reach that conclusion the original country would have to refuse to recognise that the conversion itself terminated the civil partnership, as well as finding a good reason to depart from their normal rules on the recognition of overseas divorces: it would need to refuse to recognise the reality of the relationship's end, where there is no good policy reason to do so. Some countries of course will do what they can to make things awkward for same-sex couples, but countries which have introduced civil partnership have already shown themselves willing to accommodate same-sex couples and so are unlikely to attempt to create exceptions to their normal recognition rules. Having swallowed the camel, why would they strain at the gnat?

If we were truly worried about couples whose home countries refuse all recognition of same-sex relationships not having their marriage (or divorce) recognised then we ought to have forbidden them from marrying at all in Scotland. We did the reverse, and s.5(4)(f) of the Marriage (Scotland) Act 1977 which sets out the general impediment to marriage in Scotland if the law of the party's domicile disallows the party to marry is now qualified by s.2(b) of the 2014 Act, which excludes domiciliary impediments based solely on the fact that the couple are of the same sex. Two Russian men, or two Saudi Arabian women, can marry in Scotland and the fact that their marriage will not be recognised in Russia or Saudi Arabia is neither here nor there. It is a risk that the couple themselves must bear. We sometimes forget, now that we in this country treat gay and lesbian people properly, that every married or civilly partnered same-sex couple in the world remain subject to the risk of having their relationships dismissed as "pretended" and having their legal status diminished every time they cross an international border. Scots law alone cannot resolve that particular problem, and ought not to seek to give special "protection" (by withholding rights) from the small number of couples who have registered a civil partnership elsewhere and now seek to marry in Scotland. A better way to ensure recognition of termination of the whole relationship is to require a court that dissolves a converted

marriage also to issue a declarator that the underlying civil partnership is no longer valid.

### *Automatic and Compulsory Conversions*

It may be noted, finally, that some civil partnerships will have been automatically converted into marriages, irrespective of the wishes of the parties, on 16<sup>th</sup> December 2014. Same-sex couples who *married* abroad have since the coming into force of the Civil Partnership Act 2004 had their relationships treated throughout the United Kingdom as civil partnerships: that Act automatically converted foreign same-sex marriages into UK civil partnerships simply by the couple crossing the border into the United Kingdom. These relationships are now converted back into marriages – at least in Scotland and in England and Wales. In Northern Ireland these marriages will remain treated as civil partnerships – and if a Scottish same-sex married couple visit or move to Northern Ireland, their relationship will, in that jurisdiction, be treated as, or revert back to being, a civil partnership. Heavy weather.